NYSEDirectors™
Centris Group™


*By Jack Feldman*

# MONTH IN REVIEW: January 2020

## Read All About It!

***A Monthly Synopsis of Salient Cases in Special Education***

In this installment of the Attorney's Corner, we review decisions from the Tenth Circuit Court of Appeals, a state educational agency decision, a decision from the Office of Civil Rights ("OCR"), an advisory letter from the Department of Labor ("DOL"), and a policy letter from the Office of Special Education and Rehabilitative Services ("OSERS").

First, we review a decision from the Tenth Circuit, which aligns with the Second Circuit's standards on mootness within the context of IDEA disputes. We then look at a state educational agency decision from Wisconsin, which illuminates how CSEs should combat bullying and mirrors the holdings of relevant Second Circuit cases. Next, we review a decision from OCR, which shows that the implementation of an appropriate IEP will not result in a denial of FAPE. Then, we review an advisory letter from the DOL, which highlights the interaction of IDEA with the Family and Medical Leave Act ("FMLA"). Finally, we conclude with an advisory letter from OSERS, which advises that compensatory services awarded in one state will still need to be provided when a student moves out-of-state.

## *Circuit Court Decisions*

***

### I. When Parents Dispute an Old IEP and Do Not Seek Compensatory Services or Tuition Reimbursement, Their Claim is Likely Moot.

  

*Nathan M., a minor, by and through his parents and next friends, Amanda M. v. Harrison Sch. Dist. No. 2*, 119 LRP 43757, 19-1008 (10th Cir. Nov. 14, 2019)

## SALIENT FACTS AND PROCEDURAL HISTORY:

The student, Nathan M., is classified as autistic. He attended a private school. In April 2016, his home school district found Nathan eligible for services. Over a series of contentious meetings, the IEP team (i.e., the CSE), met with Nathan's mother to address her concerns about his IEP. In December 2016, the IEP team developed an IEP ("2016 IEP"). The team proposed placement in a public school program for students with autism. The mother rejected the 2016 IEP and filed for due process.

The State Complaints Officer ("SCO") found that the school district had failed to develop the 2016 IEP in accordance with IDEA. He ordered that the student resume his private school placement. Arguing that it had offered FAPE, the school district challenged this determination. The mother counterclaimed, arguing that the school district had violated IDEA procedurally and substantively through the 2016 IEP.

An Administrative Law Judge reversed the SCO, finding that the District had provided FAPE. The parent appealed to the Federal District Court of Colorado. Echoing prior arguments, the mother argued that the school district had committed procedural and substantive violations of IDEA.

The District Court held that the school district had developed the 2016 "IEP [that] provide[d] a reasonable plan to provide educational opportunity in a least restrictive environment[.]" In response, the parent appealed to the Tenth Circuit and reasserted her prior arguments regarding procedural and substantive violations of IDEA.

At the time of the appeal, Nathan had graduated to middle school, and his then-current IEP recommended a new placement, an autism program at a different private school. Accordingly, the Tenth Circuit requested supplemental briefing on the issue of mootness.

## TENTH CIRCUIT COURT DECISION:

The Tenth Circuit vacated the District Court's decision and remanded with instructions to dismiss the case as moot. It held that the 2016 IEP "governed a school year that [had] passed," and that "[a]ny controversy over where Nathan should spend the 2016-17 school year was resolved long ago by operation of the IDEA's 'stay-put' provision[.]"

The decision then analyzed exceptions which might have rendered the case justiciable, meaning circumstances where the dispute survived completion of the

  

2016-17 school year. The court stated that "[t]he capable-of-repetition-yet-evading-review exception to mootness applies in those exceptional situations when (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. . . . ***in the IDEA context[,] [the exception] looks at the likelihood that the specific IDEA violations will again be repeated***." (Emphasis added; citations and quotations omitted.)

The decision held that the mother had demonstrated no evidence that the school district would repeat the complained-of substantive and procedural violations. In the analysis, the decision cited a Second Circuit decision Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ., 397 F.3d 77 (2d Cir. 2005), which applies a similar standard regarding mootness. *See id.* ("A plaintiff must point to something more in the record to lift th[e] possibility [of repetition] beyond the speculative.")

**WHY YOU SHOULD CARE:**

In general, courts only review cases in which there is an ongoing "controversy" (i.e., active problem). If the problem has resolved itself – either over time or by other forces – and there is no meaningful relief that can be awarded, then a case is considered "moot." For example, if a parent disputes an IEP for the 2019-20 school year, doesn't seek compensatory services or tuition reimbursement for a unilateral placement, and the 2019-20 school year ends, the parent's request for relief is moot. Courts don't typically render decisions in moot cases. However, Nathan M. highlights a limited exception: courts may review what might otherwise be considered moot cases where (1) a *specific* wrong will likely be repeated, *and* (2) this wrong will not exist long enough to be reviewed by the court.

In this case, the parent was challenging a no-longer-current IEP after the school year had already expired. She did not seek tuition reimbursement or any kind of compensatory services. Moreover, her complaint was not specific enough to establish that the school district would likely repeat the same particular violations of IDEA in the future (i.e., in developing future IEPs). Accordingly, as litigation can take years, school districts should recognize potential arguments for mootness when a parent is challenging an out-of-date IEP.

While this case is from the Tenth Circuit, and is not binding on New York, it relies on a Second Circuit decision and applies a similar standard for mootness. Accordingly, its analysis is instructive.

***

## *State Educational Agency Decisions*

***

### I. After an Incident of Bullying, Reconvene the CSE, and Rethink the IEP.

  

*In re: Student with a Disability*, 119 LRP 9972, 18-091 (Wisconsin State Educational Agency Feb. 1, 2019)

## SALIENT FACTS AND PROCEDURAL HISTORY:

In April 2018, a student with an unspecified disability was found eligible for special education. His IEP noted that he had been a "target of bullying" and described "concerns about the student's interactions with peers, difficulty in understanding nonliteral language, and delayed pragmatic language skills." The 2018-19 IEP included specialized instruction in behavior and social skills and instructed staff to be aware of potential instances of bullying during transition periods. However, not all staff knew of this requirement.

In October 2018, a classmate struck the student. While the school district reported the incident, it failed to specify that it constituted bullying, as staff did not believe it was a recurring confrontation. In November 2018, the parents requested an IEP meeting. The IEP team (i.e., the CSE) discussed moving the student's placement to another building. However, the IEP team never discussed whether the incident with the classmate affected the student's ability to receive FAPE. The team did not revise the IEP.

Later that month, the student "became so upset about interactions with peers that the student's parents came to pick the student up for the school day." The school district declined to investigate because the student had not identified who had bullied him. The IEP team reconvened in December 2018 to discuss the student's placement and needs. It revised the IEP to include more instruction in behavior and social skills. In response to a request from the parents, the team discussed moving the student's placement to a different school. However, the team declined to move the student at that time. Instead, it agreed to reconvene six months later, reassess the student's progress, and reconsider the student's placement. In both meetings, the IEP team failed to discuss how the bullying affected the student's ability to receive FAPE.

The parents filed a complaint against the District with the Wisconsin State Educational Agency ("WSEA").

## WSEA'S DECISION:

WSEA determined that the school district failed to implement the IEP because school staff demonstrated "inconsistent knowledge" of the need to be alert to potential instances of bullying and how to respond appropriately. WSEA also found that the school district had improperly responded to the bullying. Although the district had held two IEP meetings to discuss the student's needs and safety, it never addressed how the bullying affected his receipt of FAPE. As a result, the decision concluded that "it is impossible to determine whether or not the district properly determined the student's placement."

The WSEA decision ordered the school district to reconvene the IEP team. It required the school district to consider compensatory services in light of the failure to implement the IEP. It also mandated that the school district consider the impact of the bullying on the student's receipt of FAPE and provide compensatory services or revisions to the IEP as necessary. Finally, the agency ordered that the school district determine the student's placement in the least restrictive environment.

**WHY YOU SHOULD CARE:**

While this decision is from a Wisconsin state educational agency, it echoes the guiding principles of the seminal Second Circuit case, T.K. v. New York City Dep't of Educ., 32 F.Supp.3d 405 (E.D.N.Y. 2014), *aff'd*, 810 F.3d 869 (2d Cir. 2016). In T.K., the Second Circuit found that a school district's failure to address bullying could result in the child being denied FAPE. In the Eastern District of New York decision, Judge Weinstein stated school districts' responsibilities: "Where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP." 32 F.Supp.3d at 422. An IEP can't merely focus on helping the victim cope with bullying. *Id.*

Accordingly, this Wisconsin decision is an example of "what not to do" when dealing with bullying. Don't ignore an incident just because it seems isolated. When developing or amending IEPs, don't forget to address bullying. Don't keep staff in the dark.

Consider goals to enable the victim to identify bullying behavior, to learn to respond or to seek assistance, to learn to walk away from an unpleasant situation or to say "stop," or to improve understanding of non-verbal, pragmatic communications. Identify a safe harbor where the child can go if she is feeling bullied. The only limitations for addressing bullying on an IEP are those imposed by the CSE's imagination.

Convene the CSE and directly address the bullying's impact on the child. Be prepared to amend the IEP and adjust services as necessary. Make sure staff know to be on the lookout for future incidents of bullying. Further, consider supplementary aids and services that may help the student, such as a 1:1 aide during times of potential vulnerability (e.g., during transition periods).

While this case doesn't address how the school district dealt with the bully, a school district must also take ameliorative measures in this regard. Consider developing an FBA and implementing a BIP for the bully.

***

## *Office of Civil Rights*

***

  

## I. If an IEP Is Appropriate, Implementing Services as Written Will Not Deny FAPE.

*Chesaning (MI) Union Schools*, 119 LRP 42921, 15-18-1412 (OCR Jan. 23, 2019)

**SALIENT FACTS:**

The IEP of a student with an unspecified disability included academic support classes. The parent alleged that the student's academic support teacher was frequently absent and that the substitute teacher was not certified in special education. The parent had also requested that the school district provide weekly progress reports. However, the IEP team (i.e., the CSE) never developed a new or revised IEP to require weekly progress reports.

The parent filed a complaint against the school district under Section 504 for the school district's use of an uncertified substitute teacher and failure to provide weekly progress reports.

**OCR'S DECISION:**

OCR held that the school district did not violate Section 504. It applied Section 504's implementing regulation at 34 C.F.R. §104.33(b)(1): "[T]he provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual education needs of students with disabilities, as adequately as the need of students without disabilities are met."

First, the decision noted that the student's regular academic support teacher was, in fact, certified in special education. Second, with respect to the allegedly uncertified substitute, OCR explained that the student's IEP had not specified that the academic support classes had to be taught by a certified special education teacher. Finally, the decision stated that the evidence was insufficient to establish that the use of the substitute amounted to a denial of FAPE.

With respect to the weekly progress reports, OCR noted that weekly updates were never listed on the student's IEP. While the parent had requested these updates in an email, the IEP team had never developed a new or revised IEP that required weekly updates. The decision explained that regardless, the parents had access to the student's progress through "other means, including updates from the teacher."

**WHY YOU SHOULD CARE:**

This case illustrates two points: first, if an IEP is determined to be appropriate, implementing the IEP as written will ensure the provision of FAPE. Second, if the CSE determines new or different services are appropriate, the IEP should be amended or a new IEP developed. Here, because the IEP team never

  

amended the student's IEP to include weekly progress reports, the school district was not required to provide them. Moreover, the fact that the child received progress reports at the same rate as typical children, was sufficient to satisfy the mandates of Section 504.

***

## *U.S. Department of Labor*

***

### I. Attending CSEs Constitutes "Medically Necessary" Care Under FMLA.

*Letter to Anonymous*, FMLA2019-2-A (U.S. DOL Aug. 8, 2019)

**CONTENT OF LETTER:**

A mother has children with qualifying serious health conditions under the Family and Medical Leave Act ("FMLA"). The mother's employer had approved her request to use FMLA leave to bring the children to medical appointments. However, the employer declined to approve the parent's request to use FMLA leave to attend the children's CSE meetings. The children's father wrote to the DOL and asked whether FMLA is available to parents caring for their children's serious health conditions to attend CSE meetings.

DOL Administrator Cheryl Stanton wrote that parents can use FMLA leave to attend CSE meetings. FMLA leave is available to individuals to "care for a family member . . . with a serious health condition." 29 C.F.R. §825.100(a). Such care includes "mak[ing] arrangements for changes in care" (29 C.F.R. §825.124[b]), even when such care does not involve a facility that provides medical treatment.

The DOL letter noted that attendance at CSE meetings involves decisions "concerning [the] children's medically-prescribed speech, physical, and occupation therapy" and "discuss[ions] [about] [the] children's wellbeing and progress with the providers of such services." Because attendance at CSE meetings is "essential to the [mother's] ability to provide appropriate physical or psychological care" to her children, the mother was entitled to use FMLA leave for this purpose.

**WHY YOU SHOULD CARE:**

FMLA leave allows eligible employees up to twelve weeks of unpaid leave to, among other things, care for a child with a serious health condition. A serious health condition is "an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider[.]" If a child is of school age, his or her condition may involve an IDEA disability.

  

Employees may take FMLA leave on an intermittent basis when "medically necessary." 29 U.S.C. §2612(b)(1). Thus, the DOL has concluded that "medically necessary" care includes attendance at CSE meetings.

The letter analyzes CSEs from an employment law perspective rather than within the special education law and IDEA/Section 504 context. Nevertheless, as *employers*, school districts should be cognizant of FMLA requirements and how they interact with special education. In certain circumstances, district employees caring for their disabled children may be able to use FMLA leave to attend CSE meetings. In addition, parents of disabled children may be able to attend CSE meetings using FMLA leave.

***

## *Office of Special Education and Rehabilitative Services*

***

### I. An Award for Compensatory Services Survives an Interstate Transfer.

*Letter to Anonymous* (OSERS Oct. 23, 2019)

**CONTENT OF LETTER:**

In New Mexico, a child's school district failed to provide FAPE. Accordingly, the New Mexico Public Education Department ordered that the child receive compensatory services. In a letter to OSERS, the child's parent explained that the family was moving out-of-state. The parent asked whether the school district in the new state would be required to provide compensatory services.

OSERS Director Laurie VanderPloeg explained that the new school district must provide compensatory services. In the letter, the Director noted that "a State's responsibility to ensure implementation of a final decision in a State complaint resolution generally would continue until the ordered corrective action has been implemented." The opinion also relied on a Third Circuit decision, which held that "a claim for compensatory education is not rendered moot by an out-of-district move even if that move takes the child out of state." *See* D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498-99 (3d Cir. 2012).

The letter also stated that the relief granted may affect school districts' responsibilities, noting as follows:

> If a [State] has ordered a [school district] to develop a new IEP for a child with a disability and the [family] move[s] to a different State, the [school district] in the State from which the child's family had moved would not need to develop a new IEP, because the new

  

[school district] in the new State would be responsible for developing and implementing the new IEP[.]

**WHY YOU SHOULD CARE:**

This opinion provides guidance as to how school districts should handle out-of-state student transfers who are owed compensatory services. If a decision is rendered for compensatory education, then a child is entitled to receive those services, even after an out-of-state move. This contrasts with a school district's obligation to provide FAPE, which ceases once a student moves to a new school district. However, if compensatory education is awarded, the new school district has to provide it.

***

**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 assistance with research and writing.**