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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review two decisions from the Second Circuit, a decision from the Sixth Circuit, two federal district court decisions, and an administrative decision from the Office of State Review ("SRO").

We first review a Second Circuit decision, which demonstrates that a parent seeking tuition reimbursement must show that her child's unilateral placement is appropriate. Next, we look at another Second Circuit decision, which provides insight as to the deference federal courts must show decisions from the IHO and SRO. We then look at two cases – one from the Sixth Circuit and one from the Eastern District of New York – which both deal with exhaustion of administrative remedies requirements with respect to Section 504 claims. Next, we analyze a decision from the Eastern District of New York, which held that New York's repeal of its religious exemption to immunization requirements did not conflict with IDEA. Finally, we conclude with a decision from the SRO, which describes when special education itinerant teacher ("SEIT") services may be appropriate and how individualized education services program ("IESP") development is similar to the IEP development process.

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Second Circuit Court Decisions

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I. Parents Seeking Tuition Reimbursement Must Demonstrate That Their Unilateral Placements Are Appropriate.

R.H. ex rel. C.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 119 LRP 25795, 18-1852-cv(L), 18-1951-cv(XAP) (2d Cir. July 2, 2019) (unpublished)[1]

SALIENT FACTS AND PROCEDURAL HISTORY:

C.H. has high-functioning autism and also suffers from anxiety. In elementary school, C.H. attended private and public schools in both special and general education settings. C.H. re-enrolled in his school district in the 2013-2014 school year. In August 2013, the CSE convened and recommended a Board of Cooperative Educational Services (BOCES) 8:1+1 special class, with a goal to address C.H.'s anxiety about attending school. In October 2013, the parents consented to add counseling to C.H.'s IEP to address his anxiety.

The CSE convened in January 2014 to develop C.H.'s IEP for the 2014-2015 school year. The CSE recommended that C.H. continue his placement in the BOCES 8:1+1 special class with related services of counseling and supports for his management needs.

In February 2014, C.H.'s father requested an emergency CSE meeting. At the meeting, the father raised concerns about C.H.'s anxiety, his perceived lack of progress, and the father's belief that the BOCES placement was unsuitable. In response, the CSE added speech language therapy to C.H.'s IEP. The CSE additionally approved the parent's request for a psychological IEE, recommended that the student undergo an assistive technology screening, and recommended that the parent visit BOCES's Asperger's Program for Independent Education ("APIE") as a potential future placement.

From January through April 2014, the student was absent from school for a significant number of days. C.H. was only present for seven days between the February 2014 CSE meeting and April 2014. The CSE reconvened in April 2014 to review two new evaluations. While the CSE discussed changing C.H.'s placement, it decided to continue the BOCES placement for the remainder of the 2013-2014 school year. The CSE also agreed to arrange for a sensory processing evaluation and to send a particular assistive technology program to BOCES.

In June 2014, the CSE convened to review C.H.'s IEP. The CSE recommended that C.H. receive home instruction with related services for the remainder of the school year. For the 2014-2015 school year, the CSE modified C.H.'s recommended placement at BOCES, changing it from the 8:1+1 special class to the APIE program with related services. C.H.'s parent believed that the BOCES

[1] Note that the Second Circuit decision did not provide a detailed recitation of the facts, so here, we also summarize the record as stated in the underlying Northern District of New York and SRO decisions.

placement was improper, so he was unilaterally enrolled at The Ridge School ("Ridge"), a private school for students with high-functioning autism. In July 2014, C.H.'s parent filed for due process and sought tuition reimbursement.

At Ridge, C.H.'s attendance improved. However, Ridge failed to create an educational program for C.H. or develop academic goals. Additionally, Ridge allowed C.H. to avoid tasks that he did not want to do.

The IHO found that the district failed to provide C.H. with FAPE and that Ridge was an appropriate placement. As such, tuition reimbursement was granted. The SRO reversed the IHO's award; the SRO found that although the district had not provided C.H. with FAPE, the parent had failed to demonstrate that the unilateral placement at Ridge was appropriate. The Northern District of New York upheld the SRO's decision. The parent appealed.

SECOND CIRCUIT COURT'S DECISION:

The Second Circuit Court upheld the Northern District of New York's decision. In so holding, the Second Circuit noted that "the parents must demonstrate that the private school is appropriate" in order to be entitled to tuition reimbursement – even where a district has failed to provide FAPE. The Second Circuit found that the District Court had correctly deferred to and upheld the SRO's judgment.

Among other claims, the parent argued that the SRO had failed to consider the totality of the circumstances by ignoring evidence of C.H.'s improved attendance at Ridge. However, the Second Circuit noted that the SRO had, in fact, considered the totality of the circumstances, and noted that, "improved attendance alone d[id] not establish that Ridge was specifically designed to meet C.H.'s needs."

WHY YOU SHOULD CARE:

The Second Circuit decision demonstrates that in the case of a unilateral placement, a parent is not automatically entitled to tuition reimbursement when a school district has failed to sustain its prong 1 burden that it provided FAPE. To receive tuition reimbursement, parents must demonstrate that their unilateral placement is appropriate and designed to meet their child's needs. In this case, while the parent had demonstrated evidence of C.H.'s increased attendance at Ridge, there was no evidence that Ridge was appropriate to meet C.H.'s needs. Accordingly, when a school district faces a claim of tuition reimbursement, it should carefully assess whether the parent's unilateral placement is specifically designed to and does address the child's needs.

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II. When SRO and IHO Decisions Conflict, the SRO Decision Prevails – as Long as It's Adequately Reasoned.

W.A. and M.S. ex rel. W.E. v. Hendrick Hudson Cent. Sch. Dist., 119 LRP 23561, 17-3248, 17-3313 (2d Cir. June 14, 2019).

SALIENT FACTS AND PROCEDURAL HISTORY:

In sixth grade (2008-2009), W.E. began having internal pain and had an appendectomy, causing him to miss at least 26 days of school. Thereafter, W.E. suffered from abdominal and conventional migraines and frequently missed school throughout seventh grade (2009-2010). His mother, M.S., referred W.E. to the district's 504 Committee in the spring of W.E.'s seventh grade year; the 504 Committee found him eligible for accommodations based on his migraine disability.

In eighth grade (2010-2011), W.E.'s condition continued to worsen, and he missed 100 school days. M.S. notified the district that she believed her son to be in "crisis." In response, the district scheduled a 504 meeting for January 2011. M.S. later emailed the district that she believed her son had made progress over the winter break, so the district cancelled the meeting.

In the spring of 2011, W.E.'s parents referred W.E. to the CSE. The parents again requested an emergency 504 meeting, which convened in April 2011. The 504 Committee recommended counseling for W.E. and that W.E. be psychiatrically evaluated in anticipation of the CSE meeting. In August 2011, the school district held a meeting, and the CSE found W.E. eligible for special education under the classification of other health impairment ("OHI"). For the 2011-2012 school year, the CSE recommended an 8:1:1 placement with related services, including counseling and extra time for assignments.

The parents believed that the CSE's recommended placement was inappropriate, so they unilaterally placed W.E. at Northwood, a private boarding school, in his ninth grade year (2011-2012). W.E. received accommodations at Northwood, such as a nurse as his faculty advisor, additional time to complete assignments, preferential seating, and regular sessions with the school counselor.[2]

In June 2012, the CSE convened to develop an IEP for W.E.'s tenth grade year (2012-2013). The CSE again recommended an 8:1:1 placement. The parents rejected this placement and continued W.E.'s enrollment at Northwood.

[2] W.E.'s parents filed for due process in November 2011 and sought tuition reimbursement for the 2011-2012 school year, but this claim was unsuccessful because the instruction at Northwood was not "designed to address" W.E.'s needs. The Second Circuit affirmed in this same case.

In tenth grade, W.E. received additional accommodations at Northwood: use of an iPad in class, a supervised study hall, and access to a school nurse. W.E.'s parents filed for due process in April 2013 and sought tuition reimbursement for the 2012-2013 school year.

In December 2013, the IHO found that the district had failed to provide W.E. with FAPE and that Northwood's program and instruction were "specially designed to meet his needs," and awarded tuition reimbursement.

In March 2014, the SRO reversed the IHO's award of tuition reimbursement. The SRO found that, although the district had failed to provide FAPE, Northwood was not an appropriate placement for W.E. The SRO said Northwood did not provide W.E. with instruction "specially designed . . . to meet his ongoing need to develop insight and understanding into what triggered his stress and anxiety, and positive coping skills to address stress and decrease anxiety."

In November 2016, the Southern District of New York affirmed the SRO's findings that the district had failed to provide W.E. with FAPE. However, it concluded that Northwood was, in fact, an appropriate placement, and it awarded tuition reimbursement. The district court compared the SRO's and IHO's reasoning and found the IHO's analysis "more compelling." It described the SRO's analysis as "conclusory and unpersuasive."

SECOND CIRCUIT COURT'S DECISION:

The Second Circuit reversed the district court's finding that Northwood was an appropriate placement for W.E. and vacated the award of tuition reimbursement. The Second Circuit noted that "[c]ourts reviewing the state agency's decision must base their decision on a preponderance of the evidence and may not substitute their own views on educational policy for those of the school authorities." Additionally, the Second Circuit noted that when an IHO and SRO decision conflict, the IHO's decision should be given "diminished weight," and the district court should give the SRO's opinion deference if it is adequately reasoned.

WHY YOU SHOULD CARE:

This case demonstrates once again that a unilateral parental placement does not automatically result in tuition reimbursement when a school district fails to provide FAPE; the parent must also demonstrate that the unilateral placement is appropriate.

Additionally, when faced with claims for tuition reimbursement, it is important for districts to be aware of appropriate procedures, so they may raise objections if (and when) appropriate. This case provides insight into the procedural elements of a tuition reimbursement claim. When a reviewing court analyzes a tuition reimbursement case, it must give deference to the SRO's

decision when it conflicts with the IHO's decision. Furthermore, the district court may only consider the IHO's opinion over the SRO's decision if the SRO's decision is inadequately reasoned. Here, although the district court found the SRO's analysis to be insufficient, the Second Circuit held that it was sufficient. The Circuit Court ruled that the SRO had considered the student's progress, testimony from teachers, and the student's services at Northwood. Thus, the district court should have deferred to the SRO's decision. The Second Circuit noted that, "rather than credit the conclusions that were most consistent with its own subjective analysis, the reviewing court should only reject the SRO's conclusions if it finds that they are not supported by a preponderance of the evidence." (Citations, brackets and quotations omitted.)

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Sixth Circuit Court Decision

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I. If a 504 Claim Seeks to Remedy a Denial of FAPE, Plaintiffs Must First Exhaust Administrative Remedies.

L.G. by G.G. and L.G. v. Bd. of Educ. of Fayette Cty., Ky., 119 LRP 22928, 18-5715 (6th Cir. June 10, 2019) (unpublished)

SALIENT FACTS AND PROCEDURAL HISTORY:

In September 2016, L.G., a middle school student, was diagnosed with an *E. coli* infection, and his doctor advised that L.G. should not attend school. L.G.'s parents notified his school. However, the district allegedly did "not accept" the parents' excuse. As a result of his absence, L.G. was to receive failing grades.

Following withdrawn truancy charges, the district approved L.G. for homebound instruction in January 2017. Later that month, the district contacted L.G.'s parents about setting up a Section 504 plan. However, L.G.'s parents disenrolled their child, arguing that the district had discriminated against L.G., on the basis of his disability. L.G.'s parents commenced a lawsuit under Section 504.

The Eastern District of Kentucky dismissed the parents' claims. The parents appealed to the Sixth Circuit.

SIXTH CIRCUIT COURT'S DECISION:

The Sixth Circuit upheld the district court's dismissal of the parents' claims. In its decision, the Sixth Circuit noted that IDEA's exhaustion of remedies requirement applies to claims under Section 504, if they are essentially claiming a denial of FAPE. Although the parents had characterized their claim as a "denial of

access" to educational services, the Sixth Circuit noted that L.G. was "in essence contesting the adequacy of a special education program."

WHY YOU SHOULD CARE:

School districts must be cognizant of IDEA's exhaustion of administrative remedies requirement, because courts will dismiss a claim by parents who fail to satisfy this requirement.

Under the exhaustion of remedies requirement, a parent must first seek administrative remedies (i.e., file for due process before an IHO) prior to seeking relief in court. Claims alleging a denial of FAPE require plaintiffs to first exhaust administrative remedies. This is true regardless of whether plaintiffs seek relief under IDEA or Section 504 and whether their claim sounds in a denial of rights, discrimination, or denial of access. If the genesis of the case is a challenge to the eligibility, program, or services, its basis is a FAPE denial. Exhaustion is required. Although *L.G.* is a Sixth Circuit case, federal cases from New York have mirrored its position regarding claims seeking a denial of FAPE; parents must first seek administrative remedies. *See, e.g.*, *Martinez v. New York City Dep't of Educ.*, No. 17-CV-3152 (NGG), 2018 WL 4054872 (E.D.N.Y. Aug. 24, 2018).

L.G. demonstrates that even where the parents couch their claim as a denial of "access," if the gravamen of the complaint is the denial of FAPE, then a parent cannot go to court without first commencing an administrative review, to wit, an impartial hearing.

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Federal District Court Decisions

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I. If a 504 Claim Does *Not* Seek to Remedy a Denial of FAPE, Plaintiffs Are Not Required to Exhaust Administrative Remedies.

Parker-Leon and Leon ex rel. J.L. v. Middle Vill. Preparatory Charter Sch., 119 LRP 22637, 17-CV-4548 (NGG) (RML) (E.D.N.Y. June 4, 2019)

SALIENT FACTS:

J.L. was a sixth-grade student at a charter school. He had an IEP that addressed his ADHD and a social anxiety disorder.

Initially, J.L. enjoyed attending school, but he soon began complaining that his classmates were bullying him. J.L. said that his classmates teased him about his disability, calling him "dumb" and "stupid." Reportedly, J.L.'s classmates bullied him on a "near daily basis."

Although J.L.'s parents contacted the school and the school's Board of Trustees multiple times between October 2016 and November 2017, the school did little to remedy the situation. Reportedly, the school transferred the "main perpetrator" of the bullying to another class only after J.L.'s family retained an attorney.

Claiming that the school had not adequately addressed J.L.'s disability-related harassment, the parents filed a complaint under Section 504 in the Eastern District of New York in August 2017. Thereafter, the school moved to dismiss the parents' claim for failure to exhaust administrative remedies.

EASTERN DISTRICT COURT'S DECISION:

The Eastern District of New York denied the school's motion to dismiss; the court found that the parents did not have to exhaust administrative remedies. IDEA requires that plaintiffs alleging a denial of FAPE must first exhaust administrative remedies, even if the underlying claim is another statute, such as Section 504. In its analysis, the court implemented SCOTUS's two-part test for determining whether a Section 504 claim encompasses a denial of FAPE claim: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school -- say, a public theater or library? And second, could an adult at the school say, -- an employee or visitor -- have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject[.]"

WHY YOU SHOULD CARE:

This case provides a counterpoint to the aforementioned Sixth Circuit *L.G.* case. Just as parents must first exhaust administrative remedies under Section 504 if they are claiming a denial of FAPE, parents do *not* have to exhaust administrative remedies if their Section 504 claim does not allege a denial of FAPE.

Here, the parents' claim had little to do with the inadequacy of their son's education, and rather it addressed the school's failure to take meaningful action in response to complaints of disability-related bullying.

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II. Vaccine Mandates and the Repeal of the Religious Exemption Do Not Preempt IDEA.

V.D., et al. v. State of New York, et al., 2:19-cv-04306-ARR-RML (E.D.N.Y. Aug. 19, 2019)

SALIENT FACTS:

New York's Public Health Law §2164 mandates that all children must receive age-appropriate immunizations in order to attend school (including public, private, and parochial institutions), unless the child has a valid medical exemption. Prior to June 2019, a religious exemption allowed parents who possessed genuine beliefs against immunizations to send their children to school without such immunizations. However, in light of numerous measles outbreaks in New York City and Rockland County, Governor Cuomo signed legislation to repeal the religious exemption, effective immediately.

On July 25, 2019, six families of children with disabilities commenced a federal lawsuit seeking to reverse the repeal of the religious exemption. The children of each of these families had received a religious exemption, and following the repeal of the religious exemption, they faced exclusion from school in September, unless they received the requisite vaccinations. The families argued that IDEA preempted the amended New York law, because excluding unvaccinated students with disabilities would violate the students' statutory right to a free appropriate public education ("FAPE"). The families also argued that the change in the law enabled an impermissible "change in placement" for the children, as they claimed that their children's exclusion from school had occurred without notice and contrary to the procedural safeguards. Accordingly, the parents filed a motion for a preliminary injunction to restore the religious exemption to Public Health Law §2164.

EASTERN DISTRICT COURT'S DECISION:

On August 19, 2019, the Eastern District of New York denied the families' motion. First, the decision noted that "[m]andatory vaccination laws are a permissible use of state police power, and states are free to pass laws that mandate compliance with immunization requirements." It explained that the religious exemption of Public Health Law §2164 had actually gone "beyond what the Constitution require[d]" (citing *Phillips v. City of New York*, 775 F.3d 538, 543 [2d Cir. 2015]) and that such exemptions were not required under the law.

The decision went on to explain that plaintiffs had not demonstrated a likelihood of success on the merits. First, the decision explained that "it is entirely possible to comply with both the compulsory immunization provisions of [Public Health Law] §2164 and the IDEA." The court explained that the parents had made "the affirmative choice not to vaccinate their children" and thus, were opting out of

private, public, and parochial school in New York. Moreover, the court noted that "New York law allows parents to access special education services for homeschooled children."

The decision also stated that Public Health Law §2164 was not a "change in placement" entitling the families to the "stay-put provision of the IDEA" (i.e., pendency), because the mandated exclusion did not constitute a "unilateral removal." The court explained, "[Public Health Law] §2164 did not itself mandate that plaintiffs' children stop receiving services in their previous agreed-upon educational placement. To the contrary, it was plaintiffs' affirmative decision not to comply with the neutral requirement imposed by the repeal that led to an alteration of services—not any unilateral action taken on the part of the state."

This case has now been withdrawn by plaintiffs.

WHY YOU SHOULD CARE:

With the recent measles outbreaks and anti-vaccination movements frequently making headline news, it's important for school districts to keep abreast of their legal obligations with regard to unvaccinated students. V.D. is significant because it demonstrates that the vaccine mandates do *not* preempt IDEA.

Moreover, it is possible that V.D. prompted the New York State Education Department ("NYSED") to clarify schools' obligations to provide unvaccinated homeschooled children with services. On August 16, 2019, NYSED issued a guidance document entitled "Vaccination Requirements Applicable to All Children." According to the guidance, homeschooled students with an individual education services plan ("IESP"), who receive special education services must either be immunized or have a valid medical exemption to be eligible to receive special education services in a school setting. However, if the student is not immunized, NYSED has now determined that special education services must be provided to the student, either in the child's home or at another location (such as the therapy provider's office or a site that is open and accessible to the general public). Note, that if the services are provided outside of the child's home, then the school district is responsible for transporting the student. However, a student who is not immunized may not be transported on a bus with other students.

Further, NYSED has now taken the position that for the 2019-2020 school year, "school districts are encouraged to honor parent requests for special education services for homeschooled children who may be impacted by the repeal of religious exemptions to vaccination requirements [which are received after the June 1st deadline]." Thus, if a school district receives a request for special education services for a child who will be homeschooled as a result of the new immunization law, the school district's CSE should convene to consider what, if any, special education services the home-schooled student requires.

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I. IESP Development Is Analogous to IEP Development; SEIT Services are a "Preschool Support."

Application of a Student with a Disability, No. 19-020 (April 12, 2019)

SALIENT FACTS AND PROCEDURAL HISTORY:

The student in this case received services under New York's "dual enrollment" statute: she attended a nonpublic school and received services through an individualized education services program (IESP). In the 2017-2018 school year, the student received five hours per week of individual special education itinerant teacher (SEIT) services, counseling, and speech-language therapy.

In April 10, 2018, the CSE convened for the student's "turning five' meeting to develop an IESP for the 2018-2019 school year. The CSE recommended related services (counseling and speech-language therapy), identified management needs, and recommended seven annual goals for the student, to develop her social/emotional and communication skills during the ten-month school year.

Later that month, the CPSE convened to recommend services for the remainder of 2017-2018 school year. The CPSE recommended that, for the remainder of the 12-month school year, the student receive 2:1 SEIT services and related services (counseling and speech-language therapy).

In September 2018, the parents filed for due process. Among other claims, they argued that the student needed continuation of SEIT services during the 2018-2019 school year "to address [her] cognitive and social/emotional and behavioral delays."

The IHO determined that the district had offered FAPE and that the student's 2018-2019 IESP offered the student an "appropriate level of services to address the student's needs." Furthermore, the IHO dismissed the parents' claims that the student required SEIT services. It noted that there was "no evidence" that the student's teacher and classroom assistants would not be able to implement the IESP. Thereafter, the parents appealed.

SRO'S DECISION:

The SRO upheld the IHO's decision. In the review of the record, the SRO noted that the school psychologist had testified that SEIT services were a

"preschool support," and that students transitioning to kindergarten should receive a more "academic model" of instruction. Further, the school psychologist had noted that SEIT services are appropriate for students with "significant academic delays," such as not being able to identify colors, count to five, or understand simple directions. When the CSE had developed the student's IESP, the student had not exhibited these kinds of delays; she was able to state her age, count to 20, and learn letters.

WHY YOU SHOULD CARE:

This case demonstrates that a CSE must consider many of the same factors when developing an IESP as when developing an IEP. Like an IEP, an IESP should "provide personalized instruction with sufficient support services to permit the student to benefit instructionally from that instruction." Here, the district based its IESP on the student's particular deficiencies and modified services where appropriate, such as by transitioning away from SEIT services.

Moreover, this case provides an example of when SEIT services are (and are not) appropriate. SEIT services are a preschool-level support, not a school-age support on the continuum. Once a child is exhibiting evidence of kindergarten-readiness (such as being able to identify colors, count to five, and understand simple directions), SEIT services may no longer be appropriate. Here, the CSE's termination of SEIT services made sense due to the student's levels of performance. Although the parents sought continuation of those services into the 2018-2019 school year, they were inappropriate based on the student's cited ability to state her age, count to 20, and learn letters.

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