CLIENT NEWS BRIEF

Ninth Circuit Upholds District's Unilateral Change Of Location Of IEP Services, Emphasizes Importance Of Academic Needs In LRE Analysis

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On April 24, 2019, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) issued a decision in *R.M. v. Gilbert Unified School District*, No. 17-16722 (9th Cir. Apr. 24, 2019), in which the parents of a special education student (Plaintiffs) challenged the Gilbert Unified School District's (District) decisions to: (1) increase the student's special education instruction by 20 minutes per day; and (2) unilaterally move the location of the student's services from his neighborhood school to a different, but substantially similar, program at a school that was not his neighborhood school.

In the underlying matter, the District and Plaintiffs were in disagreement on at least two key aspects of the student's IEP, which were addressed in a January 22, 2018 prior written notice (PWN) issued by the District. The PWN included two proposals: (1) to increase the student's special education instruction by 20 minutes per day; and (2) to change the location of the student's special education services from Ashland Ranch to the Academic SCILLS Program[1] at Pioneer Elementary (Academic SCILLS). Plaintiffs argued that the District's proposed actions would not provide the student with a free appropriate public education (FAPE) in the least restrictive environment (LRE).

As to the increased special education support, which resulted in a reduction in the amount of time the student would spend in a general education classroom, the Ninth Circuit affirmed the lower court's (District Court) analysis, relying on the factors expressed in *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), and held that the District appropriately increased the student's special education time. Based in part on its previous decision in *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1184 (9th Cir. 2016), the Ninth Circuit reaffirmed that, even when other *Rachel H.* factors (i.e., the non-academic benefits of such placement, the effect the student has on the teacher and children in the regular class, and the costs of mainstreaming the student) weigh in favor of mainstreaming a student, the educational program is still based primarily on the student's academic needs. In other words, when a student will not gain benefit in a typical classroom and his or her academic needs weigh most heavily against a mainstream environment, a smaller classroom meets the FAPE standard.

With respect to the District's act in unilaterally moving the student from Ashland Ranch to Academic SCILLS, the Ninth Circuit rejected the Plaintiffs' argument that this issue too should be analyzed under the LRE factors set forth in *Rachel H.* The Ninth Circuit held instead that the *Rachel H.* factors only apply when and where there is a proposal to change a student's *placement*, as opposed to simply changing the *location* where a student will be receiving his or her IEP services. Interestingly, the District Court addressed this issue by applying a four-factor test, consistent with guidance from the Office of Special

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[1] Academic SCILLS provides students with a hands-on, concrete approach to reading, math, wr
The academics are based off of the Arizona Common Core Standards, but alternative curriculum
most important concepts and skills. When appropriate, children are given opportunities to "pre-
education classroom to increase their success levels in that setting.

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Education Program (OSEP) in "*Letter to Fisher*," 21 IDELR 992 (OSEP 1994), in which OSEP urged consideration of the following in order to determine whether a change to placement or location has occurred: (1) whether the educational program set out in the student's IEP has been revised; (2) whether the child will be able to be educated with non-disabled children to the same extent; (3) whether the child will have the same opportunities to participate in non-academic and extracurricular services; and (4) whether the new placement option is the same option on the same continuum of alternative placements. The Ninth Circuit affirmed the District Court's determination that, when balanced, these factors indicated that student's move to Academic SCILLS was a change of *location* only, and not a change in placement.

As to whether the Academic SCILLS class constituted FAPE in the LRE for Student, the Ninth Circuit affirmed the District Court's findings that it did. For starters, the student's IEP required that the District provide him with services in a small-group setting to allow for the development of social and behavioral skills with peers working on similar academic and social levels. There were no peers at Ashland Ranch at the same level as the student, whereas Academic SCILLS provided the student with greater access to peers at his same level of functioning in a small group setting. In addition, while the District Court had acknowledged the preference for students to attend the school they would attend if not disabled, it concluded that because the student was overstimulated in his general education class despite an isolated learning environment and separate instruction in the resource room, the District correctly determined that his needs could be more appropriately met (and the IEP fulfilled as written) in the small group environment provided at Academic SCILLS.

Lastly, Plaintiffs argued at the District Court level that Student was being denied FAPE because his IEP was in fact "too difficult" in light of his circumstances. The District Court rejected the argument for two important reasons. First, the adequacy of a student's IEP must be evaluated as of the time it was developed – not in hindsight. Here, the District Court found that the student's IEP was reasonably developed from information gathered about his needs, during a multi-disciplinary evaluation.

Second, the District Court made clear that, while the IDEA may require a school district to provide a student with a disability a "basic floor of opportunity," this does not mean that states do not have the power to provide students with an education that they consider to be *more* appropriate than that proposed by a student's parents. Based on the Supreme Court's decision in *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1,* 137 S. Ct. 988, 1000 (2017), school districts are instead required to provide students with something more than *de minimis* progress, in light of the child's unique circumstances. The District Court was unpersuaded by Plaintiffs' argument, which would have required a lowering of this standard for the student. In its short three-page decision, a panel of the Ninth Circuit affirmed the District Court's decision as to the appropriateness of the increased special education support, and the District's unilaterally moving the student's special education services to a different location.

While the court's decision in *R.M. v. Gilbert Unified School District* is, at first glance, a win for school districts, we caution against firm reliance on its outcome. While the Ninth Circuit found that a change in placement did not occur, it is difficult to predict whether a similar outcome would result in California. California law defines the phrase "specific educational placement" quite broadly (Cal. Code Regs. tit. 5, § 3042, subd. (a)) and may restrict a school district's ability to unilaterally change the location of a student's special education services, despite the holding in *R.M. v. Gilbert Unified School District*. While not binding, in at least one case, the State of California, Office of Administrative Hearings (OAH), relied upon Section 3042(a) of Title 5 of the California Code of Regulation, to broadly interpret "specific educational placement," noting that this term includes "that unique combination of facilities, personnel, *location* or equipment necessary to provide instructional services to an individual with exceptional needs," (emphasis added) as specified in the IEP. (*Oakland Unified School District* (November 30, 2018) OAH Case Nos. 2017120075 and 2018060529; Cal. Code Regs. tit. 5, § 3042, subd. (a).) Therefore, California school districts likely have a more nuanced analysis of location changes than the one utilized by the Court in *R.M. v. Gilbert Unified School District*. When contemplating whether or not a move from one school site or location to another constitutes a change in placement, school districts should consult with legal counsel.

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