

ATTORNEY'S CORNER

By Jack Feldman

MONTHS IN REVIEW: August 2014

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A Monthly Synopsis of Salient Cases in Special Education

In this installment of Attorney's Corner, we review decisions from the Second Circuit Court of Appeals and federal courts. Both the Second Circuit and Southern District of New York held that deference will be given to the opinions of state education authorities regarding the use of particular educational methodologies for students. The specific type of methodology to be used for a student is not a determination to be made by the CSE or stated on the IEP. Rather, classroom teachers have the authority to determine the methodologies they will utilize when teaching students and working on their IEP goals. A Parent's belief that a particular teaching method is the best approach for their child is not enough to determine that the District did not provide FAPE and award tuition reimbursement.

Second Circuit Court of Appeals

1. [Deference Paid To The District's Choice of Educational Methodologies.](#)

A.S. ex rel. S. v. New York City Dept. of Educ., 2014 WL 3715461 (2d Cir., 2014)

SALIENT FACTS:

A student with autism demonstrated regression at a 2006-07 private school placement that utilized the Developmental, Individual Difference, Relationship (“DIR”) method of instruction. The Student was educated in a District collaborative team teaching classroom (“CTT”) the following school year. In June 2008, the CSE recommended an IEP for the student that included a 6:1:1 special class program with related services for the 2008-09 school year. The proposed classroom would utilize the Treatment and Education of Autistic and Communication Related Handicapped Children (“TEACCH”) methodology. The Parents rejected the proposed placement and unilaterally placed the student at the Brooklyn Autism Center (“BAC”). The Parents then filed a due process complaint alleging that the District’s 6:1:1 placement was inappropriate as the student required an Applied Behavior Analysis (“ABA”) approach.

The IHO found that the District did not provide a free appropriate public education (“FAPE”) based on testimony from the Parents that the TEACCH method would not meet the students’ needs. The IHO further found that BAC was an appropriate private placement and the equities favored the Parents, thus awarding tuition reimbursement to the Parents. The SRO reversed the IHO’s decision, stating that “a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used...is generally a matter left to the teacher.” Further, the SRO determined that the proposed placement provided FAPE based on testimony from the teacher and school assistant principal of the proposed placement, stating that the TEACHH method would have provided the student with educational benefits. The SRO also considered the student’s proposed related services and parent counseling and training, the student’s opportunities for mainstreaming with typical peers, and the similar profiles of other students in the 6:1:1 placement. The district court granted the District’s motion for summary judgment and affirmed the SRO’s decision.

CIRCUIT COURT’S DECISION:

The Circuit Court affirmed the lower court ruling and determined that the proposed placement provided the student with FAPE. The Court determined that deference should be given to the opinions of state educational authorities regarding educational methodology. Due to the testimony from the District’s teacher and assistant principal of the proposed placement, it was determined that the TEACHH method was appropriate for the student. Further, the Court held that the Parents did not provide evidence that the student could only make educational progress using ABA methodology. Accordingly, the parents were denied tuition reimbursement.

WHY YOU SHOULD CARE:

An IEP should not explicitly state the educational methodology that will be utilized in a proposed program. Rather, the teacher of that program or the related service provider is free to choose the methodology that best suits the particular

child and his or her needs. The Second Circuit will give deference to well-reasoned state educational authorities' opinions about the appropriateness of a particular program for a student and whether the district provided FAPE. Additionally, a Parent's mere assertion that a certain methodology is inappropriate for his or her child is not sufficient to prove that the child was not provided with FAPE. This suggests that Parents will not be awarded tuition reimbursement for unilateral placements when the Parents' decision was made based only on methodology.

2. Retrospective Testimony Regarding Possible Future IEP Amendments Not Permitted In Impartial Hearings.

Reyes ex rel. R.P. v. New York City Dep't of Educ., 2014 WL 3685943 (2d Cir., 2014)

SALIENT FACTS:

A 19-year-old student with autism and other diagnoses transitioned from private school to public school. The CSE recommended a program that included a 1:1 aide for the first three months of the school year to assist the student with the transition. The Parents did not believe the program was appropriate due to the educational methodology (TEACHH), the related services that would be provided, and the student's sensory integration needs. The Parents unilaterally placed the student in a private school and filed a due process complaint seeking tuition reimbursement.

District representatives testified at the impartial hearing that the student's IEP could have been amended mid-year if there was a need to continue the 1:1 aide beyond three months. The IHO determined that the District denied FAPE because the proposed class would not meet the student's needs, as the student required an aide for longer than three months and the program provided by the District was not appropriate. Further, the District could not rely on retrospective testimony to prove the appropriateness of the IEP. The IHO ordered tuition reimbursement for the Parents. The SRO reversed the IHO's decision, holding that the District provided FAPE because the IEP could have been modified at any time if needed. The SRO also stated that the District recommended the aide for three months with the understanding that services could be extended if needed. The district court upheld the SRO's decision, but indicated that it was impermissible to rely on District testimony that the IEP could be modified.

CIRCUIT COURT'S DECISION:

The Circuit Court reversed the district court's decision and agreed with the IHO. The Court held that it was impermissible to rely on testimony asserting that the IEP could be modified and it was not appropriate to consider the possibility of

mid-year amendments to determine whether the IEP was substantively adequate. The Court reasoned:

An IEP that contemplates or implies the possibility of amendments is therefore not substantively different from an IEP that is silent on the issue. If the school district were permitted to rely on the possibility of subsequent modifications to defend the IEP as originally drafted, then it would defeat any challenge to any IEP by hypothesizing about what amendments could have taken place over the course of a year.

The Court held that an IEP should provide a Parent with a clear understanding of the services the child *would* receive throughout the school year. As such, the case was remanded to determine the Parents' right to tuition reimbursement.

WHY YOU SHOULD CARE:

In our jurisdiction, school districts cannot meet their burden of proving that a child's IEP is reasonably calculated to provide FAPE by showing that the CSE contemplated midyear amendments. An impartial hearing officer will only consider the services specifically identified in the IEP when that IEP is challenged by the Parents. The fact that an IEP can be amended in the future to add appropriate services and accommodations for a student will not be a cure for an otherwise defective IEP. Given the Court's condemnation of retrospective testimony, a school district will not be permitted to prove services or accommodations which a District intended to provide that do not appear on the IEP in dispute. Rather, the IEP as written should include all services necessary for a student to receive FAPE. If a child requires an aide, the IEP should list an aide for the entire school year. If the aide can be removed, the Committee can reconvene and remove the aide if it is no longer required.

Federal District Courts

1. Tolling Period For Statute Of Limitations Does Not Begin Until Student Has Knowledge Of Educational Injury.

K.H. v. New York City Dept. of Educ., 2014 WL 3866430 (E.D.N.Y., 2014)

SALIENT FACTS:

A student who was born in 1989 had borderline cognitive ability and severe academic and behavioral difficulties throughout his school career. He was

classified as a Preschooler with a Disability by the CPSE and then with a learning disability upon entry to kindergarten. Thereafter, the child received a variety of services and consistently failed to make meaningful academic progress. He was educated in various special class programs with related services and his legal guardians participated in all of his CSE meetings. The child's classification was changed to emotionally disturbed in second grade due to serious academic and behavioral problems. In fourth grade, the child was placed in a program for students with intellectual disabilities. He was admitted to Schneider's in-patient treatment program for two weeks when he was 10 years old. He continued to be a non-reader throughout middle school and showed some evidence of a learning disability during various evaluations conducted by the CSE.

At age 16, he was transferred to an alternate assessment program, but was then discharged from school at age 19 due to excessive absences. The student sought-out an evaluation at age 21 because he was unable to read. At this time he was diagnosed with a learning disability. On June 3, 2010, the student filed a due process complaint under IDEA, Section 504, and Section 1983 seeking compensatory education, damages, and attorney's fees. The complaint alleged that the District failed to identify the student's disability, failed to ensure that his legal guardians were able to meaningfully participate in his CSE meetings, and provided inappropriate special education programs despite his lack of progress.

The IHO ordered a number of additional evaluations during the course of the hearing. A subsequent occupational therapy evaluation indicated fine motor deficits and an auditory processing evaluation resulted in a receptive and expressive language disorder diagnosis. The IHO concluded that the claims from the 2005-06, 2006-07, and 2007-08 school years were time-barred because the student's guardian participated in the CSE meetings that planned for those school years. Further, the District identified a number of learning and behavioral difficulties from the student on all of his IEPs. The IHO also dismissed the Section 504 claims as being either time-barred or by finding that the District did not discriminate against the student or act with "bad faith or gross misjudgment." The Section 1983 claims were also dismissed because the IHO determined that she did not have jurisdiction over such claims. The District conceded that it failed to provide FAPE for the student during the 2008-09 and 2009-10 school years. The IHO awarded individual reading instruction and speech therapy over a six-month period for the student, and also stated that these services would continue for an additional six months if the student "objectively made progress." The student appealed to the SRO who upheld the rulings regarding the statute of limitations for the IDEA and Section 504 claims and the lack of jurisdiction for the Section 1983 claims. The SRO provided additional compensatory education, including math tutoring, occupational therapy and increased speech therapy.

COURT'S DECISION:

On appeal, the District Court held that the student's learning disability claim did not accrue until 2010 when the student was provided with an official learning disability diagnosis. Further, even though the guardians attended CSE meetings and consented to services, the student did not have the "critical facts" of his injury at the hands of the District until he received the results of his evaluation in 2010. The student was denied the opportunity to learn of his injury due to the District's failure to identify his actual disability. The court discussed other cases where "IDEA claims did not accrue until the family gained new information that made them aware of inadequacies in the student's prior special education program." Therefore, the IHO and SRO's dismissal of all IDEA claims before the 2008-09 school year as being time-barred was reversed. The court also found that the Section 504 claims were timely for the same reason. The court did not make a determination as to whether the student was provided FAPE during those years, just that the claims were timely.

WHY YOU SHOULD CARE:

Districts must be vigilant in accurately identifying a student's disability and providing programs designed to address the student's needs. Further evaluations should be conducted when a student does not make adequate academic progress to assist the CSE in modifying the student's IEP and providing appropriate services. Failure to provide appropriate IEP services will constitute a denial of FAPE. The statute of limitations does not begin to run for a student who was misclassified by the District until the student learns of his educational injury (i.e., his actual diagnosis). As such, a District that does not accurately classify a child and provide the appropriate special education program and services may be liable for compensatory education services long after the typical statute of limitations period has run.

2. Failure To Adequately Address Student's Potential Special Education Needs May Result In Application Of Futility Exception For Exhausting IDEA Remedies.

Conway v. Board of Educ. Of Northport-East Northport School Dist., 2014 WL 3828383 (E.D.N.Y., 2014)

SALIENT FACTS:

An incoming eleventh grade student transferred to a new District after his family moved. Upon registering him for school, his Parent notified the school that the student had medical problems that resulted in his needing home instruction during the last few months at his previous school. These medical problems

included stomach pain, migraines, insomnia, anxiety, and depression. The Parent requested a meeting with the student's guidance counselor as soon as possible so an evaluation could be conducted and accommodations determined for the school year. In August and September, the Parent had meetings with the school principal and school guidance counselor.

The Parent alleged that District staff told her they would pursue an evaluation for the student to assist with planning for accommodations. Shortly after starting the school year, the student had a panic attack, lost consciousness, fell and required stitches on his face. After this incident, the District placed the student on home instruction until he could be evaluated by the school psychiatrist. Home instruction began four weeks later and the Parent was required to drive the student to the public library for his home instruction. The Parent alleged that the home instruction would not provide sufficient electives to allow the student to graduate on time. The Parent contacted the school several times between September and December to request an evaluation. Upon meeting with the school in December, the Parent was told that an evaluation would be conducted shortly. The evaluation was conducted in April and a CSE meeting was held shortly thereafter. The CSE determined that it did not have sufficient information to determine the student's special education eligibility and requested a psychiatric evaluation. The psychiatric evaluation was scheduled for June but was never conducted. The Parent filed a federal action against the District alleging violations of IDEA for failure to provide special education services, Section 504 for failing to accommodate the Student's disability, and Section 1983 for depriving the Student of his educational rights and discriminating against him based upon his disability.

COURT'S DECISION:

Under IDEA, plaintiffs must exhaust all of their administrative remedies before bringing a matter to federal court. A plaintiff must also exhaust IDEA administrative remedies before bringing a Section 504 or Section 1983 claim in state or federal court against a school district. However, a plaintiff does not need to exhaust all administrative remedies in situations where such actions would be futile. Futility occurs when "adequate remedies are not reasonably available" or "the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process." Here, the District made a motion to dismiss the complaint because the Parent failed to exhaust her administrative remedies. Although the Court agreed that the Parent failed to exhaust her administrative remedies under IDEA by not requesting an impartial hearing before commencing a federal action, the District's motion was denied due to the futility exception. The Court held that the Parent was "denied the procedural safeguards and administrative remedies to which she was entitled under the IDEA by defendants' conduct." Further, the motion to dismiss the discrimination claim was denied because the District's failure to address the Student's needs amounted to "deliberate indifference." Indeed, the Parent informed the District of the Student's medical difficulties before the Student began the entire school year. The District

did not complete the psychiatric evaluation, determine CSE eligibility, or identify accommodations for the Student throughout the school year. The court denied the District's motions to dismiss and allowed the Parent to proceed with the IDEA, Section 504 and Section 1983 claims.

WHY YOU SHOULD CARE:

Districts must address Parent requests for evaluations and consideration of accommodations in a timely and efficient manner. Merely placing a student with medical and social-emotional needs on home instruction without identifying potential special education and/or Section 504 needs is not an adequate remedy. Rather, a District must determine whether the student is capable of coming to school and what accommodations are required to enable his attendance. Home instruction must be provided when a student's disability requires home instruction to supplement his education to satisfy FAPE. If the student is indeed disabled and in need of additional services, the District has an obligation to determine either special education or Section 504 accommodations to address that disability. Merely providing home instruction without determining whether the child is disabled, and if so, what accommodations the student needs, amounts to deliberate indifference. As such, the plaintiffs were entitled to proceed with their federal action for damages.

3. Districts Must Include Anti-Bullying Programs On IEPs Of Students Who Are Bullied.

T.K. v. New York City Dept. of Educ., 2014 WL 3687244 (E.D.N.Y., 2014)

SALIENT FACTS:

A third grader with autism, classified with a learning disability, was placed in a collaborative team teaching class ("CTT"). In second grade, the child was physically injured by another student in her class. The students were in the same class in third grade, because they both required a CTT class, and the school building only had one CTT class per grade. The child was again physically injured by the same student in November of third grade and continued to complain to her Parents of being bullied daily. The Parents alleged that the child was "emotionally unavailable to learn, gained weight, needed to bring her dolls to school, and accumulated 24 latenesses." The Parents stated that this was the result of frequent bullying. Further, the Parents alleged that the other students in the school avoided the child and frequently laughed at her. The Parents had a private psychological evaluation conducted that indicated that the child needed a more supportive academic environment. After the Parents learned that their child would be in the

same fourth grade class as the child who had bullied her in the past, the Parents unilaterally enrolled the child in Summit, a private SED-approved special education school. They demanded due process alleging that the District denied FAPE because it was aware of the bullying and failed to address it in a meaningful way. The Parents sought tuition reimbursement.

The IHO determined that the child was bullied by other students, that the District had reason to know about the extent of the bullying, and that the District failed to take adequate steps to address the bullying. However, the IHO found that the child's educational opportunities were not negatively affected by the bullying because the child made academic progress and achieved her IEP goals. As such, the District did not deny the child FAPE. Thus, tuition reimbursement was denied. On appeal, the SRO determined that the District was not deliberately indifferent, as it took steps to address the bullying. The SRO also affirmed that the bullying did not affect the child's learning, as she made academic and social-emotional progress. The SRO held that the child was not denied FAPE, the Parents did not demonstrate that the unilateral private school placement was appropriate, and the equities were not in the Parents' favor.

COURT'S DECISION:

The Eastern District stated that FAPE is denied "when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts a child with learning disabilities in her educational opportunities." Bullying occurs when student behavior is "sufficiently severe, persistent, or pervasive that it creates a hostile environment" for the victim. Districts must take appropriate measures to address bullying, including having a system in place to investigate any allegations of bullying and implementing programs to prevent bullying from occurring in the future. The Court applied the same four factors as the IHO and SRO in determining whether the child was denied FAPE due to bullying. First, all parties agreed that the child was bullied during third grade. Second, the bullying negatively affected the child's educational opportunities due to its social-emotional (i.e., becoming withdrawn, bringing dolls to school for comfort) and physical effects (i.e., gaining a significant amount of weight in third grade). Because she was ostracized by the other students in her class, the classroom was a hostile environment. Third, the District was deliberately indifferent, because the steps it took to address the bullying were inappropriate and only resulted in the further harassment of the child. Finally, the CSE did not properly address bullying on the IEP. The Court examined three factors to determine whether the CSE adequately addressed bullying:

1. The CSE must consider evidence of bullying when developing the IEP. Failure to do so indicates that Parents were not able to meaningfully participate in the IEP's development.
2. Anti-bullying measures must be included on the IEP "where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities."

3. Any language on the IEP pertaining to anti-bullying must specify steps to be taken and must be written in language understood by a layperson. Failing to do so prevents the Parents from meaningfully participating in the IEP development process.

Here, the Court determined that the CSE did not take the child's bullying into account when creating her IEP. Further, the IEP did not include an anti-bullying plan, goals or recommendations to address bullying and the IEP did not include language that would have led a parent to believe that the District was addressing the bullying issue. Although the IEP provided some goals to address the child's reaction to bullying, the failure to mention bullying, its impact, and how it would be addressed in the IEP resulted in a finding that the District denied the Parent's the opportunity to participate in the development of their daughter's IEP. As such, the Court determined that the District denied the child FAPE because of its failure to consider the child's bullying issues and failed to specifically address this issue on the child's IEP. Further, the Court determined that the private school was appropriate for the child and the equities favored the Parents. The Court awarded tuition reimbursement.

WHY YOU SHOULD CARE:

Bullying is an IEP issue for students with disabilities. The social-emotional and management sections of an IEP are areas in which to describe a child's social-emotional well-being, needs and steps to be taken to address bullying. When bullying is a concern for a particular child, the Committee should gather additional information from the child's teachers, service providers, and parents. Once a CSE has determined that a child with a disability is being bullied, it must consider whether the child's "educational opportunities are substantially restricted." The CSE should look beyond typical academic impact (e.g., grades, achievement scores, progress on academic IEP goals) in determining whether bullying affects a child's educational opportunities. Other factors to consider include the child's social-emotional well-being, peer relationships, and physical manifestations of harassment. When there is evidence of negative educational impact due to bullying, the District should systematically address this by providing supports, accommodations, and implementing comprehensive bullying prevention strategies. Further, the CSE must include methods of addressing the bullying in the bullied child's IEP. This should include an anti-bullying program and goals designed to address the child's social-emotional needs. Failure to address bullying in this systematic manner and failure to alleviate the harassment will likely result in a finding of a denial of FAPE for a child with a disability.

4. Deference Paid To Educators In Determining Appropriate Educational Methodology For Students.

P.S. v. New York City Dept. of Educ., 2014 WL 3673603 (S.D.N.Y., 2014)

SALIENT FACTS:

A 14-year-old boy with autism and problem behaviors attended the McCarton School, a private school that utilizes applied behavior analysis (ABA) techniques, for 10 years. Prior to the 2011-12 school year, the CSE convened and developed an IEP that recommended an in-District 6:1:1 class with related services, a behavior intervention plan, and a 1:1 behavior management aide. The Parent rejected the proposed IEP and unilaterally enrolled the student at the McCarton School. The Parent filed for an impartial hearing and alleged that the District failed to provide FAPE on a number of procedural and substantive grounds. Specifically, the Parent alleged that the proposed District program would not meet the student's needs because it utilized Treatment and Education of Autistic and Communication Related Handicapped Children ("TEACHH") methodology rather than ABA.

The IHO found that the District denied FAPE by not addressing the student's social-emotional and self-injurious behavior needs, failing to utilize the ABA method that was historically successful for the student, conducting a CSE with a special education teacher who was not familiar with the 6:1:1 classroom, and failing to include a transition plan for the student to return to District. The IHO further found that McCarton was an appropriate placement for the student and that the equities favored the Parent. As such, the Parent was awarded tuition reimbursement.

The SRO reversed the IHO decision and held that the District provided FAPE. The SRO stated that the District adequately addressed the child's social-emotional and behavioral needs, the IEP did not need to specify the educational methodology to be utilized, there was no indication that ABA was the only methodology that would allow the student to make meaningful educational progress, and the recommended classroom was appropriate for the Student. However, the District had already paid for McCarton due to pendency.

COURT'S DECISION:

The Southern District deferred to the SRO's decision, concluding that the District provided FAPE. The 6:1:1 classroom was appropriate for the student, as it provided individualized instruction in a group setting, which had been successful for the student in the past. The Court also held that an IEP was not required to indicate the particular educational methodology to be used. Further, although ABA was successful for the student in the past, there was no indication that this was the only method that would allow the student to make educational progress. The TEACHH method also employed strategies that were similar to ABA and that could be used to address the student's goals. As such, the District provided FAPE with its recommended program.

WHY YOU SHOULD CARE:

Similar to the ruling in A.S. ex rel. S. v. New York City Dept. of Educ., 2014 WL 3715461 (2d. Cir. 2014), courts will pay deference to state education authorities in determining the appropriate educational methodology for a student where the decision is well-reasoned. Indeed, educational methodology is not a decision that is required to be made by the CSE and explicitly stated in the IEP. Rather, a methodology is a decision that may be made by the instructor, classroom teacher or related service provider. A history of success with a particular teaching method does not provide indisputable evidence that other methods will not be appropriate for a student. Similarly, Parental belief that only one teaching method is appropriate for their child does not indicate that the District did not provide FAPE. Rather, it is the identified needs and resulting goals, programs, and related services that demonstrate that the District provided FAPE.

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

Anne McGinnis, an Associate with Frazer & Feldman, LLP, provided research, writing and assistance.

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