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MONTHs IN REVIEW: August-September 2017

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review three federal court decisions, one administrative decision from New Jersey, and an update on the *Endrew F.* litigation.

In a federal district case in the Eastern District of New York, a federal judge rejected the parents' claims that they were prevented from participating in their child's various CSE meetings. The Court pointed to the school district's IEP minutes and prior written notice letters documenting the parents' involvement, asking questions and receiving the district's responses to those concerns. In a significant and novel decision from the Southern District of New York, a federal judge found that the school district failed to offer FAPE by failing to develop inclusion settings, in-district, for the CSE to consider. Moving further up-state, a decision from the Northern District of New York rejected a family's claim for moving expenses as an award not allowable under IDEA. With a view to the future, a hearing officer in our sister state of New Jersey directed a school district to consider hi-tech assistive technology options, specifically a remote robot, to increase a student's access to the classroom during extended medical absences. Finally, we track the state of *Endrew F.* litigation following the U.S. Supreme Court's decision, reviewing the 10th Circuit Court of Appeals' decision on remand.

Federal District Courts

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I. Detailed Minutes Support District's Witnesses' Credibility

and Help Defend Against FAPE Challenge

F.L. et al v. Board of Education of the Great Neck Union Free School Dist., Case No.: 15-cv-05916, (E.D.N.Y. August 14, 2017)

SALIENT FACTS AND HISTORY:

R.C.L. was classified since elementary school, first as having multiple disabilities and then as learning disabled. He has significant deficits in reading, writing and math, which impact his learning, and has extremely low processing speeds and working memory deficits. At the June 24, 2014 annual review, the CSE, based in part on R.C.L.'s progress in 2013-14, recommended his continued placement in 15:1 special classes at the district's high school for core academics; daily resource room (with the support of a 1:1 aide), wherein he received specialized reading instruction; a consultant teacher skill builder support period every other day, to address IEP goals and academic support; 1:1 speech twice weekly; 1:1 occupational therapy (OT) and an OT consult; counseling; and assistive technology (AT), together with other supports. An additional skill builder class every other day was added in September 2014, to provide R.C.L. with additional support in academics, homework and long term assignments. However, prior to end of the 2013-14 school year, the parents filed for due process, seeking inter alia, the cost of a private non-SED approved Lindamood Bell (LMB) reading program for the summer 2014, 1:1 tutoring in R.C.L.'s four core subjects, undisclosed compensatory education and extended school year services (ESY).

IMPARTIAL HEARING OFFICER'S DECISION:

After 14 days of hearings, the IHO found that the district's programs during the 2012-13, 2013-14 and 2014-15 school years deprived R.C.L. of FAPE. He ordered the district to reimburse the parents for the cost of a neuropsychological evaluation conducted by their private expert, claiming that the parents were entitled to it as an IEE. He also ordered the district to reimburse the parents for the cost of LMB services for the summer 2014, to pay for 750 hours of reading remediation and 750 hours of math remediation, all provided at LMB after school and during the summer.

APPEAL TO THE OFFICE OF STATE REVIEW:

On appeal, the SRO reversed the decision of the IHO. The SRO addressed R.C.L.'s progress during the 2011-12 and 2012-13 school years, finding that the evidence indicated that R.C.L. had made steady progress commensurate with his abilities. The SRO also addressed the 2013-14 school year, detailing each of the four CSE meetings which were held to develop, review and modify R.C.L.'s IEP. The SRO discussed goals and supports which were added during the school year and found that the program and placement were appropriate. The SRO wrote that the CSEs "progressively added additional supports targeted to RCL's particular needs while balancing the benefit RCL would receive by exposure to the content

curriculum of the 15:1 special class…." The SRO found that notwithstanding the complexities of RCL's disabilities, the CSE developed IEPs with sufficient support services to permit RCL to benefit educationally from the instruction.

With regard to the IHO's finding that the CSE should have offered an ESY program for the years in question, the SRO found that "the hearing record includes evidence of R.C.L.'s progress … and, although R.C.L. continued to struggle with academic work, the hearing record does not include evidence that R.C.L. demonstrated substantial regression."

The SRO reversed the IHO's determination that the parents were denied a meaningful opportunity to participate. The SRO reasoned that "while the CSEs did not accede to every request made by the parent, the parents and the accompanying attorneys were provided with ample opportunity to discuss R.C.L., provide input into R.C.L.'s present levels of performance and annual goals, and contribute to the development of his IEPs." The SRO concluded that neither the compensatory hours nor the LMB reimbursement ordered by the IHO were warranted.

COURT'S DECISION:

The Federal District Court for the Eastern District of New York dismissed the proceeding in its entirety, including claims brought by the parents which alleged that the IEPs developed for the child for the 2012-13, 2013-14, and 2014-15 school years were procedurally and substantively deficient. The Court upheld the decision of the SRO which found that the IEPs provided the child with FAPE. Also, the Court denied the parents' claim for relief in which they sought reimbursement for the cost of private non-SED approved Lindamood Bell (LMB) services during the summer, and also for 750 hours of reading remediation and 750 hours of math remediation at LMB.

Furthermore, the Court dismissed the parents' claim that they were denied the opportunity to participate at the CSE meetings, finding that:

> Based on the record evidence […] the SRO correctly held that the District afforded Plaintiffs the opportunity to meaningfully participate in the CSE process. As an initial matter, it is undisputed that F.L. and his attorney attended each CSE meeting and were given the opportunity speak, ask questions, raise concerns, and offer suggestions… Although the CSE did not ultimately adopt each of [the family's and the [private neuropsychologist's] suggestions and recommendations, the evidence demonstrates that the **CSE actively sought Plaintiffs' participation at the CSE meetings, thoughtfully considered their suggestions, and, where applicable, clearly explained its reasons for declining to adopt Plaintiffs' suggestions and recommendations.** (emphasis added)

In discussing the substantive adequacy of the student's IEPs, the Court disregarded the parents' arguments that R.C.L. languished and regressed in a special class. Instead, the Court pointed to statements made by district staff at the numerous CSE meetings and in the hearing testimony which spoke to R.C.L.'s progress and that he was appropriately placed in a special class setting. Based on this testimony, the Court disregarded the findings of the parents' private expert.

Finally, the Court found that the parents failed to cite any evidence that R.C.L. regressed over the summer, or that he needed an "inordinate period of review" to re-establish the IEP goals and objectives mastered the prior school year.

WHY YOU SHOULD CARE:

In New York, parents must generally file their hearing request within two years of the CSE meeting they are challenging. After two years, memories are hazy. Staff may have retired or resigned and may no longer be available to testify. However, an IEP containing well written minutes, and/or a prior written notice letter ("PWN") detailing what was discussed at the CSE meeting and why the CSE recommended or rejected what it did, is akin to a time capsule reminding meeting participants what occurred, and serving as a record *before* litigation was initiated as to what happened. These items serve as institutional memory for all of the staff involved. Should a CSE member no longer be available to testify on the district's behalf, those items – along with evaluations and progress data – will assist the IHO in reconstructing what was offered to the student. In short, there is no good reason *not* to develop detailed PWNs and minutes. They can only help. They can assist the parents to understand what happened at meetings where a great amount of information is discussed in a short period of time and provide evidence of what the CSE did right to an IHO, the SRO or the courts.

This decision also illustrates the necessity of maintaining progress and regression data. School staff should maintain baseline data at the beginning of the school year, and chart the student's progress throughout the year showing the extent the student is making gains in his or her IEP goals. Staff should also record regression data when children return to school after the summer and after winter and spring breaks to determine whether they show signs of sustained regression. IDEA requires goals to be measurable. Especially in the aftermath of *Endrew F.*, this means school staff should be able to point to quantitative measures when describing the student's progress, or lack thereof.

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II. District's Failure to Offer a Full Continuum of Services Results in FAPE Violation

Connie Avaras, individually and as Parent of A.A., v. Clarkstown Central Sch. Dist., 70 IDELR 129, 15 Civ. 2042 (NSR)(S.D.N.Y. July 17, 2017)

SALIENT FACTS AND HISTORY:

This case involves an ongoing dispute and conflict between the school district and the parents, beginning with opposition from the family as to whether to refer the child to the CSE to disagreement about whether the student was making progress in his IEP programs.

In second grade (2009-10), A.A., the student, moved through the District's response to intervention ("RTI") tiers with little positive response. The student was thereafter classified as OHI after an ADHD diagnosis, which identified significant deficits in reading and math along with social delays. A.A. was placed in special math and ELA classes with a ratio of fifteen students to one teacher (15:1) for a total of two hours and fifteen minutes per day. He also received consultant teacher direct services for two hours per week in science and social studies provided in the general education classroom for the remainder of second grade and for third grade (2010-11).

Throughout third grade, the parent was dissatisfied with the progress A.A. had made. In response, the CSE recommended at annual review, the same program with additional test accommodations for A.A.'s fourth grade year (2011-12). A.A.'s IEP progress report and report card for his fourth grade year indicated that he had achieved all of his IEP goals and made progress on his overall educational development.

For fifth grade, the CSE recommended 15:1 class for ELA and math, along with the addition of counseling services in a small group, once a week, to address the student's self-esteem issues identified by the parent. The parents rejected the fifth grade recommendation (2012-13), electing to place him at the Hawk Meadow ("Hawk Meadow") School, a private Montessori setting. The student continued there through sixth grade. The District did not develop an IEP for the student for sixth grade, instead developing a service plan under dual enrollment, offering consultant teacher services three times per year for one hour each session, and occupational therapy. Thereafter, the parents filed for due process, seeking tuition reimbursement for the student's fifth and sixth grade (2013-14) attendance at Hawk Meadow, challenging the District's offer of FAPE for the prior two school years and seeking an award of compensatory education, and prospective funding for the seventh grade (2014-15) school year at Hawk Meadow.

IMPARTIAL HEARING OFFICER'S DECISION:

The IHO found that the District was required to develop an IEP for the student for the sixth grade, 2013-14 school year. Moreover, the IHO denied the parents' application for full reimbursement and prospective payment for tuition, related expenses, and transportation to and from Hawk Meadow for the 2012-2013, 2013-2014, and 2014-2015 school years. The IHO also denied reimbursement for various other expenses sought by the parents, including compensatory services for the 2011-2012 school year. Specifically, the IHO

concluded: 1) the parents' claims relating to the 2011-2012 school year (fourth grade) were time-barred, 2) the District offered the student an appropriate education for the 2012-2013 school year (fifth grade), 3) the District failed to offer the student an appropriate education for the 2013-2014 school year (sixth grade), and 4) Hawk Meadow was, nevertheless, an inappropriate alternative placement. The parents appealed the IHO's decision, and the District cross-appealed on the finding that it failed to offer FAPE for the 2013-14 school year.

APPEAL TO THE OFFICE OF STATE REVIEW:

The SRO confirmed the IHO's decision and denied the District's cross-appeal challenging the IHO's determination that a) the District was required to prepare an IEP for the 2013-2014 school year and b) the District's IEP for that year did not provide a free and appropriate public education.

COURT'S DECISION:

The U.S. District Court of the Southern District of New York overturned the SRO's decision, finding that the CSE failed to consider a continuum of alternative placements, specifically an integrated co-taught ("ICT") setting. The court held that the proposed special class placement, where the student would spend 90 minutes of each school day, violated the LRE requirement. In considering LRE, the judge held that IDEA instructs districts to develop a continuum of alternative placements that includes resource room and ICT. Overall, the Court found that the 15:1 setting was too restrictive to address the student's social delays or implement reading services. Moreover, the Court found that the CSE failed to discuss other options with the parent at the CSE meeting, and failed to have an integrated co-taught setting available for consideration. The Court found that the CSE should have "**considered the creation of small integrated classrooms, with disabled and non-disabled students, in order to accommodate the various reading issues encountered by [...the student].**" Because the 15:1 class was far more restrictive than what the student's ADHD and reading difficulties required, the Court held that the district failed to offer the student FAPE in the LRE.

The court reversed the SRO's decision that the placement was appropriate and remanded the case for a review of whether the parent was entitled to reimbursement for the student's unilateral private placement.

WHY YOU SHOULD CARE:

Generally, a school district is not expected to create a program from the continuum for a student to meet his or her unique needs, which does not exist in the district. However, this decision reflects the developing trend and preference for inclusion. School districts are strongly advised to consider the creation of inclusion programs for their students. Moreover, this is a reminder that a student who attends a private school and receives dual enrollment services is nonetheless entitled to a FAPE IEP from his home school district. This is in addition to

receiving an IESP describing equitable services the student shall receive in a unilateral private setting.

An appeal has already been filed by the school district, likely due to its precedent-setting requirement that a district create a placement that is not otherwise available among the programs it offers.

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III. Moving Costs to Another State Not Permissible Under IDEA

R.S. v. Board of Educ. Shenendehowa Central Sch. Dist., 70 IDELR 154, 1:17-cv-501 (LEK/CFH)(N.D.N.Y. August 7, 2017)

SALIENT FACTS:

The student in this instance is a six year-old child diagnosed with an autism spectrum disorder. The family and the District disagreed over what services the student would receive on his IEP for the 2017-18 school year, specifically concerning the restrictiveness of the student's program.

The family apparently filed an impartial hearing request and subsequently appealed to the SRO; however, no case history was provided in the decision, notwithstanding that the SRO and NYSED were both joined as parties in the federal case. What is clear is that the family proceeded to federal court seeking a preliminary injunction requiring the District to pay the family's moving costs (including monthly rent) to a school district in Massachusetts: estimated to be between $5,500 and $7,000 a month. According to the family, the Massachusetts school district had a better program than could be provided via the District's IEP.

COURT'S DECISION:

Noting that monetary damages are not an available remedy under the IDEA, the District Court held that the parents were unlikely to prevail in their effort to recover moving expenses. Thus, the court denied the parents' motion for an order that would require the district to immediately fund the family's relocation to Massachusetts. The Court found that the parents' claim that they would suffer "irreparable harm" if the court failed to order immediate payment of their moving expenses had no basis.

Furthermore, even if the parents showed that the student was likely to suffer irreparable educational harm, they still needed to demonstrate that they were likely to succeed on the merits of their claim. The Court found that the parents could not demonstrate a likelihood of success, both that the District was incapable of providing appropriate special education services and that the parents' unilateral placement was appropriate. The judge observed that the parents also did not offer any legal support for their argument that a district may be responsible

for relocation costs. The judge wrote: "[b]ecause the IDEA does not require school districts to pay for non-educational expenses and does not permit money damages, the court doubts [the parents] can establish that they are entitled to the [order] they seek."

WHY YOU SHOULD CARE:

School law attorneys are often asked whether a parent can sue over a particular issue. The answer invariably is that *anyone* can file a lawsuit. There is no way to predict when a litigant will offer a novel legal theory in their claim for something outlandish. Nonetheless, every lawsuit must be taken seriously.

Stepping back, what if the facts in this case had been different? What if the school district failed to develop an IEP, or failed to provide the family with a timely IEP? In that scenario, the school district would need to concede it had failed to offer the student FAPE, removing one of its strongest arguments against why the court should not find that the parents were likely to succeed on the merits. With no program to defend, the parents – more likely than not – would prevail under Prong II of Florence v. Carter; the requirement that parents demonstrate their unilateral placement is appropriate. While monetary awards are not permissible under IDEA, expenses related to the student's educational needs are within the realm of an acceptable award. If the claim were put forth in more creative terms, the school district might have found itself required to contribute towards the family's moving expenses, especially had the family made claims under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act – two statutes that do permit money damage awards.

This case is a reminder that a defensible IEP is the first and best chance school districts have in defending IDEA claims. The well-drafted IEP, and accompanying prior written notice letter, show that the CSE knows the student, is meeting its responsibility to educate disabled children, and – by adhering to the procedural requirements of the act – is taking their responsibility seriously.

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New Jersey Federal and Administrative Decisions

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I. Districts Must Describe Why Alternatives to Parents' Preferred Expensive/Hi-Tech Assistive Technology are Appropriate Before Rejecting Request.

Warren Hills Regional High Brd. Of Educ., 70 IDELR 57 (NJ State Educ. Agency Feb. 8, 2017)

SALIENT FACTS AND HISTORY:

A student diagnosed with Marfan Syndrome, a genetic disorder of the connective tissue, had an IEP which provided home instruction by his school district during periods of medical leave. Due to his diagnosis, the student experienced challenges to his muscular and cardiovascular system, and was expected to undergo a series of surgeries throughout his high school career to address resulting health issues, including open heart surgery.

The student's teachers described him as a hard worker with a capability to attend grade-level to advanced academic instruction. At the IEP meeting for his 9th grade year, the team considered the student's emotional difficulty arising out of not being in school with peers, the difficulty receiving home instruction from tutors unfamiliar with the advanced course work for which he was registered, and the lack of home instructors available to teach the student in the classes on his schedule. The family requested that the district procure a VGo robotic telepresence device, suggesting it would enable the student to be a virtual presence in class with his peers, while homebound, and to receive the benefit of direct instruction from his classroom teachers. The team, rejecting the parents' request, recommended that the student receive home instruction during the periods of illness, recovery and recuperation. The parents filed a due process complaint to have the robot included in the IEP.

ALJ'S DECISION:

The administrative law judge ("ALJ") found that the district did not provide FAPE in the LRE because it declined to use or consider available technological modifications to allow the student access to direct instruction as it is delivered in the regular education setting. The ALJ applied the following standard to determine whether an IEP provides FAPE in regards to assistive technology and support: 1) whether education in the regular classroom with use of supplementary aids and services can be achieved satisfactorily; and 2) if placement outside of the regular classroom is necessary for the child's educational benefit, whether the district has included the child in school programs with children without disabilities to the maximum extent appropriate.

Here, the ALJ found that record revealed that the district was predisposed to be against the inclusion or "even consideration" of the robot, finding that district staff did "little to make inquiries, conduct its own due diligence, or generally explore how to make [the vGo robot system] work." The ALJ pointed out that no one from the district "made any real attempt to obtain information from other districts ... [that] have successfully deployed this technology."

WHY YOU SHOULD CARE:

The VGo virtual presence robot has been successfully used in New York districts and may offer opportunities to enhance the education of homebound children. Like most areas of our lives, rapid technological advancement often

outpaces our understanding and pre-set notions. This is doubly true in the world of special education. It is critical that special education staff keep up-to-date and keep open minds.

Before you reject a parent request we advise you to consider it or other available alternatives.

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Endrew F. Update

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A Series of Remands Begins With the Case Being Sent to the Federal District Court

Endrew F. v. Douglas Co. Sch. Dist. Re-1, 137 S.Ct. 988 (2017)

SALIENT FACTS:

As we wrote in the last issue of the *Attorney's Corner,* it would take some time for the dust to settle on the impact of *Endrew F.* once the federal courts interpreted the decision. We discussed how the Supreme Court seemed to suggest two standards: one for children in the regular classroom environment, and one for student's in more restrictive settings not functioning on grade level. For a child being fully integrated in the regular education environment, the Court reiterated what it stated in Rowley, that educational progress means passing marks and advancement from grade to grade. For a child who is not educated in the regular education environment, and who is not functioning on grade level, the student's program must be "appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Endrew F.*, 137 S.Ct. at 1000. The Supreme Court remanded the case back to the Tenth Circuit Court of Appeals to review the student's case under this new standard.

The Tenth Circuit, in a not-unsurprising turn of events, has now similarly remanded the case back to the Federal District Court so it too may consider remanding the matter down to the administrative hearing officer. At this rate, it will likely be at least another year before there is a final determination in this case, assuming the parties do not take further federal appeals.

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