NYSE Directors
Centris Group

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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of Attorney's Corner, we are reminded that a school's history of difficulties and failures in providing IEP-mandated services does not automatically render a CSE's recommendation of that school inappropriate. "Failure to Implement" claims can only be raised *after* the district's duty to implement the IEP has been triggered, and the district has failed. Raising such claims prior to such time will be premature and result in the dismissal of the parents' claims.

Second Circuit Court of Appeals

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1. A School's History of IEP Implementation Failures Does Not Automatically Render It Inappropriate.

F.L. ex rel. F.L. and M.L. v. New York City Dept. of Educ., 2014 WL 53264 (2d Cir., 2014).

SALIENT FACTS:

The Parents of a student with autism appealed from a federal district court's ruling that the Parents' speculation that the District would not adhere to the child's IEP was an inappropriate basis for a unilateral placement. The student's IEP recommended related services of speech and language ("speech") therapy and occupational therapy ("OT"). The parents challenged the District's ability to

provide the speech and OT services given the proposed school's history of difficulties providing such services. According to the District, if, for any reason, its service providers were unavailable, the student's related services would be arranged through outside providers. If the outside providers were unavailable, the Parents would be provided with vouchers to obtain the services from private providers. The district court held that the District offered FAPE and denied the Parents' claims for tuition reimbursement.

COURT'S DECISION:

According to the Parents, the District's testimony regarding the ways it would have provided the student with his IEP-mandated services constituted impermissible retrospective testimony that the district court should not have considered. The Circuit Court wrote, "such testimony did not pertain to services not listed in the IEP; rather, it explained how listed services would be provided." Accordingly, the Circuit Court declined to reverse the lower court's decision.

Regarding the Parents' assertion that the District's choice of school was inappropriate because of its difficulties implementing students' IEPs, the Circuit Court held that the appropriate forum for challenging the District's implementation of an IEP is "'a later proceeding' to show that the child was denied FAPE 'because necessary services included in the IEP were not [actually] provided in practice.'"

WHY YOU SHOULD CARE:

As you are now aware, under R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2d Cir., 2012), a school district may not augment a challenged IEP with "retrospective testimony" (i.e., testimony that certain services not listed in the IEP would actually have been provided to the child if he or she had actually attended the school district's proposed placement). However, as long as the services are listed on the IEP, the district may present testimony regarding how these services will be provided. If the services are not enumerated in the IEP, the district will be foreclosed from presenting evidence regarding the special education services and supports it would have provided, had the child attended the program.

Although a district may have previously had difficulties implementing IEP-mandated services for children, and parents may be concerned that the district will fail to implement their child's IEP in the future, such concern will not justify a unilateral placement. Such claims are merely speculative if the district has not yet had an opportunity to implement the IEP. Failure to implement claims may only be raised *after* the District's obligation to implement the IEP has been triggered (i.e. after the "Start Date" of the recommended program). If the parents unilaterally place the student prior to this time, they cannot offer evidence that had the district had an opportunity to implement the IEP, it would have failed.

Federal District Courts

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1. Goals Do Not Need to Explicitly Reference Each Identified Need.

C.L.K. and J.K. ex rel. C.K. v. Arlington Sch. Dist., 2013 WL 6818376 (S.D.N.Y., 2013)

SALIENT FACTS:

The Parents of a student with Autism challenged the District's 2011-12 recommendation of co-teaching integrated services along with related services of speech, OT and physical therapy ("PT"). The crux of the Parents' complaint was that the annual goals were inappropriate, because they did not explicitly refer to each need identified in the SPAM section of the IEP. The IHO concluded that the district failed to provide FAPE and the SRO reversed.

COURT'S DECISION:

The court affirmed the SRO's holding that the goals were appropriate and did not need to explicitly reference each of the student's needs. Without referencing a particular goal, the court pointed out that all of the goals contained evaluation criteria, the procedure that would be used to evaluate the goals, and a schedule that indicated a time frame for measuring each goal. The court pointed out that State and federal regulations require that IEP goals must "'***relate to***' each of the student's educational needs" (emphasis added) 8 NYCRR 200.4(d)(2)(iii)(A); *see also* 34 CFR 300.320(a)(2)(i)." However, the court held that IDEA, "does not require that the IEP contain goals that explicitly reference each need." As such, the court held that there was no reason to reverse the SRO's decision.

WHY YOU SHOULD CARE:

When developing IEPs, CSEs first develop the SPAMs (i.e. social, physical, academic and management needs). To develop the SPAMs, the CSE must consider the student's present levels of performance and expected learning outcomes. The needs relate to knowledge and skill domains (e.g.: reading, writing, math, organization, communication, motor and social skills), the student must obtain. The needs the CSE identifies will provide the basis for the annual goals that are developed. The annual goals are statements that identify what knowledge, skills and/or behaviors a student is expected to demonstrate within the year during which the IEP will be implemented. The goals focus on the knowledge, skills and behaviors the student must demonstrate in order to address the identified special education needs. As such, the goals do not necessarily need to explicitly reference each specific need. For each need, there must be a corresponding annual goal, and

for each goal, there must be a corresponding need. Practically speaking, it may be helpful for the CSE to carry over each need statement into a goal, and modify the language as appropriate so that a goal is created. This will ensure that there is correspondence between the needs and goals. Even though the court indicated in this decision that it is not necessary for each goal to reference a need, it is good practice to reference an identified need in each goal to guarantee that the goals address all of the identified needs.

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2. One District's Failure to Implement Three IEPs Did Not Permit the Parents to Bypass the Administrative Hearing.

Donus v. Garden City U.F.S.D., 2013 WL 6571089 (E.D.N.Y., 2013)

SALIENT FACTS:

Parents of children with disabilities pursued their claims for discrimination in federal court pursuant to Section 504, Section 1983, and the ADA directly, without first exhausting their claims through an administrative hearing. The Parents claimed that the District's systematic violations of IDEA, which included failing to provide one student with an aide and other services, failing to provide another student with OT and speech services for several months, and failing to provide a third student with an aide for the first two weeks of school, obviated the need to go to a hearing as exhaustion was futile.

COURT'S DECISION:

New York has a two-tiered administrative system of review of IDEA claims. The first level mandates that an IHO be selected from a list of certified IHOs appointed by the local board of education to conduct the initial hearing and issue a written decision. The next level provides that the decision of the IHO may be appealed to the Office of State Review ("SRO") of the New York State Education Department. Only after both of these procedures have been exhausted may a party file suit in federal or state court. Although the Parents' claims alleged violations of Section 504, Section 1983 and the ADA, the court noted:

> [C]omplainants must overcome this significant procedural hurdle not only when they wish to file suit under the IDEA itself, but also whenever they assert claims for relief available under the IDEA, regardless of the statutory basis of their complaint (*citing* Cave v. East Meadow Union Free School Dist., 514 F.3d 240 [2d Cir., 2008]).

Thus, despite the Parents raising their issues in Court under Section 504 and ADA, they were not relieved of the duty to go to due process, where their claims could be addressed under IDEA. Here, the Parents sought monetary

damages as the only relief. Although monetary damages are unavailable under IDEA, "a prayer for damages does not enable a plaintiff to 'sidestep the exhaustion requirement of [] IDEA'" (*citing* Polera v. Bd. Of Educ, 228 F.3d 478 [2d Cir., 2002]). Because all of the claims in the complaint related to the identification, evaluation or educational placement of the student, these claims fell "squarely within the ambit of IDEA," and therefore, required the Parents to exhaust their administrative remedies in due process prior to pursuing their claims in federal court.

The Parents argued that the exhaustion requirement should not apply, because exhausting administrative remedies under the circumstances would be futile (i.e. the Futility Exception). The Futility Exception permits parents to bypass the administrative review level and proceed directly to federal court. However, this exception applies in narrow circumstances, and only when either: (a) adequate remedies are not reasonably available, or (b) where the wrongs alleged could not or would not have been corrected by pursuing the administrative hearing process. For example, where the problems alleged are systematic violations, the Futility Exception will apply and the parents will be permitted to bypass administrative review. Despite the Parents' claims of systematic violations, the court held that, "the few conclusory allegations contained in their Amended Complaint fail to demonstrate a 'district-wide total failure to construct and implement IEPs for special needs students." The Futility Exception may also apply where the Complaint alleges that the school has failed to implement services specified in the IEP. At most, the court noted that this exception would apply only to two of the children who were denied OT, speech and an aide. Nevertheless, "such failures are isolated incidents that do not call into question the district's implementation of [the] IEPs as a whole." Accordingly, the court found that the parents were not excused from the exhaustion requirement.

WHY YOU SHOULD CARE:

Where relief sought in a Section 504 complaint is available under IDEA, the parents must exhaust their administrative remedies before proceeding to federal court. This is also true where the relief sought is unavailable under IDEA (i.e. monetary damages), but the claims relate to the identification, evaluation or educational placement of the student. Thus, the parents may not challenge the district's placement or implementation of the IEP, cloak the alleged violations in terms of violations of Section 504, seek only monetary relief, and pursue their claims directly to federal court. Rather, under these circumstances, the parents must exhaust their administrative due process remedies first. However, where the violations are systematic and evidence district-wide failures to implement IEPs, the parents may succeed in bypassing the administrative process by using the Futility Exception.

Office of State Review

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1. The LRE Analysis Applicable to Special Classes is Inapplicable to a Class in Which ICT Services Are Provided.

***Application of the NYC Board of Education*, Appeal No. 13-191 (2013)**

SALIENT FACTS:

For 2012-13, the CSE recommended that a student with a speech or language impairment receive integrated co-teaching ("ICT") services for math and social studies, be placed in a 12:1 special class for all other classes, and receive related services of speech therapy and counseling. The reason for the CSE's combination recommendation was that the student succeeded in math and social studies, but required more individualized instruction in all other classes. The Parents chose to unilaterally enroll the student at the Cooke Center for Learning and Development ("Cooke") and seek direct payment of tuition from the District.

SRO'S DECISION:

The SRO pointed out that the crux of the parents' complaint was that the ICT/12:1 combined placement was overly restrictive. The Parents requested that the student be placed in a general education setting with full-time 1:1 support. While enrolled in Cooke, the student was placed in ungraded, 12:1 classes. The SRO noted that, the Second Circuit explained that the LRE test for special classes does not adequately address the LRE question involving a student recommended to receive ICT services within the general education environment. See M.W. v. New York City Dep't of Educ., 2013 WL 3868594 (2d Cir., 2013). The Second Circuit described an ICT placement as "somewhere in between a regular classroom and a segregated, special education classroom." Id, at *9-*10. To this end, the Court determined that the appropriate question focused on whether "ICT services were appropriate supports for the student within a general education environment." Id, at *11-*12.

Regarding the appropriateness of the CSE's recommendation, the SRO pointed out that Cooke staff testified that the 12:1 portion of the recommendation would be too restrictive because the student was attending that type of class at Cooke, his teachers believed that he needed a more challenging environment, and that he "could do a general education curriculum, with support." According to the Parents, given the student's previous difficulties in a class with ICT services, he would not be successful in a similar placement without 1:1 support. The District contended that a 1:1 aide in the ICT classes would be overly restrictive and unnecessary, as the presence of the special education teacher would be sufficient to offer any additional support the student might require. The SRO held:

> Under M.W., the evidence supports the finding that the recommended ICT services within a general education setting were properly designed to support the student's academic strengths in the areas of mathematics and social studies, especially [because]...the special education teacher in the ICT classrooms would appropriately support the student's needs.

Additionally, the SRO concluded that the CSE properly considered the student's areas of weakness when it recommended a 12:1 special class placement for all other classes. As such, the SRO held that the "CSE acted reasonably in offering the student a combined program of ICT services and a 12:1 special class placement given his then-current academic levels and his relatively recent success in a particular inclusion program at Cooke."

WHY YOU SHOULD CARE:

As we reported in our July-August 2013 Issue of *Attorney's Corner*, the Second Circuit Court of Appeals rejected the assertion that the recommendation of an ICT program meant that the student would be in an ICT *class*. Rather, the Regulations define ICT as a *service* consisting of "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students." 8 NYCRR 200.6(g). As the Second Circuit pointed out, because ICT is a *service* provided in a regular education class, rather than a class itself, the LRE factors applied when considering the restrictiveness of a particular class should not apply. As such, the appropriate inquiry into the restrictiveness of the ICT services is not whether: (1) the student can be satisfactorily educated in the regular classroom, with the use of supplemental aids and services and (2) the school has included the child in school programs with nondisabled children to the maximum extent appropriate; ***but rather***, whether the placement of the student in a general education environment with a regular curriculum alongside typically developing peers, but supplemented with a special education teacher was overly restrictive. In this case, it was not.

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2. The Educational Placement is Not the Bricks and Mortar of the School.

Application of the NYC Board of Education, Appeal No. 13-218 (Dec. 31, 2013)

SALIENT FACTS:

The District appealed the decision of an IHO awarding Parents of a child with multiple disabilities and "autistic tendencies" reimbursement of tuition paid

to the Rebecca School and enrollment at a Summer Camp. The Parents challenged the District's recommendation of a 12-month 6:1:1 special class in a special school with related services of speech, OT, PT, and the services of a 1:1 aide. The New York City Department of Education had several schools within the recommended program and the school to which the student was assigned was an administrative, rather than a CSE decision. Nevertheless, the IHO held that the District denied FAPE because it failed to include the specific address of the proposed school on the final notice of recommendation ("FNR"). The IHO found that the 6:1:1 class was inappropriate because despite the student having "Autistic tendencies," he was not diagnosed with Autism, and all of the students in the proposed class were diagnosed with Autism. Thus, placing him in a class which included solely students with Autism would have been inappropriate. In addition, the IHO held that the ABA methodology that was employed in the proposed class would have been inappropriate for this student. The IHO also determined that both the Summer Camp and Rebecca were tailored to meet the student's needs, and thus, awarded the Parents reimbursement of the student's tuition at the Summer Camp and Rebecca.

SRO'S DECISION:

The SRO disagreed with the IHO's determination that the District's failure to include the address of the proposed school on the FNR denied FAPE. The SRO pointed out that, "[w]hen determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation." As such, the SRO held that the District had no obligation under IDEA, its implementing Regulations or State law to formally provide the Parents with notice including the school's physical address. Assuming that the District had an obligation to provide the school's address in the FNR, its failure to do so would still not warrant reimbursement. IDEA provides parents with an opportunity to offer input in the development of the student's IEP, but it does not permit parents to veto a district's efforts to implement the IEP. The opportunity to participate in the development of the IEP is different from the right to select where the IEP will be implemented and the services that will be provided. Thus, the SRO held, any failure of the District to identify the school's address in the FNR did not significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student. Although parents have due process protections regarding IEP recommendations, they do not have corresponding due process protections regarding the location where the IEP, its programs and services will be implemented and provided.

Regarding the substance of the IEP, the SRO held that the Parents could not prevail on their claim that the district denied FAPE because School 2 would not have properly implemented the student's IEP. The SRO held that this claim was "speculative" because the Parents did not accept the District's IEP, and instead, unilaterally placed the student in a private school prior to the district's duty to

implement the IEP was triggered. Thus, the SRO held, "the District was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, as such, there is no basis for concluding that it failed to do so."

Finally, the SRO addressed the Parents' claims regarding the functional grouping of the proposed classes. The Parents claimed that the student would not have been appropriately grouped for functional purposes because the other students in the proposed class had an Autism diagnosis. However, the SRO pointed out that Regulations require that, in special classes, students must be suitably grouped for instructional purposes with other students having similar needs, not similar classifications or diagnoses. The SRO disagreed with the IHO's holding that, because the student had not been diagnosed with Autism, the use of ABA methodology in the proposed class would be inappropriate for the student. The teacher of the proposed class testified that her students presented with varied ability levels and needs, and that methodology is not a "one hat fits all" determination. There was nothing in the record that indicated that: (1) instruction using ABA methodology would have been the only methodology used in the class, or (2) that the student would not receive any educational benefit from ABA or other methodology developed for use with students with autism.

WHY YOU SHOULD CARE:

A district must have an IEP in effect at the beginning of each school year for each child with a disability who resides within in its jurisdiction. 34 CFR 300.323(a); 8 NYCRR 200.4(e)(1)(ii). The Second Circuit Court of Appeals has held, "though the IDEA requires the 'educational placement' decision to be made by a group of people including the parents,...'educational placement' within the meaning of the IDEA does not refer to a specific location or program." See K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 (2d Cir., 2010). When determining how to implement an IEP, the assignment of a specific school is an administrative decision, not the decision of the CSE or the parent. As the SRO noted here, "parents generally do not have a procedural right in the specific locational placement of their child."

Another important piece of this decision was the SRO's analysis of when PWN is required. The IHO held that the District was required to provide PWN as a result of its changing the student's assigned school from School 1 to School 2. However, the SRO pointed out that PWN is required "any time a district proposes or refuses to 'initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to the child.'" The "educational placement" refers to the program (e.g. the classes, individualized attention, and additional services a child will receive) not the "bricks and mortar" of the specific school. See T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419-20 (2d Cir., 2009). Thus, the SRO held, "a change from one school building to another,

without more, is not a 'change in educational placement' that triggers the district's obligation to provide the parents with [PWN]."

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*This publication is intended to provide general information and is not meant to be relied upon as legal advice. If you have questions about anything discussed we urge you to contact your school attorney.

