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Centris Group

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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this month's issue of the *Attorney's Corner*, we review cases concerning various special education-related issues. In particular, we review a Case of Interest from the New York Appellate Division for the Second Department, which reassures Districts that they have no duty to supervise students placed by the CSE out-of-district. In Begley v. City of New York, 2013 WL 5225242 (2d Dep't., 2013), the Parents of a student who suffered from asthma, as well as severe allergies to a wide range of foods and substances, sued the School District following the student's death at a New Jersey private school, where the student was placed by the District's CSE. The student died after an apparent exposure to blueberries. In denying the Parents' claim that the District was liable based on a claim of negligence, the Court held that the district had no duty to supervise the staff at the out-of-district placement.

U.S. Supreme Court

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1. Regulation Providing For An IEE At Public Expense Does Not Exceed Scope of IDEA.

Phillip C. v. Jefferson County Bd. Of Educ., 701 F.3d 691 (11th Cir., 2012), cert. denied 2013 WL 1703390 (2013).

SALIENT FACTS:

After disagreeing with a District-conducted re-evaluation, the Parents obtained their own evaluation from a private Autism Center. Thereafter, the Parents requested that the District reimburse them for the cost of the evaluation. After the Board refused, the Parents filed a demand for due process. The IHO ordered the District to reimburse the Parents, but the Board continued to refuse. The Parents then filed a lawsuit in a federal district court seeking to enforce the IHO's order. The district court affirmed the IHO's order and directed the District to reimburse the Parents for the cost of the evaluation. The District appealed this decision to the Circuit Court of Appeals with jurisdiction over the matter.

COURT'S DECISION:

The District argued that 34 CFR §300.502(b)(1), the Regulation governing independent educational evaluations ("IEE") must be invalidated because IDEA (20 USC §1415[b][1]) does not *expressly* state that parents are to be reimbursed for the cost of an IEE. The District argued further that by allowing state and local agencies to establish and maintain procedures to ensure procedural safeguards, Congress implicitly delegated to states the right to decide whether to reimburse parents for the cost of an IEE.

Although the Circuit Court agreed that IDEA does not expressly state that agencies must pay for a parent's IEE, the Court rejected the District's arguments. The Court pointed out that another section of IDEA (20 USC §1406[b][2]) preserves any IDEA regulation that existed as of July 20, 1983 and provided protection for children. On July 20, 1983, the Regulation granting parents the right to an IEE at public expense if they disagreed with an evaluation conducted by the District was in effect. After 1983, IDEA was reauthorized in 1990, 1997, and 2004. The 1983 provision concerning IEEs was never altered or removed. As the Court pointed out, "[u]nder the re-enactment doctrine, 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change'" (citations omitted). Thus, because Congress did not alter the IEE provision at any time during the three times it re-enacted IDEA, the Court reasoned that it was Congress' intention to maintain a Parents' right to an IEE at public expense if they disagreed with an evaluation conducted by the District.

Additionally, the Circuit Court recognized that if the District's interpretation of the IEE provisions were accurate, only the class of Parents who could afford private evaluations would be able to obtain IEEs. If Congress intended to delegate to the States the right to decide whether to reimburse parents for the cost of an IEE, and some States chose not to reimburse parents for the cost of an IEE, then the Parents who could not afford the private evaluation would not have "access to an expert who can...given an independent opinion." The Court wrote, "[t]here is 'nothing in the statute to indicate that when Congress required States to provide

adequate instruction to a child at no cost to parents, it intended that only some parents would be able to enforce that mandate.'"

In light of the foregoing, the Circuit Court ordered the District to reimburse the Parents for the cost of the IEE. By denying certiorari, the Supreme Court preserved the Circuit Court's decision.

WHY YOU SHOULD CARE:

Under IDEA, parents and legal guardians are entitled to an IEE at public expense if they disagree with an evaluation conducted or obtained by the District, 34 CFR §300.502(b)(1). According to the Circuit Court, exercising the right to an independent expert opinion is a procedural safeguard to which parents are entitled (*citing* Schaeffer v. Weast, 546 U.S. 49, 60-61 [2005]. "[IDEA [] ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion"). Individual States and Districts have no authority to decide whether to reimburse a parent for the cost of an IEE. Rather, when a parent disagrees with an evaluation conducted by the District, the District only has two options: (1) provide the IEE at public expense (or reimburse the parents for the cost of the IEE they obtained after they expressed disagreement with the District's evaluation), or (2) pursue due process to prove to an impartial hearing officer that the District's evaluation is appropriate and no further evaluations are necessary.

Federal District Courts

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1. Lack of Evidence That Student Would Not Make Progress in A Program Less Restrictive than 1:1 Weighs Against Parents' Claim for Tuition Reimbursement.

D.A.B. v. New York City Dept. Of Educ., 2013 WL 5178267 (S.D.N.Y., 2013)

SALIENT FACTS:

For 2009-10, the student attended the McCarton Center (McCarton), where he received 1:1 speech therapy six times per week for forty-five minutes per session, 1:1 OT five times per week for forty-five minutes per session, and twenty hours of ABA therapy per week. During the meeting convened to develop the student's 2010-11 IEP, the CSE reviewed reports from McCarton and included all of the related service recommendations. Specifically, the IEP included speech therapy, 1:1 six times weekly and in a small group once weekly; 1:1 counseling twice weekly. To address the student's behavioral needs, the CSE recommended a dedicated behavior management paraprofessional (BMP) and a 12-month

placement in a 6:1+1 special class. The parents rejected the recommendation, maintained the student at McCarton and sought tuition reimbursement.

The IHO held that the District denied FAPE as a result of procedural and substantive violations of IDEA. The IHO reasoned that the vagueness of the annual goals resulted in a procedural error, which denied FAPE, and that the recommended 6:1:1 program was not reasonably calculated to confer educational benefits because the student required more intensive instruction. The SRO reversed. This appeal ensued.

COURT'S DECISION:

First, the court addressed the annual goals. The IEP included 17 annual goals and 96 short-term objectives, many of the annual goals were broadly worded. For example, the IEP included goals such as, "[the student] will improve reading skills," or "[the student] will improve math skills." The IHO held that the annual goals were inappropriate, as they failed to include evaluative criteria, evaluation procedures and schedules; were vaguely worded; and failed to identify how well, and over what period of time the student would have to perform a skill for it to be considered "mastered." The SRO held that the specificity of the short-term objectives cured the defects in the vague annual goals. Further, the SRO held that the IHO's ruling concerning the evaluative criteria was erroneous because the student's teachers would determine the method of measurement. As such, according to the SRO, the CSE's failure to identify a specific method of measurement in the IEP did not deny FAPE.

After considering both the IHO's and SRO's reasoning, the court held that the SRO's decision was "persuasive" and entitled to deference. After reviewing the annual goals, the court held that the broad annual goals had complementary detailed short-term objectives with specific numerical targets. Many of the annual goals included specific and measurable short-term objectives. For example, the goal, "[the student] will improve his reading skills" contained the following short-term objectives:

- [The Student] will match at least 25 words to the corresponding pictures and vice versa with 80% accuracy;
- [The Student] will receptively identify as a listener at least 25 written words, with 80% accuracy;
- [The Student] will match 15 words in different font with 90% accuracy;
- [The student] will read 10 C-V-C (Consonant-Vowel-Consonant) words, with 80% accuracy.

The court held that the failure to designate a specific means of measurement (e.g. 80% accuracy, match at least 25 words) in the annual goals did not deny the student FAPE, because the specificity of the short-term objectives

cured the defect. Moreover, the annual goals and short-term objectives were read aloud at the CSE meeting, and no one objected.

Concerning the substantive adequacy of the IEP, the court again held that the SRO's decision was entitled to deference. The court noted that, although McCarton staff reported to the CSE that the student "need[ed] somebody with him constantly," during the CSE meeting, no one, except the Parent, indicated that the student required full-time 1:1 instruction, or that the 6:1:1 program was inappropriate. However, the court pointed out that there was nothing in the record to suggest that the student "would not [have been] adequately supported by a 1:1 paraprofessional working under the direction of the special education teacher to provide support with the student's behavior." The court credited the testimony of the CSE Chairperson that the CSE reviewed all of the information before it and received input from the student's providers. Based on this information, the CSE Chairperson opined that it would have been inappropriate for the CSE to consider anything more restrictive than a 6:1:1 program. The information before the CSE indicated that the student required 1:1 support for his behavioral issues. To address this, the CSE recommended a 1:1 BMP. Because the parents failed to present any evidence to suggest that the student required full-time 1:1 instruction to make progress, and the District presented evidence that the student would receive educational benefit from the 6:1:1 class, the court affirmed the SRO's decision.

WHY YOU SHOULD CARE:

Generally, federal courts will defer to the expertise of administrative decisions concerning the sufficiency of annual goals and strategies. As this court explained, "[w]hen an IEP contains a significant number of specific short-term objectives to supplement otherwise broad annual goals, the vagueness of the annual goals alone will not rise to the level of a denial of FAPE." Procedural deficiencies caused by vague annual goals may be cured by specific short-term objectives. W.T. v. Bd. of Educ. Of Sch. Dist. Of New York City, 716 F.Supp.2d 270 (S.D.N.Y., 2010). For example, in M.H. v. New York City Dept. of Educ., 685 F.3d 217, 248-49 (2d Cir., 2012), the Second Circuit Court of Appeals affirmed a lower court's decision that the absence of specific methods of measurement in the annual goals did not deny FAPE because many of the short-term objectives contained a method of measurement (i.e. teacher observation).

It is SED's position that, "[t]erms such as 'will improve…,' 'will increase…' and 'will decrease…' are not specific enough to describe what [] the student is expected to be able to do."[1] To be measurable, a behavior must be observable or able to be counted. While short-term objectives may cure a vague annual goal,

[1] See SED Guidance, "Annual Goals, Short-Term Instructional Objectives and/or Benchmarks: Requirements" (last updated June 30, 2010) (*available at*: http://www.p12.nysed.gov/specialed/publications/iepguidance/annual.htm).

CSEs must remember that short-term objectives are only required for preschool students and those students being assessed through the Alternate Assessment. 8 NYCRR §200.4(d)(2)(iv). IEPs for all school-age students who are not alternately assessed are not required to contain short-term objectives. Thus, because the CSE cannot fall back on the specificity of short-term objectives for these students, CSEs must be diligent about ensuring that the annual goals are specific and measurable.

Another important part of this decision is its analysis of R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2d Cir., 2012). The court noted that a deficient IEP may not be rehabilitated or amended after the fact through the introduction of retrospective testimony regarding services not appearing in the IEP that would have been provided to the student. The court pointed out that the converse is also true. Specifically, "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE." As such, parents will be precluded from presenting evaluations, reports, or testimony during the hearing to prove the insufficiency of the IEP if this information was not presented to the CSE when it developed the IEP at issue.

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2. Federal Courts May Afford Less Deference to Administrative Determinations On The Question of the Equities.

A.R. ex rel. F.P. v. New York City Dept. of Educ., 2013 WL 5312537 (S.D.N.Y., 2013).

SALIENT FACTS:

For 2010-11, the District failed to offer the student FAPE. As a result, the Parent unilaterally placed the student at the Cooke Center for Learning and Development ("Cooke"), and sought tuition reimbursement. The District conceded that it failed to offer FAPE because it's May 24, 2010 IEP failed to make a placement recommendation. Indeed, it was not until the District received the Parent's 10-day notice on August 24th that a placement recommendation was made. Pursuant to her March 12, 2010 tuition contract, the Parent enrolled the student at Cooke. Despite its failure to offer FAPE, the district argued that the Parent's request should be denied because: (1) the Parent entered into an enrollment contract with Cooke 10 weeks prior to the CSE annual review meeting, (2) Cooke never attempted to recover the $44,500 tuition payment from the Parent, and (3) the Parent did not file her Due Process Request until the end of the 2010-11 school year. As such, the District argued that the equities weighed against tuition reimbursement. Both the IHO and SRO found that the equities weighed against reimbursement and denied the Parent's claims. The Court disagreed.

COURT'S DECISION:

The Court rejected the District's argument that the Cooke contract was a "sham" in that it was not an agreement under which the Parent would actually be liable to pay the student's tuition. Rather, the District argued that it was "simply a collusive effort to induce payment" from the District. The Court rejected this argument. The Court noted that although the Cooke contract provided that full payment was due on September 30, 2010, it also expressly allowed payment to be delayed if the Parent pursued due process to seek direct or prospective tuition funding from the District. The court wrote, "[the parent's] lack of confidence in [the district's] ability to offer a FAPE does not preclude her from obtaining relief in the event that her fears were realized." Rather, the Parent's "confidence in the merits of her claims [did] not undermine them, nor [did] it prove that her contract with Cooke was a sham." Moreover, the court held that there was no evidence that the Parent failed to cooperate with the District, declined to visit the proposed placement, or failed to notify the District of her dissatisfaction with the District's proposal. For these reasons, the Court granted the Parent's request.

The Court also rejected the District's argument that the Parent had predetermined the student's placement because she entered into an enrollment contract well before the CSE meeting. The Court reasoned that the Cooke contract provided that the Parent would be "released from this contract without financial penalty or continuing responsibility for tuition payments should she choose to accept a school placement recommended by the [District] in a public school, provided that she give notice by October 31." In light of this provision, "the Court decline[d] to infer bad faith on the part of the [Parent], who sought to make arrangements to preserve her options should the [District's] recommended placement prove to be inadequate."

WHY YOU SHOULD CARE:

Generally, federal courts are expected to give "due weight" to administrative proceedings, mindful that the judiciary generally "lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." See Walczak v. Florida UFSD, 142 F.3d 119, 129 (2d Cir., 1998). However, as noted here, "the deference owed to the administrative decisions may be less weighty when it comes to reviewing whether the equities support a reimbursement award" (citations omitted). Although a federal court may afford due deference to the administrative decisions concerning whether the District offered FAPE and the appropriateness of the private program, the federal court may afford less deference to a determination of the equities. A determination concerning the equities does not necessarily require the same level of expertise concerning educational policy as the first two issues. Thus, the federal court may conduct a more independent review of this issue. When doing so, the federal court may be inclined to be less critical of enrollment contracts entered into between the Parent and the private school, including the circumstances surrounding them. This is the case even where, as was the case here, (1) the Parent

entered into an enrollment contract more than two months prior to the CSE meeting, (2) the contract expressly provided that payment could be delayed if the Parents pursued due process against the District seeking recovery of tuition, and (3) the Parent does not have the financial means of paying the tuition.

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3. CSE's Failure to Sufficiently Address Autism-Related Needs Rendered IEP and Placement Inappropriate.

F.O. v. New York City Dept. Of Educ., 2013 WL 5495493 (S.D.N.Y., 2013)

SALIENT FACTS:

A student with autism was also diagnosed with Myasthenia Gravis Fast Channel Syndrome ("MG"). The student's MG caused muscle weakness and severe fatigue. Because of the student's difficulties swallowing food, he requires a nurse to feed him directly using a gastronomy tube. Because the CSE failed to make a placement recommendation for the student's 2009-10 school year, the Parents unilaterally enrolled him in the Rebecca School ("Rebecca"), and the District agreed, per the terms of a Stipulation of Settlement, to pay the costs of the student's attendance.

On May 25, 2010, the CSE convened to develop the student's 2010-11 IEP. The IEP included various annual goals and short-term objectives, many of which derived from a May 2010 Report from Rebecca. During the CSE meeting, Rebecca Staff opined that the neither a 12:1:4 nor a 6:1:1 class would be appropriate for the student. The Rebecca Staff recommended that the student be placed in a program with a small class ratio. The district psychologist and the parents' experts agreed that the student needed a small class that used an intensive, highly structured approach. The CSE reviewed the student's treating physician's report, which indicated that the student required a program that specifically addressed autism. Nevertheless, the CSE recommended that the student be placed in a 12:1:4 special class for students with physical disabilities. The parents objected to this recommendation on the basis that prior classes of ten or twelve students had been too large or too distracting for the student. Nevertheless, the Parents visited the proposed placement. After their visit, the Parents rejected the CSE's recommendation on the basis that the 12:1:4 class was inappropriate because of the lack of an autism curriculum, there was insufficient equipment to address the student's sensory needs and there were an insufficient number of therapists. As a result, the Parents unilaterally placed the student at Rebecca for 2010-11 where he was placed in an 8:1:3 class, and sought reimbursement of tuition.

The IHO agreed that the recommended program was inappropriate and ordered the District to reimburse the Parents $92,100 for the cost of the student's 2010-11 tuition at Rebecca. The SRO reversed the IHO's decision.

COURT'S DECISION:

The Court criticized the SRO's failure to analyze testimony from the Parents' witnesses that conflicted with testimony presented by the District. Although the SRO mentioned some testimony from Parents' witnesses, he did not analyze or explain their testimony or discuss why it was less persuasive than that of the District's witnesses. Specifically, the student's pediatrician, who had been the treating physician for the past four years, testified that Autism was the student's most pressing educational need. Additionally, the pediatrician testified that, "students with Autism benefit most from programs specifically targeted to address autistic features." Although the SRO cited this testimony, he dismissed it and held that the CSE-recommended program would meet the student's needs.

The Court criticized the SRO for ignoring testimony that the 12:1:4 class was designed for students whose primary educational deficit was their physical disability. While the student's muscle disorder could physically impact his speech and writing, the social and academic effects of his autism were far more significant. The District argued that the parents' "fixation" on having a classroom with an autism label was trivial. The court disagreed and wrote:

> "The difference between the 12:1:4 classroom proposed in the IEP and a smaller classroom with a program more tailored to [the student's] autism is not trivial...Instead, the distinction goes to the heart of [the student's] right to a [FAPE]."

Finally, the court criticized the SRO's reliance on retrospective testimony that the student's 12:1:4 teacher would have used the TEACCH methodology, a picture exchange system, sign language, an auditory tactile stimulation and individualized schedule. None of these services were enumerated in the IEP. As a result, the court deferred to the IHO's determination that the District denied FAPE and reversed the SRO's decision. After finding that Rebecca was appropriate because it met the student's specific special education needs, the Court reversed the SRO's decision in the District's favor.

WHY YOU SHOULD CARE:

When developing an IEP for a student with multiple disabilities, it is imperative that the IEP addresses all of the student's identified special education needs. If a Parent presents information to the CSE that indicates that one of the student's disabilities is more significant than the others, the CSE should not ignore this information. Rather, the CSE must determine how the student's disability affects the student's ability to function in school and recommend an appropriate program, related services and accommodations and modifications to meet the

student's special education needs. CSEs that ignore particular special education needs because the District does not offer a program that addresses these needs will find themselves on dangerous ground at an impartial hearing. If the District does not have a class capable of addressing the student's particular needs, you cannot ignore these needs. The "I" in "IEP" stands for "individualized." Therefore, the IEP must address each of the student's individual special education needs and the recommended placement must be capable of meeting those individual needs.

This case also reiterates the Retrospective Testimony Rule. An SRO may rely on testimony that describes both an IEP's recommended method and why it was appropriate or testimony explaining how an IEP recommended service operates. See T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, n.12 (SDNY., 2013). However, an SRO may not rely on retrospective testimony that the district would have provided additional services beyond those enumerated in the IEP. R.E. v. New York City Dept. Of Educ., 694 F.3d 167 (2d. Cir., 2012). "Programmatic" services not identified in an IEP, will not be considered by a reviewing body, IHO, SRO, or the Courts. Districts will be precluded from proving that these programmatic services were part of the CSE's recommendations.

New York Appellate Division

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1. The DOR Has No Duty To Provide Direct Supervision of a Student in an Out-Of-District Placement.

Begley v. City of New York, 2013 WL 5225242 (2d Dep't., 2013)

SALIENT FACTS:

The CSE of the district of residence ("DOR") recommended that the student be placed in the Forum School ("Forum"), a private school located in New Jersey. The student suffered from asthma as well as allergies to a wide range of foods and substances. In light of his severe allergies, the CSE recommended that the student be provided with daily nursing services while traveling to and from school and throughout the school day. The Parents selected the nurses and the DOR paid for their services. One afternoon, after having lunch, the student began experiencing difficulties breathing. The student's condition did not improve after receiving his nebulizer treatment. Consequently, his nurse injected him with three Epi-Pens while awaiting paramedics. The student passed away in the hospital two days later. The parents filed a lawsuit against the DOR, Forum and the nurse, alleging that all three parties negligently allowed the student to be exposed to blueberries, a food to which he was allergic, and failed to properly respond to him when he was in distress.

COURT'S DECISION:

Although all three defendants filed a Motion to Dismiss the Complaint, this review concerns the DOR's Motion. Curiously, the complaint did not raise any issue as to whether the DOR-developed IEP was deficient or failed to identify all of the student's known allergens. Rather, the Complaint merely alleged that the DOR failed to properly supervise the student.

The DOR argued that it did not owe the Parents a duty to supervise the student because Forum had physical custody and control over the student. Moreover, the DOR argued that "it could not be held vicariously liable for [the nurse's] negligence because [she] was an independent contractor recruited and selected by [the Parents], and its involvement was limited to reimbursing [the Parents] for [the nurse's] services."

As this Court has previously held:

> "Although a school has a statutory duty to provide special education services to children who require them, where the school has appropriately contracted out that duty, it cannot be held liable on a theory that the children were in [the school's] physical custody at the time of the injury. See Ferraro v. North Babylon Union Free School Dist., 892 N.Y.S.2d 507, 507 (2d Dep't, 2010)."

Applying this reasoning here, the Court wrote:

> "Having placed [the student] in a private school equipped to provide educational services to a child with both severe medical problems and developmental delays, the [DOR] was entitled to reasonably rely on that school to act reasonably in providing for [the student's] medical needs, and protecting his safety."

The DOR did not exercise control over the student's day-to-day supervision and the DOR's statutory obligations to provide the student with FAPE did not extend as far as to impose a duty on it to supervise the student while he was under the care and custody of Forum.

As the Court pointed out, "[t]his is not a case in which [the district] failed to properly identify, in its IEP, the child's special needs, and the services necessary to provide the child with an appropriate education." Rather, the DOR's IEP identified all of the allergens known to be irritants for the student. At the time the CSE developed the student's IEP, none of the documents before it indicated that the student was allergic to blueberries and the Parents did not indicate same to the CSE. As such, the Court found no error in the CSE's exclusion of blueberries from the list of allergens included in the student's IEP. The Court dismissed the claims against the DOR and held:

> "To impose a direct duty of supervision on the [DOR]…where the child is in the custody of a private school in another state, would place the [DOR] in the position of being an insurer against the alleged acts of negligence committed by [] Forum [] despite its inability to exercise control over [] Forum's [] staffing and educational decisions."

WHY YOU SHOULD CARE:

Generally, a District has a duty to supervise students in its charge. Such duty generally arises from the District's physical custody over these children. As noted by this court:

> [A] school's duty to supervise is generally viewed as being "coextensive with and concomitant to its physical custody of and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty ceases" (at *11).

Thus, when a CSE recommends that a student be placed out-of-district, the District is entitled to reasonably rely on the out-of-district school to act reasonably in providing for [the student's] medical needs, and protecting his safety. The reasoning for this is that the District does not exercise control over the day-to-day supervision of the student and has no supervisory responsibility over the staff. Rather, the District's involvement with the out-of-district school is generally limited to recommending the placement, reviewing the progress and reimbursing the school for the special education services provided.

However, if there is an allegation that the District failed to properly identify, in its IEP, the child's special needs, and the services necessary to provide the child with an appropriate education, the District may be liable. For example, if it were known to the CSE that the student was allergic to blueberries, and the CSE failed to include blueberries on the list of allergens enumerated in the student's IEP, and Forum allowed the student to be exposed to blueberries while in school, the DOR might have been liable.

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