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By Jack Feldman

MONTHS IN REVIEW: June-July 2014

Read All About It!

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. The Second Circuit has clarified that claims that a District delays the provision of related services to all IDEA-eligible students until after the start of the school year, as a general policy or practice, are not subject to IDEA's exhaustion requirements. The Second Circuit has held that these claims fall within the "policy or practice of general applicability" exception. Thus, Districts may find themselves in federal court sooner than expected when faced with claims of a general practice of illegally delaying related services until after the start of the school year, despite their IEP mandates.

Second Circuit Court of Appeals

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1. A District's Delay In The Provision Of Related Services Until Third Week Of School Results in An Exception to the Exhaustion Requirement.

R.A.G. v. Buffalo City School District, 2014 WL 2722745 (2d Cir., 2014), *affirming* 2013 WL 3354424 (W.D.N.Y., 2013)

SALIENT FACTS:

A student's 2011-12 IEP mandated that she be placed in an integrated co-teaching ("ICT") program and receive three 30 minute sessions of speech and language therapy every six (6) day cycle. The start date of the student's IEP was September 7, 2011. Prior to the commencement of the 2011-12 school year, the District proposed to amend the IEP without a CSE meeting to change the start date of the speech therapy from September 7, 2011 to September 26, 2011, the third week of school. The reason for the change was "to follow district policy" regarding the start date for the provision of related services. The Parent never consented to amend the IEP and the CSE never reconvened prior to the start of the school year. Although ICT services were provided, speech therapy did not begin until the third week of school. The IHO dismissed the complaint on the grounds that the "minor flaws in the District's special education program offered to [the] Student, as raised in [the] Parent's Due Process Complaint fail to establish that [the] Student was denied her entitlement to a FAPE." The SRO affirmed this finding on the grounds that there "was no material failure in the District's implementation of the student's IEP for the 2011-12 school year."

On appeal to federal court, the Parents alleged that the District does not provide special education related services per District-students' IEPs during the first two weeks of school (or longer), regardless of the fact that IEPs mandate that related services begin the first day of school. As a result, the Parents claimed, among other things, that the District denied FAPE and discriminated against the students on the basis of their disabilities. The Parents sought to represent all students between the ages of 5 and 21 residing in the District and receiving related services. The District opposed the class certification, arguing that the Parents failed to exhaust their administrative remedies by failing to raise their claims of delayed provision of related services to all students with disabilities in their Complaint, before the IHO or SRO. Thus, the District argued that the federal court lacked subject matter jurisdiction. Because the Parents alleged systemic violations of the procedural rights afforded by IDEA, the district court held that the exhaustion requirement did not apply. More specifically, the district court wrote:

> [T]he argument is that the District adopted a policy that violates IDEA by hindering the IEP development and implementation process, requiring focus on the existence and scope of the alleged policy, not whether a particular IEP is appropriate for a particular student.

As such, the district court granted the Parents' request for class certification.

COURT'S DECISION:

The Circuit Court affirmed the lower court ruling awarding the Parents' request for class certification without exhausting their administrative remedies.

An exception to IDEA's exhaustion requirement exists when the Parent alleges "broad systemic violations." Because the Parents alleged that the District refused to provide related services for the first two weeks of the school year as a matter of policy, the Circuit Court ruled the exhaustion requirement did not preclude the Parents from bypassing the administrative level of due process. The Circuit Court wrote, "[b]ecause the [Parents] allege systemic failures [of the] school district to implement [related] services for students from the beginning of the school year as a matter of district policy, we determine that the district court was correct to conclude this objection was no barrier to class certification." Accordingly, the Second Circuit effectively permitted the Parents to bring a lawsuit on behalf of all students in the District between the ages of 5 and 21 who did not receive related services for the first two weeks of the school year.

WHY YOU SHOULD CARE:

Generally, claimants under IDEA must exhaust their administrative remedies before they can be heard in federal court. See 20 U.S.C. 1415(i). However, exhaustion is excused in IDEA actions where: (1) it would be futile to use the administrative due process procedure, (2) a district has adopted a policy or pursued a practice of general applicability that is contrary to law, or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g. the IHO lacks the authority to grant the requested relief)." See Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir., 1987); J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 113 (2d Cir., 2004). As illustrated here, because the Parents alleged that the District implemented a policy whereby it refused to provide IEP-mandated related services until the third week of school, the Parents were permitted to bypass IDEA's administrative process, based on the second exception to the exhaustion requirement.

Districts should understand that based on this decision, they may find themselves in federal court sooner than they might expect when the basis for the complaint is that the District adopted a policy or practice of delaying the start date of related services despite IEP mandates. Many districts have followed a practice of starting related services weeks into the school year to allow providers to arrange and schedule their classes. In addition, some districts end services early to free up providers to serve as proctors during the intensive end of year testing period. If they do, the IEP must clearly state the actual start and end dates for such services. Otherwise, a late start to related services is more than an individual IEP violation, it can be deemed a systemic practice of violating IDEA and lead directly to a federal court proceeding.

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2. Parent's Implied Promise To Pay Warranted Direct Payment of Tuition.

E.M. v. New York City Dept. of Educ., 2014 WL 3377162 (2d Cir., 2014)

SALIENT FACTS:

The CSE acknowledged that the student required highly intensive individual supervision, but instead of recommending a 1:1 program, the CSE recommended a 12-month 6:1:1 special class with related services of OT, PT and speech. The Parent rejected the recommendation on the grounds that the student required 1:1 instruction, unilaterally enrolled the student in Reach For The Stars ("RFTS") and sought direct payment of $85,000 tuition for the school year. The tuition contract provided that the parent assumed "complete financial responsibility for enrollment of [the student at RFTS] for the year 2008-09" and that she agreed to "pay when due the Annual Tuition and Fees." Absent from the contract was a payment schedule or the deposit amount required to be accompanied with the contract "to make it valid." The parent did not pay, and due to her financial circumstances, was unable to pay any of the tuition. However, the Parent and RFTS agreed that the Parent would seek funding from the District.

Without deciding the merits, the IHO held that the parent lacked standing to sue for tuition reimbursement because she had not paid RFTS for the student's enrollment, nor did it appear that she was in any way obligated to do so. IDEA restricts recourse solely to the disabled and parents of the disabled. On the grounds that RFTS, not the Parent, was the party who had an interest in direct funding, the IHO denied the Parent's request for direct payment.

Considering the merits of the case, the SRO held that the 6:1:1 special class with "programmatic supports" would enable the student to receive educational benefit. The SRO did not identify what "programmatic supports" would render the 6:1:1 class appropriate. However, the SRO relied on testimony from the teacher of the proposed class that, had the student required 1:1 attention during the entire school day, she would make sure that either she or the paraprofessional worked with him at all times. On the grounds that the District offered the student FAPE, the SRO denied the request for direct payment.

The District Court reversed the IHO's decision, and held the Parent had standing to sue for direct payment, even if she had not paid RFTS. The Court reasoned that the denial of FAPE, without more, constitutes injury sufficient for a parent to satisfy the standing requirement. See S.W. v. New York City Dept. of Educ., 646 F.Supp.2d 346 (SDNY, 2009). Because R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2d Cir., 2012) had not been decided by the date of the SRO's decision, the District Court held that it was permissible for the SRO to consider retrospective testimony concerning services which were not enumerated in the IEP that the District would have provided had the student enrolled in the District. The District Court then deferred to the SRO's decision regarding the appropriateness of the IEP.

COURT'S DECISION:

The Circuit Court affirmed the District Court's decision that the Parent had standing to sue for direct payment to RFTS, although she had not paid anything toward the tuition, but reversed the District Court's decision that the SRO properly considered retrospective testimony.

Regarding the Parent's standing, the Circuit Court pointed out that the seminal cases in tuition reimbursement (Burlington-Carter) contemplated the unilateral-withdrawal option being available only to "'conscientious parents *with adequate means*' to foot the bill for private school tuition while their IDEA claims are adjudicated." However, the question in this case concerned whether the same remedy of tuition reimbursement was available under IDEA to parents without adequate means to pay the bill. The Circuit Court held that direct payment "fits comfortably within the Burlington-Carter framework…" To have standing to sue for a remedy, the plaintiff must have suffered an injury in fact. When the parent seeking direct payment has not paid tuition, the court must determine whether the parent has suffered an injury, and then the court must determine how the direct funding will redress the injury.

The Circuit Court determined that the Parent's claim of a denial of FAPE constituted an injury in fact. Further, as a result of this injury, the Parent demonstrated that she incurred a financial obligation to RFTS. The contractual agreement, the Circuit Court held, "constitutes an 'injury in fact'…one that is 'redressable' by the direct payment she seeks." The Circuit Court wrote, "indeed, there is nothing in the record to suggest that, if [the parent's] IDEA claim proves fruitless, she is automatically relieved of her contractual promise to pay tuition." Thus, the Circuit Court concluded that the Parent maintained her contractual obligation to pay tuition regardless of the success of her IDEA litigation. As such, the Parent suffered an injury in fact and had standing to seek direct funding from the District to RFTS.

The Circuit Court held that the District Court erroneously relied on retrospective testimony that the District "would have" provided one-to-one instruction despite the IEP's mandate for a 6:1:1 placement. For this reason, the Second Circuit vacated and remanded the case to the District Court to either consider the merits, or remand the case to the SRO to consider the merits, exclusive of impermissible retrospective testimony.

WHY YOU SHOULD CARE:

IDEA promises FAPE to disabled children regardless of their families' financial status. The Circuit Court acknowledged that there has been a trend among New York federal district courts ordering payment of tuition directly to private schools. See e.g. Mr. & Mrs. A ex rel. D.A. v. New York City Dept. of Educ., 769 F.Supp.2d 403, 428 (S.D.N.Y., 2011). The Circuit Court was not persuaded

that the absence of a payment schedule from the contract or the failure to pay the required deposit was evidence that the parents had no obligation to pay tuition. The Circuit Court attributed these facts to "a creditor's willingness to be patient with a debtor." Thus, this case will make it increasingly more difficult for Districts to argue successfully that a parent does not have standing to sue for direct payment of tuition. Further, this case makes it easier for Parents to recover tuition after unilaterally enrolling their child without any payment to the private school, and arguably, without any real obligation to pay.

As long as the tuition contract indicates that the Parent is obligated to pay and does not relieve the obligation where, for example, the Parent does not have to pay if unsuccessful in recovering tuition from the District, the Parents may have standing to sue for direct funding. Where there is evidence in the contract that relieves the Parents of any financial obligations if they are unsuccessful in a due process proceeding, the District may successfully argue that the Parent does not have standing. See S.W. v. New York City Dept. of Educ., 646 F.Supp.2d 346 (S.D.N.Y., 2009) (Denying direct funding where the contract indicated that if the Parent did not recover tuition from the District, the private school would not be paid).

Federal District Courts

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1. Grades Alone Do Not Determine IDEA Eligibility.

M.M. and I.F. ex rel. L.F. v. New York City Dept. of Educ., 2014 WL 2757042 (S.D.N.Y., 2014)

SALIENT FACTS:

The Parents of a student with a history of emotional instability sued the District for reimbursement of tuition paid to a Utah therapeutic residential school. Until November 2007, the student attended a District school. Academically, the student did well and received good grades. However, due to her emotional issues and anxiety surrounding attending school, she missed several weeks of school during the Fall of 2007. Eventually, after a suicide attempt, she stopped attending school altogether. Between November and January of 2008, the District provided the non-classified student with home instruction at the Parents' request. While on a family vacation between January and April, the student attempted suicide again. When the student returned from vacation, her parents enrolled her in a private, therapeutic residential school in Utah. The school is described as "a structured boarding school for teenage girls with histories of eating disorders, substance abuse, or behavioral issues." Although the student's grandmother agreed to pay the tuition, per a written agreement, the parents agreed to repay the grandmother.

After enrolling the student in the Utah school, the parents referred the student to the CSE.

The CSE determined that the student "was a good student, who performed well academically, and that her emotional problems were not impacting her education." The CSE concluded that the student was not disabled within the meaning of IDEA "since her psychiatric issues did not affect her strong academics." At the end of the following year, the CSE reconvened to review reports from the Utah school and reaffirmed its decision. The Parents sought reimbursement of tuition on the grounds that the District erred when it refused to classify the student.

The IHO held that the CSE erred in refusing to classify the student and that the parents would have been entitled to reimbursement had they actually paid the student's tuition. However, because the grandmother paid the tuition, the IHO held that the parents lacked standing to sue for reimbursement. On appeal, the SRO held that the parents were not entitled to reimbursement because the CSE correctly declined to classify the student. The SRO found it significant that the student consistently received good grades whether she was in public school, on home instruction, or enrolled at the private school; had good relationships with her parents and grandparents; and had a few age-appropriate friends. As such, the SRO concluded that the student's education was not affected by her emotional issues.

COURT'S DECISION:

The court disagreed with the SRO's determination that the student was ineligible under IDEA as a student with an emotional disturbance ("ED"). The court held that the student exhibited two characteristics of an ED student –

(1) She demonstrated inappropriate types of behavior or feelings under normal circumstances (i.e.: anxiety, body image, cutting, eating disorders and suicide attempts), and
(2) She exhibited a general pervasive mood of unhappiness or depression over a long period of time and to a marked degree.

The Court wrote, "the SRO's decision amounts to a finding that students who have good grades cannot be found disabled." According to the Court, the SRO's determination that the student's educational performance was unaffected by her emotional problems had three major flaws:

1. The SRO focused on assessing the student's grades without considering the more fundamental question of whether she could even attend school;
2. The student did not earn the minimum number of credits required to move on to the next grade; and

3. The SRO conducted a misleading analysis of the student's grades - while she generally received good grades in any school she attended, her grades declined in-district and improved in the private school.

Regarding the first flaw, the court pointed out that during the student's last months in the district, "the [district] gave [the student] home instruction, a program which is normally only given to [students with disabilities]." Few things, the court wrote, "could be more indicative of an emotional problem that 'adversely affected' a student's education than one that prevented her from attending school." As such, the court held that the SRO's determination was insufficiently reasoned to warrant deference.

Regarding the appropriateness of the Utah school, the court pointed out that, "while it may be better for parents to place students in a less restrictive private placement, parents have no obligation to find the least restrictive private placement possible." The District argued that the student inappropriately benefitted from the restrictive environment at the Utah school because it treated her psychiatric problems, which was a medical benefit, not an educational one. The court rejected this argument, affirming the IHO's conclusion that the private school met the student's educational needs due to its therapeutic interventions.

Finally the court considered the district's argument that the parents lacked standing to seek reimbursement because the grandmother paid the tuition. The court ruled that the grandparent's payment of the student's tuition did not bar the parents' reimbursement claim because documentary evidence (i.e. the written agreement between the Parents and grandmother) demonstrated that the grandparent considered these payments a loan to the parents.

WHY YOU SHOULD CARE:

As the court noted, in order to be classified as a student with an emotional disturbance, two conditions must be met: (1) the student must exhibit certain behavioral characteristics, symptomatic of an emotional disturbance, and (2) the characteristics must be exhibited over a long period of time and to a marked degree that adversely affects the child's performance in school. The characteristics are: (a) an inability to learn that cannot be explained by intellectual, sensory, or health factors; (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (c) inappropriate types of behavior or feelings under normal circumstances; (d) a generally pervasive mood of unhappiness or depression; **or** (e) a tendency to develop physical symptoms or fears associated with personal or school problems. While receipt of good grades may constitute evidence that the student's school performance was not adversely affected by emotional problems, it is not dispositive. Grades alone may not be the deciding factor of whether a student is eligible for services under IDEA. Rather, the CSE must consider all factors relevant to the student's education (e.g. grades,

school attendance, class participation, relationships with peers, etc.). As illustrated here, although a student may earn good grades, if the student's school refusal and related symptoms (e.g.: anxiety) are exhibited over an extended period of time and to marked degree, such that without home instruction, the student will not attend school, the student may be eligible for classification as emotionally disturbed under IDEA.

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4. An Altercation On School Grounds Prior To Parent's Site Visit Does Not Automatically Render Proposed School Inappropriate.

N.S. v. New York City Dept. of Educ., 2014 WL 2722967 (S.D.N.Y., 2014)

SALIENT FACTS:

Just prior to a father's arrival for a site visit at the District's proposed school, there was an altercation in the hallway that required police intervention. The Parents argued that because of the incident, the proposed school was inappropriate for their child and that the school would be unable to implement the child's IEP. The Parents sued the district for reimbursement of tuition paid to the Imagine Academy ("Imagine"), where the student had been parentally placed for several years. The IHO awarded the parents reimbursement and the SRO reversed on the grounds that the parents' speculation that the proposed school would fail to implement the student's IEP was insufficient to warrant reimbursement.

COURT'S DECISION:

Regarding the substance of the IEP, the court pointed out that when the CSE developed the student's IEP, it: considered a number of reports, including some from Imagine; noted that the student's language and pragmatic skills were "severely below age level;" included a BIP; recommended a 6:1:1 special class with a 1:1 paraprofessional; provided fifteen 1:1 sessions of OT, PT and speech; and included numerous annual goals. The Court held that some annual goals were measurable (e.g. "Within one year, the student will improve readiness skills by identifying colors, numbers, and shapes with 80% accuracy as measured monthly by her teacher"), while others were not (e.g. "The student will improve her expressive language skills"). For those goals that were immeasurable, the court noted that measurable short-term objectives were included (e.g. "The student will consistently exchange a picture in her PECS book for a desirable item with minimal prompting with 80% accuracy over 10 sessions").

While the Parents felt that the student would not be safe in the District's proposed school, citing rough-housing and the high male-female ratio, the Parents

failed to present any objective evidence that the proposed school would not have been able to meet the student's needs and implement the IEP. The court wrote:

> If one altercation renders a school unsafe, the court suspects that every public school in New York – or at least the vast majority of them – would have to be deemed "unsafe." The reality is that students have altercations. The mere fact that an altercation occurred between students (if they actually were students) simply does not mean that a school is not safe.

During the father's visit, he was informed that the school had only one 6:1:1 class in which there were only boys. Although the father never observed the class, the Parents alleged that it was inappropriate. According to the Parents, the classes the father observed were too advanced for the student, and as such, the proposed school would be incapable of meeting the student's needs. However, the father refused to observe the 6:1:1 class in which the student would have been placed. The crux of the Parents' claim regarding the implementation of the IEP was that, the IEP-mandated 1:1 paraprofessional could take care of the student, but could not teach the student to care for herself. While the District bore the burden of proving the adequacy of the IEP, the court held that this burden did not require specific testimony that the paraprofessional would supervise the student's hand washing or other bathroom activities.

WHY YOU SHOULD CARE:

A parents' mere speculation that a proposed school will fail to implement a student's IEP, without more, will be insufficient to support tuition reimbursement. The Second Circuit will not grant tuition reimbursement to a parent who unilaterally abandons a district's proposed placement based on mere speculation that the school would not adequately adhere to the IEP. See R.E. v. New York City Dept. of Educ., 694 F.3d 167, 195 (2d Cir., 2012). The parents must present objective evidence that the proposed placement is deficient. The fact that an altercation occurred on school grounds, while undesirable, does not automatically render a placement inappropriate. While this case concerned an isolated incident, one wonders whether the Court would have maintained its position on fighting amongst peers if the school had a history of student altercations or if the altercation involved weapons.

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

Eboné Woods, an associate with Frazer & Feldman, LLP, provided research, writing and assistance.