NYSE Directors™
Centris Group™

By Jack Feldman

MONTH IN REVIEW: October 2019

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review three federal district court decisions, a state agency decision from Florida, and an advisory opinion from the Family Policy Compliance Office ("FPCO").

First, we review a decision from the District Court of New Mexico, which sheds light on how IDEA interacts with state-level medical marijuana laws and how school districts might administer services for a medical marijuana recipient. Next, we review a decision from the Southern District of New York, which highlights the importance of tailoring IEPs to students' needs, communicating with parents, and how resolving disputes outside an impartial hearing (when appropriate), may protect a school district from liability for a parent's attorney's fees. We then look at a decision from the District Court of New Jersey, which highlights the idea that CSEs should analyze the factors behind attendance issues when determining whether a student is eligible for special education. Then, we look at a state agency determination from Florida that provides a "crash course" in the standards that manifestation determination review teams consider when evaluating the misconduct of a child with a disability. Finally, we conclude with an advisory opinion from FPCO, which indicates that evaluation protocols are not necessarily education records under FERPA, but they may be relevant in responding to reasonable requests for explanations of education records.

Federal District Court Decisions

***

I. IDEA Cannot Require Medical Marijuana to Provide FAPE, But Medical Marijuana May Indirectly Affect a Student's Placement.

Albuquerque Public Schools v. Sledge, et al., 119 LRP 30098, 18-1029 KK/LF, 18-1041 KK/LF (D.N.M. Aug. 8, 2019)

SALIENT FACTS AND PROCEDURAL HISTORY:

The student in this case suffers from Dravet syndrome, which results in seizures. Initially, the student had been prescribed legal medications. However, such medications caused serious side effects. The student and her family moved to New Mexico, where the Lynn and Erin Compassionate Use Act ("CUA") permits caregivers to administer cannabis to qualified patients without criminal prosecution.

Thereafter, the student was designated by the New Mexico Department of Health to receive cannabis. The student received cannabidiol (a.k.a., CBD) three times a day as maintenance medication, and cannabis oil as rescue medication in the event of seizures. According to the record, these substances "greatly reduced the frequency and duration of [the] [s]tudent's seizures without any serious side effects."

The school district determined that the student was eligible for special education services under the classification of other health impairment ("OHI"). During the student's preschool years (the 2016-2017 and 2017-2018 school years), her mother voluntarily accompanied the student to school so that in the event of a seizure, she could remove the student from class and administer cannabis oil. The mother failed to provide the school district with prescription medications. Because the student did not attend school for a full day, the mother was able to accompany the student to school.

In March and April 2018, the IEP team (i.e., the CSE) met to develop the student's IEP for kindergarten (the 2018-2019 school year). The IEP team recommended placement in a "full-day kindergarten in a cross-categorical classroom at [the student's] neighborhood school with a one-on-one educational assistant[.]" The IEP team discussed homebound services as an option, but ultimately rejected this recommendation, because it determined that there was no medical or academic documentation in support. The mother requested an abbreviated kindergarten schedule rather than a full-day program, because she felt that she would not be able to accompany the student for a full day. The IEP team similarly found no support for such an arrangement.

In July 2018, the parents filed for due process. The due process hearing officer ("DPHO") found that the school district had denied the student FAPE in the

2018-2019 school year by recommending the full-day kindergarten program in lieu of homebound special education and related services. The school district appealed.

DISTRICT COURT DECISION:

The decision upheld the DPHO's finding that the school district had denied the student FAPE in the 2018-2019 school year. In the decision, the court analyzed arguments from the parents that IDEA required the administration of cannabis in school to afford the student FAPE. The court rejected this argument. First, the decision noted that the federal marijuana prohibition may preempt New Mexico's CUA. Second, the court noted that the CUA merely precludes state-level prosecution of caregivers' possession, distribution, and use of cannabis, without actually legalizing its use. Accordingly, the court held: "IDEA, a federal statute, cannot reasonably be interpreted to require [the school district] to accommodate a federal crime to satisfy its obligation to provide [the] [s]tudent with FAPE; such a result would be absurd."

However, the court also concluded that the school district could not condition services for the student on the parents providing prescription medication. It noted that "although [the school district] was not obligated to offer [the] [s]tudent a FAPE that accommodated [the] [m]other's administration of cannabis to her, it was obligated to offer her a FAPE that accommodated her seizure disorder without prescription medication." Further, the court held that the school district could not compel the mother to accompany the student to school, because such a mandate would impose a "substantial financial burden," and consequently, conflict with the IDEA's requirement that FAPE be provided "without charge."

WHY YOU SHOULD CARE:

Similar to New Mexico, New York allows qualifying patients to obtain medical marijuana. Thus, this case provides (non-binding) insight as to how a school district and a CSE might address a student receiving medical marijuana.

While this case is not binding on New York courts, its guidance on how medical marijuana laws interact with IDEA is illuminating. Because federal marijuana prohibitions ultimately conflict with local laws that allow marijuana use, medical cannabis cannot be a "related service" or required under the IDEA, a federal statute. However, this case demonstrates that a school district may nonetheless have to consider a student's receipt of medical cannabis indirectly. Here, the school district was obligated to provide a placement that would enable the student to receive FAPE within the context of her seizure disorder and a lack of access to prescription medication at school. For the student, that meant receiving homebound services, as "this setting would allow [the] [s]tudent to receive special education and related services at public expense and preserve her access to prompt treatment for seizures[.]"

***

II. Being on the Hook for Parent Attorney's Fees Can Get Costly. The Best Defense? Specificity.

D.B. ex rel S.B. v. New York City Dep't of Educ., 119 LRP 36730, 18 Civ.7898 (AT) (KHP) (S.D.N.Y. Sept. 20, 2019)

SALIENT FACTS AND PROCEDURAL HISTORY :

D.B. is the mother of S.B., a child with an unspecified disability. In April 2015, D.B. filed a request for an impartial hearing with the New York City Department of Education ("DOE"). The parties expected the hearing to be a complicated matter, and thus, they spent extensive time preparing for the case. However, the DOE ultimately admitted that it had denied S.B. FAPE for the 2014-2015 school year. As a result, the administrative proceedings were "short and less complicated than anticipated." The IHO ordered the DOE to provide S.B. with FAPE in the 2015-2016 school year. Because D.B. prevailed in the administrative proceedings, D.B. brought an action against the DOE for attorney's fees and expenses.

In April 2019, a magistrate judge issued a report and recommendation ("R&R") that D.B.'s motion for attorney's fees be granted, with a recommended award of over $83,000 in fees and over $3,500 in costs. The DOE objected to the R&R. Among other objections, the DOE specifically argued that the hearing before the IHO had been "short and straightforward" due to its admission that it had failed to provide FAPE in the 2014-2015 school year. Accordingly, given the relative simplicity of the hearing, the DOE claimed that the number of hours billed by D.B.'s attorneys was excessive.

DISTRICT COURT DECISION:

The Southern District of New York adopted the magistrate judge's R&R in its entirety, and it found the fees and costs reasonable. The decision noted that while the administrative proceedings were not as involved as expected, D.B.'s attorneys were nonetheless entitled to fees for their time spent preparing for the hearing.

WHY YOU SHOULD CARE:

This case serves as a warning to school districts. A denial of FAPE can be expensive – even if the impartial hearing is simple. It illustrates the significance of tailoring IEPs and communications with parents (and their attorneys). Boilerplate language should be avoided in all situations. Though this case doesn't explain why the DOE admitted that it denied the student FAPE, an IEP tailored to the individual student's needs would have insulated the DOE from this result. Moreover, if a school district engages in a dialogue with parents and counsel – rather than through stock notices and communications – it may discover issues

that can be resolved outside the context of a potentially expensive impartial hearing. Finally, where a school district acknowledges its IEP's deficiencies, the best solution is to pursue settlement rather than costly litigation.

***

III. When Dealing With Absences, Analyze Why. Eligibility Under IDEA Requires that a Disability Impact Educational Performance.

M.S. and D.S. individually and as Guardians ad litem of N.S. v. Randolph Bd. of Educ., 119 LRP 37700, 18-13029 (KSH) (CLW) (D.N.J. Sep. 30, 2019)

SALIENT FACTS AND PROCEDURAL HISTORY:

N.S. was diagnosed with anxiety in sixth grade (the 2011-2012 school year). Nonetheless, N.S. received As and Bs in seventh through tenth grade, with a C+ in Accelerated English. He demonstrated "superior" performance on standardized tests. Throughout N.S.'s high school years, N.S.'s parents waived him into higher level classes rather than those recommended by the school district.

In seventh grade (the 2012-2013 school year), N.S.'s mother requested that the school district develop a 504 plan, which was developed for N.S. in November 2012. In May 2013, N.S.'s mother asked to meet with N.S.'s teachers, because she believed that the accommodations were not sufficient to address his disability. The school district updated the 504 plan. During the school year, N.S. was absent 10 days and late once.

In eighth grade (the 2013-2014 school year), the school district again updated the 504 plan with new accommodations in response to N.S.'s mother's concerns. N.S. was absent eight days and late four times. A comparable 504 plan was in place for N.S. in ninth grade (the 2014-2015 school year). In ninth grade, N.S. was absent seven days and late four times.

In tenth grade (the 2015-2016 school year), N.S.'s anxiety "re-emerged." The school district arranged for home instruction, but N.S. "refused to participate." Accordingly, N.S.'s parents placed him at a residential treatment facility from November 2015 to February 2016. At the facility, N.S. underwent a psychological assessment. The evaluator determined that N.S.'s IQ was in the high average range, and his academic functioning was "average to above average." When he was discharged, the professionals recommended that N.S. receive home instruction for his first week, and then begin attending school for partial days with supplemental home instruction until he caught up. The school district implemented these recommendations, and N.S. returned to school full-time. While N.S. completed

tenth grade, "his pattern of school refusal and anxiety returned." Excluding the time he was at the treatment facility, N.S. was absent 12.5 days and late six times.

In eleventh grade (the 2016-2017 school year), the school district continued to implement N.S.'s 504 plan with "supports and accommodation for extensions" of time to complete assignments. In September 2016, N.S.'s mother requested that N.S. be evaluated for special education. Thereafter, the school district began the evaluation process. In the interim, N.S. stopped attending school in November 2016, when he turned 17. Due to N.S.'s age and New Jersey state truancy laws, the school district could do nothing to force him to attend school.

In December 2016, N.S.'s mother requested home instruction and provided the school district with a psychiatric evaluation. The school district denied the request for home instruction on the basis that there was no evidence that N.S. was unable to attend school for medical reasons. After reviewing the parent-provided psychiatric evaluation at an eligibility meeting, the Child Study Team (i.e., their CSE) concluded that N.S. was ineligible for special education because he did not require specially-designed instruction.

Thereafter, the psychiatric evaluator wrote a letter to the school district indicating that N.S. could not attend school based on his anxiety. As a result, the school district physician recommended home instruction. However, excluding one session, N.S. refused to participate in home instruction, and was unwilling to return to school.

Challenging the school district's failure to classify N.S., N.S.'s parents filed for due process in February 2017. In May 2017, they notified the school district of their intention to enroll N.S. at Waypoint Academy, a residential treatment facility for students with anxiety. They sought tuition reimbursement from the school district.

On July 16, 2018, an administrative law judge ("ALJ") found that the school district had provided N.S. with appropriate services under its 504 plan and upheld the school district's finding that N.S. was ineligible for special education services under IDEA. The parents appealed.

DISTRICT COURT DECISION:

The District Court upheld the ALJ's determination that N.S. was ineligible for an IEP. In New Jersey, a three-part test exists whether a student is eligible for services: "(i) the student has one of 14 enumerated disabilities, one of which is emotionally disturbed; (ii) the disability adversely affects the student's educational performance; and (iii) the student is in need of special education and related services" (citations and quotations omitted). The student must meet all three to be eligible for services. Notably, this test is comparable to that of New York.

The District Court found that N.S.'s disability did not affect his educational performance. The decision emphasized that the consistency of N.S.'s "good grades and standardized test scores," and the lack of N.S.'s "consistent attendance problems," indicated that N.S.'s anxiety was not affecting his educational performance. Further, the decision noted that N.S.'s attendance problems only began "after N.S. could no longer be compelled to attend school."

The court also found that the student did not require specially designed instruction. The judge based this finding on the student's performance in high-level classes, which his parents had "waived" into, although they had not been recommended by the school district. The court adopted the ALJ's observations: "That petitioners consistently chose to waive N.S. into higher level classes demonstrates that they do not believe he requires adapted content to access the curriculum."

WHY YOU SHOULD CARE:

While this case takes place outside New York, the court's analysis of eligibility is relevant for school districts everywhere. Here, the critical piece was whether the student's disability negatively impacted his educational performance. The ALJ found—and the court upheld— the fact that N.S.'s anxiety-related disorders did not trigger his absenteeism; rather, it had been voluntary.

Hypothetically, N.S. might have been eligible for classification under IDEA if his anxiety was causing him to miss school or hurting his academic performance. However, N.S. simply chose not to go to school. This key element prevented a finding that the school district had denied N.S. FAPE in failing to find him eligible for special education services. In this case, an average of 10 absences and two or three latenesses a year did not indicate anxiety; it was a reasonable number. It was only when the student had free choice that his absences became excessive. Thus, the court concluded it was choice, and not anxiety, that led to excessive absences. Accordingly, if faced with a student's excessive absenteeism, CSEs should consider the reasons before concluding that a disability was the cause. Other factors may be at play.

***

State Agency Decisions

***

I. Manifestation Determination Refresher: For Long-Term Discipline, There Must Be a Direct and Substantial Link Between the Disability and the Misconduct.

Bradford County School Board, 119 LRP 37681, 19-2239EDM (Florida State Educational Agency May 21, 2019)

SALIENT FACTS AND PROCEDURAL HISTORY:

A student with an unspecified disability recorded a fight in the school restroom and then shared it online via social media. This conduct violated the school district's code of conduct. Accordingly, the student was recommended for a "lengthy suspension."

The school district conducted a manifestation determination review ("MDR") meeting. The MDR team determined that the behavior was not a manifestation of the student's disability. The parent disagreed and filed a request for an expedited due process hearing. At the hearing, the parent presented no evidence to demonstrate that the MDR's determination was incorrect. Accordingly, the school district moved to dismiss the parent's due process complaint.

FLORIDA STATE EDUCATION DEPARTMENT DECISION:

The administrative law judge dismissed the parent's complaint, because the parent had not met her burden of proving that the MDR team had deviated from procedures specified in the relevant statutes and regulations. In the decision, the ALJ noted that a school district cannot suspend a disabled child for more than 10 school days without first establishing whether the child's behavior was a manifestation of his disability.

The ALJ cited 20 USC §1415(k)(1)(E) as setting forth the standard to determine whether misconduct is a manifestation of the child's disability. The relevant inquiry reads as follows: "(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."

If the answer to either (I) or (II) is yes, then the misconduct is a manifestation of the child's disability, and the child must be returned to his original educational placement. Additionally, the school district should conduct a functional behavior assessment ("FBA") and implement a behavioral intervention plan ("BIP") for the student.

However, if the answer to both (I) and (II) is no, then the school district may discipline the student "in the same manner and duration as would be applied to children without disabilities." However, the ALJ noted that the school district should still provide such a child with services so that he may progress towards the goals set forth in his IEP. Moreover, the child should still "[r]eceive, as appropriate, a[n] [FBA], and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." See 34 C.F.R. §300.530(d)(1)(ii).

WHY YOU SHOULD CARE:

While this case is from a Florida educational agency, its overview of the manifestation determination review process and references to statutes and regulations are applicable under IDEA nationwide, including in New York school districts. This decision demonstrates that school districts should carefully analyze the reasons for a disabled child's misbehavior. Only when the disability has a "direct and substantial" relationship to the behavior, or when the behavior results from the school district's failure to implement the IEP, can there be a finding of a manifestation of the disability.

IDEA requires a school district to conduct an MDR when a child is suspended for 10 days. The law also requires that an FBA be conducted to determine the function of the negative behaviors and to allow the development of a BIP. We recommend that the FBA be conducted before a student reaches 10 days so that additional suspension days are available before the BIP is implemented.

***

Family Policy Compliance Office

***

I. Evaluation Protocols Aren't FERPA Records, But Take Care to Explain Evaluations to Parents.

Letter to Anonymous, 118 LRP 42922 (June 18, 2018)

CONTENT OF LETTER:

A mother of a classified student requested copies of test protocols that the school district had used to evaluate the student. The school district allowed her to inspect the test protocols, but it denied her request for copies, explaining that they were protected by copyright law. The mother brought a complaint against the school district under FERPA. The school district argued that if the test records had been education records, the school district had allowed the mother to review and inspect them, thus satisfying their obligations under FERPA. Further, the school district argued that the test protocols were not "education records" entitled to FERPA protections.

FPCO Director Dale King agreed with the school district's arguments and dismissed the mother's complaint. Mr. King explained that under FERPA, a school district must allow a parent to inspect education records. However, a school district is not generally required to provide a parent with copies of these records, unless "circumstances effectively prevent a parent from exercising his or her right to inspect and review education records," such as when a parent "does not live within commuting distance of the school." Because here, the school district had

provided the mother with a chance to review the documents in question, there was no cognizable violation of FERPA.

Additionally, Mr. King explained that the documents in question might not even be education records subject to disclosure under FERPA. Mr. King noted that a test question booklet could only be an education record if it contained information "directly related to the student and [was] maintained by the school[.]" However, Mr. King caveated this by explaining that school districts may nonetheless review a document, such as a test question booklet, with a parent when responding to a parent's reasonable request for an interpretation of a student's education record, such as a "student's answer sheet."

WHY YOU SHOULD CARE:

This opinion provides guidance as to how school districts should proceed under FERPA when faced with a parent request to review evaluation protocols. Pursuant to FERPA and the obligation to respond to reasonable requests for explanations of education records, a school district should consider reviewing the evaluation and its protocols with the student and the parent. However, the evaluation test booklet itself (if missing responses from the student) would likely not be an educational record that the school district would have to provide.

Note that this opinion does not address meaningful participation under IDEA. Although the parent in this case was not denied access to test protocols, hypothetically, if a parent is denied access, he might argue that he has been denied the opportunity to participate meaningfully in the development of his child's IEP. Accordingly, CSEs should take care that restricting parent access to evaluation materials does not inadvertently impede parent participation. A full explanation of evaluation protocols and results would likely prevent this.

***

Jack Feldman is Managing Partner with Frazer & Feldman, LLP, a law firm in Garden City.

Timothy M. Mahoney and Abigail A. Hoglund-Shen, Associates with Frazer & Feldman, LLP, provided research, writing and assistance.