NYSE Directors™
Centris Group™

By Jack Feldman

MONTH IN REVIEW: September 2019

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review a State court decision from the New York Supreme Court (Nassau County), a federal district court decision, an administrative decision from the Office of State Review ("SRO"), and advisory opinions from the U.S. Department of Education's Office of Services and Educational Programs ("OSEP") and Family Policy Compliance Office ("FPCO").

First, we review a New York Supreme Court (Nassau County) decision, which suggests that schools could be held liable for ignoring bullying of disabled students under Section 504 and Title II of the Americans with Disabilities Act ("ADA"). Next, we review a decision from the Southern District of New York, which describes when a court should use a last agreed-upon IEP analysis versus an operative placement analysis when determining pendent placement. The decision also explores how substantial similarity may transform a new placement into a pendent placement. Then, we look at an SRO decision that shows that a parent's burden in demonstrating that his/her unliteral placement is appropriate may be rather low. Additionally, we review an OSEP advisory opinion that assesses whether school district administrators may attend CSE meetings merely as observers. Finally, we conclude with an advisory opinion from FPCO, which indicates whether recordings of CSE meetings are subject to disclosure under FERPA, and how such records may implicate IDEA concerns.

***

State Court Decision

***

I. Ignoring Bullying Can Expose a School District to Liability.

Collazo v. Hicksville Union Free Sch. Dist., 65 Misc.3d 268 (Nassau Cnty. Sup. Ct.2019)

SALIENT FACTS AND PROCEDURAL HISTORY:

A student suffered from scoliosis. He reported that he had been bullied throughout elementary school for his appearance and mannerisms. The bullying got worse when the student entered middle school – in one instance, a group of boys allegedly pulled the student's pants down.

In eleventh grade, the student underwent surgery for his condition. When he returned to school, he had to wear a back brace and take medication. Upon his return, the bullying did not stop, even though his mother notified school administrators of the situation in "several conferences." The mother alleged that in one instance, boys who had previously bullied the student in middle school, were harassing him in English class. A guidance counselor said he would "look into the matter," but instead, he simply removed the student from the class.

In the end, the student took his own life; he died after being struck by a train in an apparent suicide.

The student's mother brought claims against the school district in New York Supreme Court for, *inter alia*, negligence. The school district moved to dismiss. In a cross-motion, the mother moved to amend her complaint to add claims under Section 504 and Title II of the ADA.

NEW YORK SUPREME COURT (NASSAU COUNTY) DECISION:

The court concluded that the parent had stated cognizable claims under Section 504 and the ADA, so she was allowed to amend her complaint accordingly. In the decision, the court articulated the standard for a ***denial of educational access claim*** based on bullying: "[P]laintiff may establish harassment by other students that is so severe, pervasive, and objectively offensive, and that so undermines and distracts from the victims' educational experience, that the victim-student[] [is] effectively denied equal access to an institution's resources and opportunities." (Internal quotations and citations omitted.) The court went on to state that a school district can be liable when its "response to known discrimination is clearly unreasonable in light of the known circumstances." (Internal quotations and citations omitted.) The court explained that if the mother's allegations regarding bullying and the school's lack of intervention were true, then the mother might have valid claims under Section 504 and the ADA.

WHY YOU SHOULD CARE:

This sad case demonstrates how crucial a school investigation and intervention are in response to reports of bullying. A school district may be on the hook for failing to intervene in bullying, and a court may find such a school district liable for a student's injuries. Moreover, the fallout of such a crisis would undoubtedly send shockwaves across the school community – as it likely did here.

While the court had not yet assessed the veracity of the mother's claims, it opens up the possibility of the mother winning damages from the school district. To avoid exposing a school district to potential liability, it is essential that staff take allegations of bullying seriously. It should investigate all incidents in a prompt manner, and it must be careful with its response. The results of the guidance counselor removing the victim (rather than the bullies) from the classroom is a lesson in what not to do. In essence, the victim was victimized yet again. Instead, a thorough investigation might have revealed the extent of the bullying. This might have led to discipline for the offenders, dispersing them to other classes or a range of alternative options.

***

Federal District Court

***

I. Pendency: When There Is No Last-Implemented IEP, Go to Operative Placement. Substantial Similarity Can Render a New Placement Equivalent to an Original Pendent Placement.

Angamarca ex rel. J.G. v. New York City Dep't of Educ., 119 LRP 26406, 19 Civ. 2930 (PGG) (S.D.N.Y. July 10, 2019)

SALIENT FACTS AND PROCEDURAL HISTORY:

J.G. is a student who suffers from a traumatic brain injury ("TBI"). The CPSE convened and developed an IEP for the 2014-2015 school year ("2014 IEP"). The CPSE recommended a 6:1+2 class in an approved special education program with related services, including vision services. The parents consented to this IEP. For reasons unexplained in the decision, the 2014 IEP was also implemented in the 2015-2016 school year.

In March 2016, the CSE convened to develop an IEP for J.G.'s 2016-2017 school year ("2016 IEP"). The CSE recommended placement in a 6:1+1 class at a "New York State approved nonpublic day school if there [was] the possibility that a fuller range of [J.G.'s] needs could be addressed in that setting" with related services, including vision services. In June 2016, J.G.'s mother informed the New York City Department of Education ("DOE") of her intention to unilaterally place

J.G. at Hope Academy ("Hope"). In a settlement, the DOE agreed to pay for J.G.'s tuition for the 2016-2017 school year, with the stipulation that Hope would not constitute a recommended placement for purposes of pendency in the future.

In March 2017, Hope developed an education plan for the 2017-2018 school year that was similar to that contained in the 2016 IEP: placement in a 6:1+1 class, and related services, including vision services. However, unlike the 2016 IEP, Hope's recommended plan included monthly parent counseling. The CSE also developed an IEP for the 2017-2018 school year. The CSE recommended a 12:1 special education program with related services at a "NYC DOE Specialized School." In June 2017, J.G.'s mother again informed the DOE of her intention to unilaterally place J.G. at Hope. In a new settlement, the DOE agreed to pay for J.G.'s tuition for the 2017-2018 school year, with the stipulation that Hope would not constitute a recommended placement for pendency.

In May 2018, the CSE developed an IEP the 2018-2019 school year ("2018 IEP"). The CSE recommended that J.G. be placed at "The School of Science and Applied Learning." J.G.'s mother rejected this placement, and in June 2018, she notified the DOE of her intent to unilaterally place J.G. at a new school – the Brain Institute ("Brain Institute") – for the 2018-2019 school year.

On July 9, 2018, J.G. began attending the Brain Institute. That same day, J.G.'s mother filed a due process complaint. J.G.'s mother requested an "interim order of pendency." In an impartial hearing, J.G.'s mother argued that the 2016 IEP was the most recent "unchallenged IEP", that Hope had implemented the 2016 IEP, and that the Brain Institute's educational program was "substantially similar" to Hope's program. Thus, J.G.'s mother argued that the Brain Institute was effectively implementing the 2016 IEP and Brain Institute was J.G.'s pendent placement.

In October 2018, the IHO issued a decision, which concluded that the record did not indicate any of the following: (1) that the 2016 IEP was ever implemented, (2) that the Brain Institute's program was substantially similar to Hope's program, or (3) that the Brain Institute was implementing the 2016 IEP. The IHO made no finding as to J.G.'s pendent placement. J.G.'s mother appealed.

The SRO upheld the IHO's determination that the 2016 IEP was not the last agreed-upon IEP. Moreover, the SRO agreed that "the hearing record does not establish that [the Brain Institute] could be found to be the student's pendency placement by virtue of being substantially similar to the . . . 2016 [DOE] IEP program and services." Thereafter, the SRO concluded that J.G.'s "pendency placement for the instant proceedings must be based on [J.G.'s] 2014-[20]15 IEP as the last agreed-upon and implemented IEP[,]" because it was the most recent (and only) unchallenged IEP. The parent appealed.

SOUTHERN DISTRICT COURT OF NEW YORK DECISION:

The District Court found that the "'operative placement actually functioning at the time' [the parent] filed her due process complaint" was "the educational program that Hope . . . provided to J.G. during the 2017-[20]18 school year." In the decision, the court noted three factors used in determining the pendent placement: "(1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP." The court explained that contrary to the SRO's analysis, it was inappropriate to use the most recently agreed-upon and implemented IEP, because it was very much out of date – it had been issued five years prior, when J.G. was just four years old. Moreover, the court declined to find that Brain Institute was J.G.'s pendent placement, because J.G. had started school at the Brain Institute on same day that the parent commenced her due process complaint (and less than two weeks after the conclusion of the 2017-2018 school year, when J.G. had attended Hope).

Additionally, the court analyzed whether the Brain Institute's program was substantially similar to Hope's program. The court noted that there is no change in placement where an educational program is "substantially and materially similar" to that of the pendent placement. The court held that the program at the Brain Institute was not substantially similar to Hope's program. In the decision, the court noted four factors in determining substantial similarity: "[1] whether the educational program set out in the child's IEP has been revised; [2] whether the child will be able to be educated with nondisabled children to the same extent; [3] whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and [4] whether the new placement option is the same option on the continuum of alternative placements." The court held that the Brain Institute was not substantially similar because it lacked vision education services and parent counseling and training, despite the fact that "[t]he Brain Institute's educational plan for J.G. emphasize[d] the importance of vision education services[.]"

WHY YOU SHOULD CARE:

This decision explores pendency when the last agreed-upon setting is out-of-date and no longer appropriate. Here, the Southern District of New York determined that it should instead use "the operative placement actually functioning at the time when the due process proceeding was commenced" to determine pendency, because the last agreed-upon IEP was five years old and no longer made sense for the student.

Moreover, this decision examines when a new placement may be considered "substantially and materially similar" to that of the original pendent placement – and thus function as a pendent placement itself. Here, the new placement was not

substantially similar, because it lacked related services that were considered "important" in the pendent placement.

***

Office of State Review

***

I. Parents Demonstrating That Their Unilateral Placement Is Appropriate May Have a Low Burden.

Application of a Student with a Disability, No. 19-035 (June 7, 2019)

SALIENT FACTS AND PROCEDURAL HISTORY:

The student in this case was classified as autistic. In the 2017-2018 school year, via an agreement with the New York City Department of Education ("DOE"), he attended Yaldeinu School ("Yaldeinu"), a nonpublic school for students with autism.

In February 2018, the CSE convened to develop an IEP for the student's third grade year (2018-2019 school year). The CSE recommended placement in a 6:1+1 class at a DOE "specialized school" with related services. The CSE additionally recommended extended school year ("ESY") services and parent counseling and training.

In June 2018, after receiving a prior written notice from the DOE regarding the CSE's recommended placement, the parents advised the DOE that they did not believe the February 2018 IEP and the recommended 6:1+1 class were appropriate. Moreover, the parents objected to the fact that the CSE produced a behavioral intervention plan, despite the fact that the IEP did not indicate that the student required such a plan. The parents also noted the BIP failed to address the "full scope of [the student's] needs." The parents advised that they were willing to visit and consider the DOE's proposed placement, but until then, they intended to enroll the student at Yaldeinu for the beginning of the 2018-2019 school year. Thereafter, if the parents were not satisfied with the DOE placement, they explained that they intended to request an impartial hearing and seek payment for their unilateral placement.

In August 2018, the parents advised the DOE that they believed the DOE placement was inappropriate and incapable of meeting the student's needs. Thus, the parents kept the student at Yaldeinu, where he attended an ungraded class with seven other boys, a teacher, and seven 1:1 instructors. The parents filed for due process by a complaint dated December 3, 2018 and sought tuition reimbursement or direct payment to Yaldeinu.

The IHO issued a decision in March 2019. The IHO concluded that the DOE had failed to demonstrate that it had offered the student FAPE for the 2018-2019 school year, because it had not made an opening statement or "put on a case," and had merely cross-examined witnesses at the impartial hearing and submitted a closing statement. The IHO additionally found that the parents had failed to establish that the unilateral placement at Yaldeinu was appropriate because "the only documentation of the student's academic skills, social/emotional/behavioral levels, and daily living skills was anecdotal, and the testimony of staff witnesses from Yaldeinu was not from the individuals who provided direct instruction or direct service to the student." The IHO also found that the record had failed to indicate whether the Yaldeinu staff were certified. Thus, the IHO declined to award tuition reimbursement for the parents' unilateral placement.

The parents appealed to the Office of State Review. They argued that Yaldeinu was an appropriate unilateral placement and that the IHO had ignored testimony regarding the student's progress.

SRO DECISION:

The SRO reversed the IHO's finding that Yaldeinu was inappropriate and ordered the DOE to pay tuition directly to Yaldeinu.

In the decision, the SRO first noted that the record did not include evidence of the student's needs at the time the February 2018 IEP was developed, other than what was contained in the February 2018 IEP. The SRO blamed the DOE for this deficiency. The SRO cited a court decision that explained, "[W]hen analyzing whether the unilateral placement addresses the student's needs, the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance." A.D. v. Bd. of Educ. of City Sch. Dist. of New York, 690 F.Supp. 2d 193, 207-08 (S.D.N.Y. 2010). Thus, even though the child had been placed unilaterally, the district was still responsible for identifying the student's current levels of performance sufficient to develop an appropriate IEP.

The SRO then noted that testimony from the Yaldeinu staff members had, in fact, established the student's present levels of performance at the beginning of the school year. The testimony also documented progress by the end of the year: a reduction of tantrum-like behaviors, an increased ability to sustain attention, and increased social skills. While the SRO noted that "[a] finding of progress is not required for a determination that a student's unilateral placement is adequate . . . [it] is, nevertheless, a relevant factor to be considered." In a footnote, the SRO noted that while he was unclear as to the specific progress that the student made in one instance, he nonetheless concluded that this still indicated progress in some

form (*see* footnote 16: "It is unclear to me whether the witness was referring to a decrease in calling other students by insulting names or calling out the names of other students in a repetitive manner, but a decrease in either weighs in favor of a finding of progress.").

The SRO concluded that Yaldeinu was "reasonably calculated to enable the [student] to receive educational benefits" based on the testimony of the staff at Yaldeinu. Yaldeinu's program had placed a "heavy emphasis on" occupational therapy, incorporated ABA therapy, and had been "individualized" based on the student's performance on assessments. The Yaldeinu staff witnesses had not "directly instructed" the student, and the IHO had used this factor in finding that the parents had failed to demonstrate that their unilateral placement was appropriate. However, the SRO considered this testimony valid. He explained that this was because "all staff members . . . who testified . . . were familiar with the student and knowledgeable with respect to his performance[.]"

The SRO also noted that the lack of licensing of the staff at Yaldeinu was merely a "factor" that was not dispositive in determining whether the unilateral placement was appropriate.

WHY YOU SHOULD CARE:

In our last edition of Read All About It, we reviewed R.H. ex rel. C.H. v. Board of Educ. Saugerties Cent. Sch. Dist., 119 LRP 25795, 18-1852-cv(L), 18-1951-cv(XAP) (2d Cir. July 2, 2019) (unpublished). R.H. stated that parents must demonstrate that their unilateral placement is appropriate and designed to meet their child's needs to receive tuition reimbursement. The parents in R.H. failed to do so because they did not provide documented evidence that the unilateral placement met their child's specific needs.

While this SRO decision came out a few weeks prior to the R.H. decision, it provides a counterpoint; the parents' burden in demonstrating that a unilateral placement is appropriate may be rather low. In this case, the anecdotal testimony of staff at the unilateral placement was sufficient to establish both the student's present levels of performance and that the educational program met the student's needs.

While the R.H. decision was issued more recently than this SRO decision, this SRO had taken the underlying Northern District of New York R.H. decision (which the Second Circuit R.H. decision affirmed) into account in holding that the parent's unilateral placement was appropriate (R.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 2018 WL 2304740, at *6, *7 [N.D.N.Y. May 21, 2018]). The R.H. decisions were unpublished. Therefore, based on this issue's ambiguous precedent, it is unclear whether future hearing officers and judges will be more or

less lenient to parents attempting to demonstrate that their unilateral placements are appropriate.

In any event, this SRO decision indicates that the district bears the burden of establishing the student's present levels of performance. In this case, the district had clearly failed to present data to that effect. To avoid an unfavorable decision, districts should take care to actively document a student's levels of performance and to introduce this evidence into the record even where the student attends a unilateral parental placement.

***

Office of Special Education Programs

***

I. Don't Let Non-Participating School Administrators Attend CSE Meetings.

Letter to Haller, 119 LRP 21571 (May 2, 2019)

CONTENT OF LETTER:

An individual asked whether it was appropriate to invite school administrators to IEP team meetings (i.e., CSE meetings), when such administrators intend to merely observe the meeting and not contribute to the development of the IEP. OSEP cautioned against having non-participating school administrators attend such meetings.

In its opinion, OSEP noted that the IEP team (i.e., the CSE) should consist of the parents, relevant school officials, and the child. 20 U.S.C. §1414(d)(1)(B); 34 C.F.R. §300.321(a). At the discretion of the parent or the district, the IEP team can include other individuals "who have knowledge or special expertise regarding the child, including related services personnel" (*see* 20 U.S.C. §1414(d)(1)(B)(vi); 34 C.F.R. §300.321(a)(6)) and/or "professionals . . . who have expertise in (for example) an instructional method or procedure" (*see* Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, Final Rule, Analysis of Comments and Changes, 64 Fed. Reg. 12406, 12585 (March 12, 1999)).

In general, OSEP recommends that "attendance at IEP meetings should be limited to those who have an intense interest in the child." Cong. Rec. § 10974 (June 18, 1975) (remarks of Sen. Randolph). Further, OSEP noted that the confidentiality provisions of IDEA and FERPA require parental consent before public agencies can release personally identifiable information to third parties (other than "than officials of participating agencies in accordance with 34 C.F.R. §300.622(b)(1)"), who do not have a need to know. Thus, any individual who

doesn't have special expertise with regard to the child should not be permitted to attend, absent parental consent.

WHY YOU SHOULD CARE:

A school district may believe that one of its administrators would be able to attend a CSE meeting for observation purposes only. However, given the sensitive nature of such meetings, we caution school districts in allowing such personnel at CSE meetings, unless they can actively participate in the development of the IEP.

***

Family Policy Compliance Office

***

I. Caution! While Districts Don't Have to Maintain Educational Records for Which There Is No Disclosure Request under FERPA, Destroying Records of CSE Meetings May Violate IDEA.

Letter to Anonymous, 118 LRP 42909 (June 18, 2018)

CONTENT OF LETTER:

A parent filed a complaint with FPCO, which alleged that the child's school district had violated the Family Educational Rights and Privacy Act ("FERPA"). The parent alleged that a teacher had recorded a response to intervention ("RTI") meeting on her personal cell phone. The parent also alleged that the special education director had recorded an IEP meeting on her personal cell phone, as well. The parent reported that when he/she requested these two recordings, the district said they were "never placed in the [s]tudent's file, or were lost."

In its opinion, FPCO explained that the district's actions did not give "reasonable cause to believe that there has been a violation of FERPA." FPCO explained that while parents must be allowed to inspect their child's educational records, FERPA does not require school districts to maintain specific education records or audio recordings. FPCO noted that a school district is only obligated to maintain privacy protections "to those education records that the [district] selects to maintain" and may destroy records for which there is no outstanding request to inspect "without notice."

WHY YOU SHOULD CARE:

In this decision, FPCO explained that FERPA does not require a school district to maintain specific educational records. Because these recordings were

not made part of the child's file and were presumably lost before the parent requested to inspect them, the district had no duty to maintain such records.

Such video recordings may also fall under the "personal note" exception and accordingly would be excluded from FERPA. The "personal note" exception addresses "those records which are kept in the sole possession of the maker of the records and are not accessible or revealed to any other person except a temporary substitute for the maker of the records."[1] These "personal notes" may serve as a "memory jogger" for the person who created the record, i.e., "if a school official has taken notes regarding telephone or face to face conversations, such notes could be sole possession records depending on the nature and content of the notes."[2] Because the teacher and the special education director may have made recordings of the meetings to function as their own personal reminders, the recordings may constitute "personal notes" that a school district would not have to disclose under FERPA. As long as such personal notes are not shared with other CSE members and not disclosed, they are not student records subject to FERPA disclosure.

However, in an abundance of caution, we would note that any record of a student – in particular, video or audio records – may be considered a FERPA record, and therefore, a school district should treat them as such if faced with a request for disclosure from a parent.

While so far there is no school district liability for a violation of FERPA, this guidance document does not go far enough in terms of describing a school district's potential liability under IDEA, because this parent may have a possible claim under the statute. For example, the parent in this case may be able to argue that the denial of access hinders his or her ability to participate as an equal member of the CSE.

***

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 research, writing and assistance.

[1] U.S. Dep't of Ed., *What records are exempted from FERPA?*, available at https://studentprivacy.ed.gov/faq/what-records-are-exempted-ferpa (last accessed Aug. 7, 2019).
[2] *Id.*

