NEW JERSEY LAWYER

April 2022

No. 335

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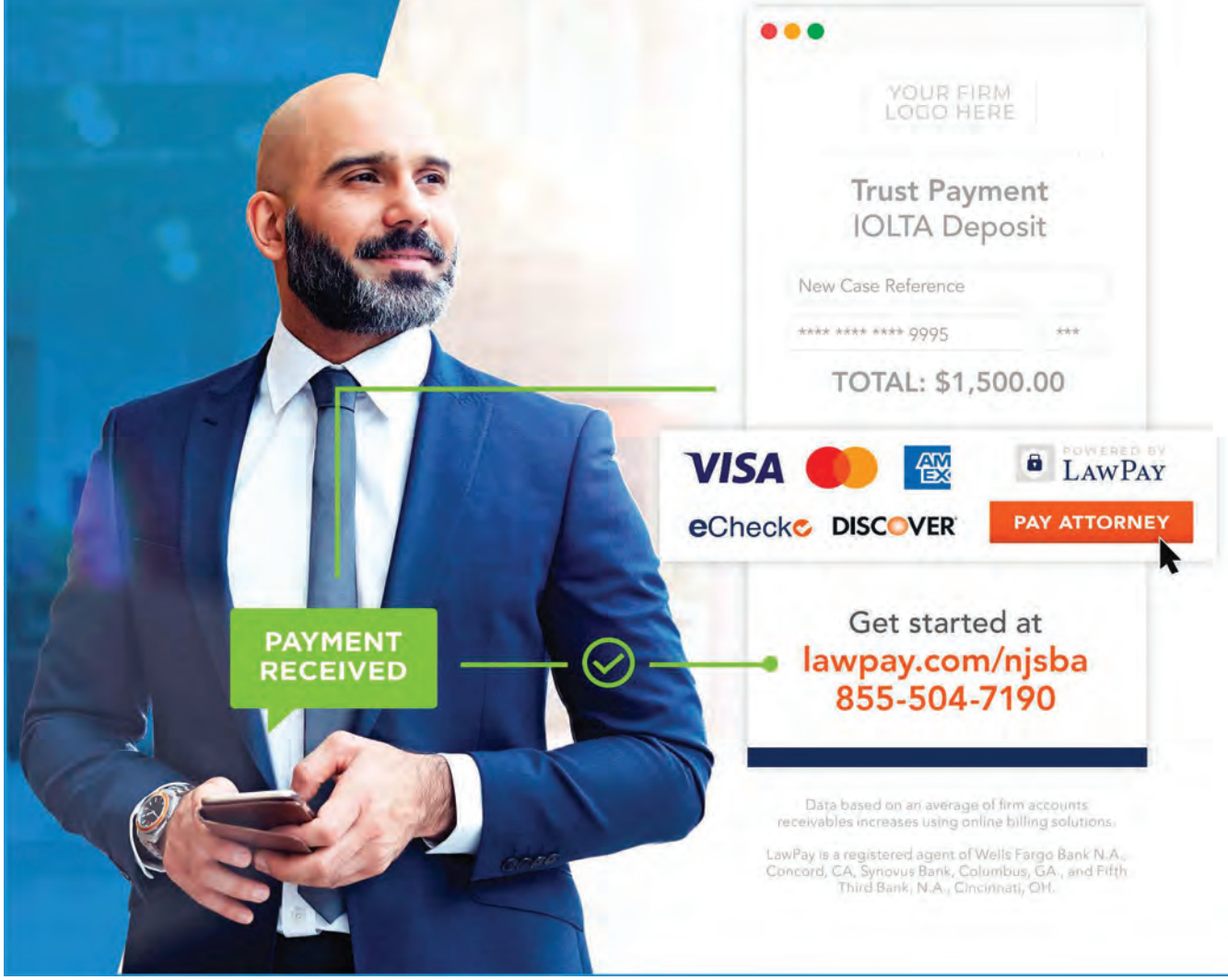

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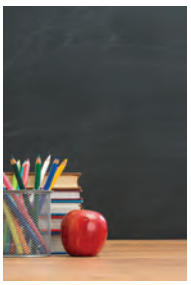

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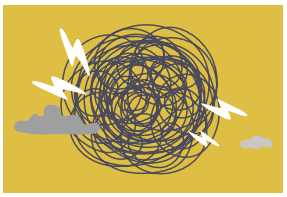

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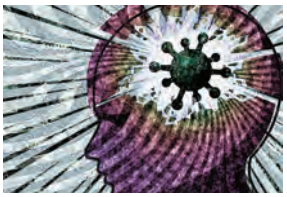

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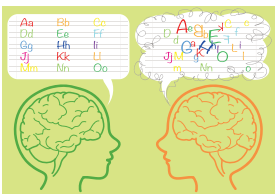

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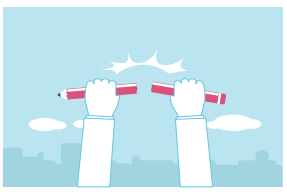

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DOMENICK CARMAGNOLA

New Lawyers Find a Vibrant Community in the NJSBA

Earlier this spring I had the pleasure of taking part in a new lawyer admissions ceremony. It was a great day, one of the best and most gratifying I have had this year as president of the New Jersey State Bar Association. The event was held at the New Jersey Law Center where we were able to host people in person and virtually using our newly upgraded technology.

Looking into the crowd who assembled and at the screen of people taking part online, I saw faces bursting with pride, beaming with smiles and maybe even a few eyes shining with tears of relief and gratitude. Chief U.S. District Court Judge Freda Wolfson offered advice and encouragement. Chief Justice Stuart Rabner virtually welcomed the group into the profession. U.S. District Court Judge Julien Neals and Young Lawyers Division Chair Ryan Gaffney shared words of practical wisdom that resonated with everyone assembled. It was a truly special event.

But what happened in the moments after the official event ended are what really stick with me and why membership and participation are so important. As most of the crowd was filtering out or grabbing a few pictures with family members in our auditorium, a new attorney arrived. He was flustered and his face was clouded with worry that he had missed the ceremony, his opportunity to be sworn in, and disappointed his mother who had managed to login and was watching the event from home.

In a matter of moments, we knew what had to be done. Chief Judge Wolfson jumped into action. She and I administered the oath for the state and federal courts for him. Colleagues were soon shaking hands with their new colleague and suggesting to him people to connect with in his field of practice. People stepped in as surrogates to take photos and video for him to send to his family.

In that instant, his shoulders relaxed and his demeanor shifted from panic to gratitude. He was able to see first-hand what it means to be a part not just of the New Jersey legal community, but of being welcomed into the New Jersey State Bar Association family.

Central to the NJSBA's mission "to serve, protect, foster and promote the personal and professional interests of its members" is our dedication to fostering meaningful opportunities for the next generation of attorneys. The NJSBA is here to help new attorneys get a solid start to their professional journey and be their partner throughout their careers. The Association provides everything an attorney might need: leadership opportunities, practical skill building courses and communities of lawyers ready to help them get a successful start in the law.

Our Young Lawyers Division is a vibrant community of attorneys in their early years of practice. It provides critical networking opportunities, family events, and volunteer projects, like Wills for Heroes where our volunteers create wills and other documents for first responders. The Division also has a hands-on mentorship program to connect new lawyers to those who are more experienced to get practical career advice.

We have close relationships with Seton Hall University School of Law and Rutgers University School of Law and are working to strengthen those even further with combined educational opportunities. In June, we are planning a joint symposium on diversity, equity and inclusion that will shine a specific light on intergenerational diversity in the workplace. In February, we were thrilled to host two joint ventures: a continuing legal education session on Supreme Court cases involving high schools where the law school students, as well as pre-law students from Monmouth University, served as the speakers, and a program for pre-law students with Montclair State University focused on racial justice in the legal profession.

At the upcoming Annual Meeting and Convention, which will be held at the Borgata Hotel, Casino & Spa from May 18–20, we look forward to the energy that the state's law clerks bring to the conference and its educational sessions. And the NJSBA discussed mentoring, development and retention

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FROM THE SPECIAL EDITOR

COVID-19 Pandemic Helps Shine a Light on Special Education

For the first time in almost 20 years, *New Jersey Lawyer* dedicates an edition to special education law. The Individuals with Disabilities Education Act (IDEA) defines special education as "specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability." According to the New Jersey Department of Education's most recent collection report, there are approximately 238,000 classified students receiving special education in New Jersey. As reflected in this edition's articles, special education is critical, so that all students have the opportunity to learn and appropriately progress.

In the wake of the COVID-19 health crisis, this topic could not come at a better time to help shine a light on this important subject where, even before the pandemic, there were issues concerning the delivery and effectiveness of special education programs and services for many New Jersey students. The COVID-19 pandemic has been extremely challenging for many New Jersey students with disabilities who receive special education services, and their families, as remote and hybrid learning platforms presented significant educational and developmental hurdles. Now that schools have reopened and children are being assessed, learning loss and mental health issues are widespread concerns in the special education community. The impact of the COVID-19 pandemic and the resulting learning loss and regression will affect special education students for years to come, but there is hope—New Jersey's special education system is getting some much needed attention.

Gov. Phil Murphy signed into law several important pieces of legislation, which are referenced in this edition. First, on June 16, 2021, a bill (S-3434/A-5366, P.L.2021, c.109) was approved permitting certain special education students eligibility for an extra year of school. Those who may be eligible include students who would otherwise age out of New Jersey's educational system because they will turn 21 during the 2020–21, 2021–22, or 2022–23 school years. The New Jersey Department of Education (DOE) estimated that about 8,700 New Jersey students will age out of their special education services during the applicable time frame. Then, on June 30, 2021, Murphy signed legislation (A-5365/S-3872, P.L.2021, c.141) that permitted a parent or guardian to request that a student repeat a grade during the 2021-2022 school year. Next, and most recently, on March 3, 2022, legislation (A-1281/S-905, P.L.2022, c.2) was signed into law, giving parents until Sept. 1, 2023, to file a due process petition with the Office of Administrative Law (OAL) relating to compensatory education claims in connection with COVID-19 school closure or period of remote, hybrid, or in-person instruction between March 18, 2020, and Sept. 1, 2021. The new law also requires school districts to hold an Individualized

Education Program (IEP) team meeting by Dec. 31, 2022, to discuss the need for compensatory education and services for every student with a disability who had an IEP at any time between March 18, 2020, and Sept. 1, 2021. There is also a backlog of due process cases in the OAL, which New Jersey is attempting to rectify with legislation (S-2160/A-5701, P.L.2021, c.390) enacted on Jan. 18, 2022, establishing a special education unit within the OAL requiring completion over the next two years.

The 14 articles in this edition of *New Jersey Lawyer* offer a comprehensive compilation of special education*'s* hottest topics, including compensatory education, inclusion, negotiation of settlements, and unilateral placements. This edition also offers practitioners guidance on home instruction, handling matters involving emotional disabilities, the complaint resolution process, obligations concerning struggling readers, and representing college students with special needs. To kick off the edition, Arsen Zartarian, the Deputy General Counsel of the Newark Board of Education and the Chair of the School Law Committee of the New Jersey State Bar Association, provides a review of exhaustion requirements under IDEA based on recent 2021 cases. Cherie Adams, a founding member of Adams, Gutierrez & Lattiboudere, LLC, representing school districts, examines recent developments in special education legislation and New Jersey federal court decisions. Fred Buglione, the Chief Executive Officer of the New Jersey Coalition for Inclusive Education (NJCIE), outlines a student's right to an inclusive education, a very important topic since New Jersey has the highest rate of segregating students in the country, despite the federal and state laws already in place providing that students with disabilities must also be educated in the least restrictive environment to the maximum extent appropriate.

John Rue, the principal of his law firm concentrating in representing parents in legal disputes with schools, and David Rubin, who concentrates his practice on representing public school districts and private schools, provide an engaging point-counterpoint piece that explains a split of opinion among many special education practitioners concerning the ethical ground rules for negotiating settlement of litigation under IDEA. Joanne L. Butler, a partner at Schenck, Price, Smith & King, LLP representing local public school districts, Denise Dimson Rekem, a partner at Parles Rekem LLP, along with Judith Weinstock, also an attorney at Parles Rekem who focuses on representing individuals with special needs, provide guidance concerning compensatory education, which is an area that has been hotly debated even before the pandemic.

Gibbons directors Debra A. Clifford and myself, who co-lead the Gibbons Child Advocacy Team, offer a comprehensive article that reviews the applicable statutory provisions at issue when considering a unilateral placement, which is also a hotly debated area that has gained momentum given free and appropriate public education (FAPE) issues as a result of the COVID-19 pandemic. Karen Edler, who represents parents and students in education matters, provides a practitioner's guide to home instruction. Mariann Crincoli, an attorney with Sussan, Greenwald & Wesler, explains the need for school districts to address the rise in emotional disabilities. Dr. Ilise Feitshans, who works in research at the Georgetown University Law Center, reviews the impact of COVID-19 on children with disabilities.

Rebecca Spar, a well-regarded consultant in special education matters, and Elizabeth Athos, Senior Counsel with the Education Law Center, offer an article examining New Jersey's special education complaint resolution system and their view of the deficiencies. Denise G. Verzella and Anne Reynolds from Manes & Weinberg, LLC, address the legal obligation of school districts to identify struggling readers and provide effective instruction. Lacia Japp, an attorney with Disability Rights, New Jersey's Special Education and Juvenile Justice Project, focuses her article on how special education impacts juvenile justice. Lisa Hernandez, an attorney with Manes & Weinberg, LLC and founder of ThinkSpEd, LLC, discusses the new legislation giving certain special education students an extra year in school. In the last article, Laura A. Siclari, a parent attorney and partner at Santomassimo Davis LLP, provides readers with a roadmap for college-bound students with special needs. The subject matter of these articles is critical to anyone practicing or interested in the area of special education.

I am grateful to each of the authors for sharing their time and knowledge in the area of special education, making this edition a special education resource and a tool for practitioners and those interested in special education. I would also like to thank Mindy Drexel, my managing editor, for her dedication, commitment, and helpful insights throughout this process. ■

MARY FRANCES PALISANO *is a Director in the Commercial & Criminal Litigation Group at Gibbons P.C., where she co-leads the firm's Child Advocacy Team, which focuses on special education, school discipline, and juvenile delinquency proceedings. She also represents clients in a wide range of criminal matters, including state and federal crimes, municipal court cases, and conducting internal investigations. She is the chair of the firm's pro bono committee as well as the firm's pro bono coordinator and has been consistently named to* New Jersey Family *magazine's "Best Lawyers for Families" list in the areas of special education/special needs and criminal defense.*

PRACTICE TIPS

WORKING WELL

To Answer the Phone or Don't Answer the Phone, That is the Question

By L. Stephen Pastor
Hill Wallack, LLP

For several years early in my career I would often delay returning a call until I finished whatever projects I was working on so when I did speak with the client, I could say the task was completed. However, the delay in returning calls and the number of calls to return caused stress to me and my clients.

Then one day I had a moment of clarity, which decreased my stress and made my clients much happier. I did three things:

1. I change my voice mail every day to reflect that day's schedule.
2. I provided my direct dial number to my clients (who no longer needed to go through the receptionist, then my secretary, before getting through to me).
3. I started answering the phone whenever I was sitting at my desk.

Changing voice mail every day is helpful. For example, my message may say I have an out-of-office meeting at 2:00 and will not return until the following day. This way, a client will know that I am not available until the next day versus assuming I am intentionally not being responsive.

Providing my direct dial number and answering calls if I am at my desk helps in many ways. My clients now understand that if I do not answer a call that I really am not available (and my voice email gives them my schedule so they generally know when I may be able to return the call). As most calls are just a few minutes long, these calls do not cause a significant delay on any projects or tasks I am working on. If a call will take longer than I then have, we can easily schedule a time when I can focus my attention on the call. Fewer calls to return. Clients updated and happy.

Now for the best part. I let my clients know weeks and sometimes months in advance of my out-of-office schedule, when I will not be answering the phone (including my cell phone) or checking emails. For several years this was easy, as I would travel out west to remote areas to fly fish and generally had no cell phone reception, so I couldn't answer a call or check an email even if I wanted to. Unfortunately, finding such remote areas is harder these days, but now I just leave my cell phone on airplane mode. And having no calls or emails to check is a great way to completely de-stress. For the first few years it took a few days to get used to being disconnected. Now, as soon as I am on the plane I am disconnected, and the feeling is wonderful. My clients understand that I will be "out of service" for a week or so. The result? In a typical workday I get 100+/- e-mails and 20+/- calls. Now during a vacation week, I'll have just 10–20 emails and maybe 10 calls to catch up on.

So, answering the phone allows me to not answer the phone.

WRITER'S CORNER

Driving the Reader in Persuasive Writing

By Sherri Orenberg-Ruggieri
Cooper, LLC

A skilled legal writer uses signals like GPS to guide the reader. Effective arguments warn the reader of changes in direction. There should be no sudden moves that send the reader into the left lane when the reader expected to stay right.

Change of Direction—signals for contradiction:

- Contra—authority against a proposition
- But see
- But cf.
- See generally

Signals of Support:

- See—dicta supports proposition;
- See also—should include a parenthetical explanation when it refers to authorities already cited or discussed;
- E.g.—authority not cited that supports premise;
- Accord—reference to supporting authority not used in the text but "in accord" with another

Signals that compare:

- Cf.—compare

The premise relies upon *"stare decisis"* (standing by what had been previously decided). The writer directs the reader to a particular location—showing how the court ruled. Writers must identify their point by explaining the idea for which a case is cited. Without signals to alert the reader, it is easy to become lost in the weeds. It is not necessary to present case summaries in a linear way. The holding of the court and how it applies to specific facts are essential to prevent driver/reader distraction.

No driver ever wants to hear that recalculation of the navigation is necessary. The destination of persuasion should flow. When this does not occur, the reader can be left stranded on the shoulder while other cars zip past.

TECHNOLOGY

11 Top Tips on Using LinkedIn to Build Your Brand

By PracticeHQ

Social media has revolutionized the professional world, and LinkedIn is viewed by many as a vital platform for lawyers and their firms.

LinkedIn is a leading tool for the legal profession, according to the American Bar Association's TechReport 2021.

"LinkedIn is the most popular social media platform for law firms with 96% of those from firms with 100+ lawyers, 90% of those from firms with 10–49 lawyers, 71% of those from firms with 2–9 lawyers, and 95% of solos reporting a firm LinkedIn presence," the survey found.

The New Jersey State Bar Association offered members a free webinar, Legally LinkedIn with marketing consultant Marc W. Halpert, who shared tips and strategies to help attorneys make the most of their profile.

Check out these powerful tips:

- Don't skimp on your profile. Be smart, relevant, and thoughtful about how it will convey your reputation. Make sure there are no typos.
- Know what your "why" is; it is critical to professional branding to be able to tell people why you do what you do.
- LinkedIn differs from other social media, especially Facebook, because it addresses a business audience and should complement your website and CV, not restate them.
- Vet connections to ensure they can add to your professional portfolio and nurture those connections.
- Keep ethical considerations at the front of your mind when developing content and making connections.
- Use only high-resolution graphics, a recent headshot and logos of places you have worked and schools you have attended. Consider adding multimedia, such as slide decks, GIFs and video, especially in the "featured" section.
- Always keep your audience in mind and make sure your information speaks to that group.
- List multiple skills, and use details, to help foster meaningful connections.
- Don't let your profile or connections stagnate; post updates when you have something important to share.
- Learn how to use hashtags strategically.
- Don't feel overwhelmed. Remember nothing in your profile is written in stone and everything can be changed or updated.

NJSBA members can get all the tips for how to improve each LinkedIn field by visiting the PracticeHQ hub for a recording and the full presentation at njsba.com. ■

Third Circuit Reviews Exhaustion Requirements Under IDEA

By Arsen Zartarian

In 2021, for the first time in three years, the Third Circuit Court of Appeals generated a flurry of activity examining the exhaustion requirement under the Individuals with Disabilities Education Act (IDEA), issuing one major decision and at least two non-precedential opinions that provide guidance for practitioners.

The Exhaustion Requirement of 20 U.S.C. §1415(l)

In 1984, in *Smith v. Robinson*,[1] the United States Supreme Court analyzed a situation where parents were attempting to secure a free appropriate public education (FAPE) for their child. In addition to asserting a claim under the IDEA's predecessor statute (the Education for All Handicapped Children Act [EHA] of 1975), the plaintiffs sought relief pursuant to two federal anti-discrimination statutes—Section 504 of the Rehabilitation Act and 42 *U.S.C.* §1983. The Court held that the EHA statute foreclosed those additional claims, reasoning that its "comprehensive" and "carefully tailored" structure was the "exclusive avenue" through which a claim for adequacy of education could be asserted.[2]

Shortly thereafter, Congress overturned that holding with the enactment of statutory language now codified at 20 *U.S.C.* §1415(l), specifically allowing alternate avenues of relief, but nonetheless requiring exhaustion of administrative remedies in certain actions:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 [including 504] or other Federal Laws protecting rights of children with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA]. The [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].* (emphasis added).

So when exactly is exhaustion required? How does a court determine whether a claim is the type that could have been brought under the IDEA? The Supreme Court first had occasion to interpret this amendment in 2017.

Fry v. Napoleon and the Supreme Court's 'Clues' for Lower Courts

In *Fry v. Napoleon*,[3] the parents of E.F., a kindergarten child with severe cerebral palsy, requested that her school allow her to be accompanied by a trained service dog in accordance with her pediatrician's recommendation. Although the dog assisted the child with various life activi-

ties (*e.g.*, balance with walker use, opening/closing doors, turning on/off lights, taking off her coat, transfer from toilet), the school maintained that the student's individualized education program (IEP) included an aide who provided one-on-one assistance, rendering the dog superfluous. Eventually school officials acquiesced to allowing the dog on a "trial basis," but prohibited the dog from performing many trained tasks and insisted that it remain in the back of the class. After this trial period, the principal again excluded the dog, prompting the parents to remove E.F. from school.[4]

The parents then filed a complaint with the United States Office for Civil Rights (OCR), claiming that the principal's exclusion of the service animal violated federal anti-discrimination laws. After an investigation, OCR issued a letter recognizing that "a school could offer FAPE to a child with a disability but still run afoul of the ban on discrimination." The federal agency clarified that, even if assignment of the human aide satisfied the FAPE standard, the school nonetheless engaged in discriminatory conduct by prohibiting the service animal. OCR analogized the school's actions to "requiring a student who uses a wheelchair to be carried by an aide" or "requiring a blind student to be led around by a teacher" instead of permitting him to use a guide dog or cane.[5] The parents subsequently filed suit in federal district court under the Americans with Disabilities Act (ADA) and Section 504, claiming E.F. suffered emotional distress, pain, and embarrassment as a result of the discrimination. They sought a declaration that the school district had violated those statutes, along with money damages to compensate for E.F.'s injuries.[6]

The federal district court granted the district's motion to dismiss the complaint, holding that §1415(l) required the parents to first exhaust IDEA's administrative procedure. On appeal, the Sixth Circuit affirmed, finding that §1415(l) applies if the claims "relate to the specific substantive protections of the IDEA,"[7] and "the genesis and the manifestations of the complained-of harms are educational in nature."[8]

In examining the language of the statute, the Supreme Court first acknowledged that "§1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education," reasoning that "a plaintiff cannot escape §1415(l) merely by bringing her suit under a statute other than the IDEA."[9] The Court determined such claims should be submitted to administrative hearing officers who are experienced in evaluating such specialized matters. However, if the suit is brought under a different statute and the remedy sought is not for the denial of a FAPE, exhaustion of IDEA's procedures is not required, particularly since a hearing officer cannot award the requested relief.[10]

Justice Elena Kagan, writing for the majority, articulated that lower courts are tasked with determining whether the complaint seeks relief for denial of FAPE by ascertaining the "gravamen" of the claim, setting aside any attempts at "artful pleading":

> A court deciding whether §1415(l) applies must therefore examine whether a plaintiff's complaint—the principal instrument by which she describes her case—seeks relief for the denial of an appropriate education. But that examination should consider substance, not surface. The use (or non-use) of particular labels and terms is not what matters. The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words "FAPE" or "IEP." After all, §1415(l)'s premise is that the plaintiff is suing under a statute other than the IDEA, like the Rehabilitation Act; in such a suit, the plaintiff might see no need to use the IDEA's distinctive language — even if she is in essence contesting the adequacy of a special education program.[11]

ARSEN ZARTARIAN *is Deputy General Counsel of the Newark Board of Education. He is also the current Chair of the New Jersey State Bar Association's School Law Special Committee and Past President of the New Jersey Association of School Attorneys. Arsen is a 1987 graduate of Rutgers–New Brunswick and a 1990 graduate of Villanova University School of Law, where he was Case & Comment Editor of Villanova Law Review and a national moot court competitor.*

Justice Kagan then offered "clues" to assist the analysis:

> One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions. 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; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that

> explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.[12]

The Court remanded the matter so the lower court could undertake the appropriate analysis consistent with its opinion.

Wellman v. Butler: The Third Circuit Applies the Fry Analysis

The Third Circuit first had the opportunity to apply the *Fry* inquiry in *Wellman v. Butler*.[13] That case involved a student who had suffered several head injuries associated with playing sports in high school but was denied accommodations and eligibility for special education services despite suffering cognitive issues and an anxiety disorder. He eventually withdrew and enrolled in a private school. The student's parents filed a due process petition with the Pennsylvania Department of Education, seeking an IEP, compensatory education, and payment for the private school tuition. Although the parties entered into a settlement agreement of the administrative matter, the parent thereafter filed an action in federal district court alleging violations of the Rehabilitation Act, the ADA, and Section 1983.[14]

In its analysis, the Third Circuit focused on the direction from *Fry* that "a court is required to consider the gravamen of a complaint to determine whether a plaintiff seeks relief for denial of FAPE under the IDEA and therefore must exhaust administrative remedies—and consider the "clues"—(i) whether plaintiff "could have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school," and (ii) whether "an adult at the school—say, an employee or visitor—could have pressed essentially the same grievance."[15] In addition to those two "hypothetical questions," the Third Circuit noted that the Supreme Court also recognized that a court may consider the case's procedural history, "which may suggest the plaintiff is indeed seeking relief for the denial of FAPE—with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of a remedy." Hence, "prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term."[16]

Although the Supreme Court in *Fry* "declined to decide whether exhaustion would be required if a plaintiff complained of the denial of a FAPE but sought remedies which were not available under the IDEA (*e.g.*, money damages)," the court emphasized that under Third Circuit jurisprudence "a plaintiff's request for remedies not available under the IDEA does not remove the claim from being subject to exhaustion."[17] In *Wellman*, the court concluded that the plaintiff's "grievances all stem from the alleged failure to accommodate his condition and fulfill his educational needs," "the conduct about which he complains would not have occurred outside the school setting," and "a nonstudent could not…have pressed essentially the same grievance."[18] Besides the appropriateness of dismissal because the plaintiff had signed a settlement agreement and release, the court found that the claims in the complaint were clearly based on denial of FAPE and therefore subject to exhaustion.

T.R. v. School District of Philadelphia and the "Systemic Exception"

Against the above-referenced background, the Third Circuit again had the opportunity to revisit the subject matter again last year for the first time since 2018. *T.R. v. School Dist. of Philadelphia*,[19] decided July 9, 2021, allowed the court to reiterate when exhaustion under IDEA was excused:

> Despite the IDEA's administrative exhaustion requirement, our Court has acknowledged that a plaintiff's failure to exhaust may be excused where: (1) exhaustion would be futile or inadequate; (2) the issue presented is purely a legal question; (3) the administrative agency cannot grant relief; [or] (4) exhaustion would cause severe or irreparable harm." (citation omitted). Absent the existence of any of those exceptions, failure to exhaust will deprive a federal court of subject matter jurisdiction. (citation omitted). We have also stated that exhaustion is not required where plaintiffs "allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process." *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996). Yet we have suggested that this exception—we will call it the "systemic exception"—"merely flows implicitly from, or is in fact subsumed by, the futility and no-administrative-relief exceptions."[20]

In *T.R.*, the plaintiffs were parents who filed a complaint styled as a class action alleging that the district had engaged in a systemic practice of failing to provide sufficient interpretation services and timely and completely translating IEP documents and certain regular education forms. They sought an order that the district adopt and implement a new written special education plan, translation and interpretation services to class members, and translation and delivery of IEP documents in the appropriate native language in advance of IEP meetings to ensure "meaningful participation" by the parents.[21]

By the time the litigation reached the federal appeals court, the original parents who had gone through state due process procedures were no longer in the case and the only remaining plaintiffs were newly added parents who had not exhausted administrative remedies. When faced with a motion to dismiss, those plaintiffs conceded that they did not exhaust administrative remedies,

but argued that their claims "fell within the futility exception to exhaustion because they had challenged systemic legal deficiencies."[22]

The Third Circuit examined whether a recognized exhaustion exception applied:

> As an initial matter, the fact that a complaint "is structured as a class action seeking injunctive relief, without more, does not excuse exhaustion." (citation omitted). Relatedly, the systemic exception is not met every time a plaintiff challenges centralized, uniform policies that affect all students within a school or school district. (citation omitted). Instead, to satisfy the systemic exception, a plaintiff must challenge policies that are "truly systemic…in the sense that the IDEA's basic goals are threatened on a system-wide basis" and must not "focus on the shortcomings of a particular component of…special education." (citation omitted). Claims that do meet the systemic exception often challenge policies that concern the administrative dispute-resolution mechanism itself. Other cases…similarly share the "common element" that "plaintiffs' problems could not have been remedied by administrative bodies because the framework and procedures for assessing and placing students in appropriate educational programs were at issue, or because the nature and volume of complaints were incapable of correction by the administrative hearing process." (citation omitted). *The takeaway from this jurisprudence is that the systemic exception applies when plaintiffs challenge policies that threaten basic IDEA goals—not mere components of special education programs—including policies that undermine the framework of the administrative hearing process.* (emphasis added).[23]

In a structured analysis, the Third Circuit separately dealt with the plaintiffs' IDEA claims and non-IDEA claims. With regard to the plaintiffs' IDEA claims, the court concluded "whether a parent needs a certain translation or interpretation services in order to meaningfully participate requires an individualized inquiry," and the parents' claims did not "implicate policies which undermine access to the administrative hearing process itself."[24] To counter the exhaustion argument, the added plaintiffs who were before the court relied upon a hearing officer's report issued to prior plaintiffs in the case who had utilized the administrative process, wherein the hearing officer conceded he had "no authority to order wholesale changes in the District's policies or practices." The Third Circuit responded: "if this truism—that administrative hearings cannot order class-wide relief—were sufficient to satisfy the systemic exception, the IDEA's exhaustion requirement would be meaningless every time [a class action was alleged." Ultimately, the court concluded that the plaintiffs could bring the same IDEA claim in administrative court, even though the relief would be individualized. As such, they failed to exhaust their administrative remedies and had improperly invoked the systemic exception to exhaustion.[25]

The Third Circuit then addressed the plaintiffs' non-IDEA claims—including, among other statues, Section 504, the ADA, Title VI of the Civil Rights Act, and Pennsylvania anti-discrimination law. In accordance with *Fry* and *Wellman*, the Third Circuit examined these claims to determine the "gravamen" of the complaint. Regardless of the right allegedly violated, the plaintiffs contended the district "impeded equal protection by [students and parents] in the District's special education and other instructional programs." The court then added "plaintiffs fare no better under *Fry*'s suggested inquiries," given that the same claims, regarding participation in educational services, clearly could not have been brought "against a public theater or library" or "mere visitors to the school," or, as *Wellman* had characterized, "not the sort of claims that would be brought by a non-student against a non-school facility."[26] Further, invoking *Fry*'s suggestion that a reviewing court examine procedural history, the Third Circuit observed that the original plaintiffs had exhausted administrative remedies for the denial of FAPE, and the operative complaint still included the first count which alleged the denial of FAPE. Thus, dismissal was appropriate, given that both the IDEA claims and non-IDEA claims sought relief for denial of FAPE.

Other Recent Third Circuit Determinations Regarding Exhaustion

In addition to *T.R.*, the Third Circuit issued other opinions on the subject matter last year. Although both opinions discussed below are non-precedential, they are instructive to analysis and helpful for reference.

Aheam v. East Stroudsberg Area Sch. Dist.,[27] issued March 5, 2021, involved an autistic student who required a "safe plan" to redirect him and keep him on task while attending high school. Pursuant to that plan, the school was to call the parents or 911 when necessary. Instead of following that plan, on one occasion the student was restrained and placed in handcuffs by a school resource officer; on a second occasion, he was locked in a school bathroom, where he caused harm to himself and items in the room.

The parents then brought suit, alleging violations of the IDEA, Section 504 and Section 1983, claiming that these two incidents traumatized their son. They sought damages and supplementary educational services.[28] When the district moved to dismiss for failure to exhaust administrative remedies, the parents argued exhaustion was not required because "neither of the alleged incidents had anything to do with the educational program."[29] Rather, the parents maintained that they were seeking "redress for unconstitutional and discrimination," arguing that "any adult individual who

had been handcuffed without justification and/or locked in a bathroom would have a right to bring a claim for mistreatment," and, in any event, exhaustion should be excused as futile because they sought monetary damages.[30]

The Third Circuit determined that the "crux or gravamen" of the claim was the denial of FAPE, and thus subject to dismissal. Not only did the complaint reference the plan, it alleged that the defendant's failure to abide by its requirements deprived the student of FAPE and caused him to require supplemental support. Further, the court recognized "it is of no moment that plaintiffs only seek monetary damages in their complaint."[31]

Finally, on Dec. 21, 2021, the Third Circuit closed out the year by dealing with the exhaustion analysis one last time in *F.S. v. Crestwood Sch. Dist,*[32] where the plaintiff filed a complaint sounding in disability-based discrimination as a result of the district allegedly forcing her to cease participation in cheerleading. The district court dismissed the plaintiff's claims brought under Section 504 and Section 1983, finding that the claims were subject to §1415(l) and therefore required exhaustion.

Applying the analysis from *Fry* and *Wellman*, the court concluded that the plaintiff's claims concerned the denial of a FAPE, as they could "not have occurred outside the school setting and that a nonstudent could not have pressed essentially the same grievance." A "mostly identical complaint" to that filed by F.S. "could not be brought against a public facility, nor could an adult visitor or employee bring such a claim." Rather, the court found that exclusion from the school's cheerleading program constituted a denial of FAPE, given that ability to participate in such extracurricular activities, included as a section in a student's IEP, was part of a child's educational experience.[33] However, the court was careful to restrict this finding:

> This conclusion does not mean that all involvement in extracurricular activities necessarily falls within the scope of a school's FAPE requirement. Nor do we suggest that activities not enumerated in an IEP necessarily fall outside a FAPE. Although involvement in a given extracurricular activity may not implicate a FAPE, the District Court correctly held that the allegations here do not refer to any such activity. Instead, Defendants' alleged disability-based discrimination and failure to accommodate [the student's] participation in the cheerleading program is a denial of her educational needs under the IDEA, including participation in extracurricular activities.[34]

The Third Circuit also concluded that the plaintiff's choice not to pursue her claims through the administrative process was "not determinative" of whether they concerned the denial of FAPE.[35] Rather, the court observed that the Supreme Court in *Fry* directed courts "to consider the procedural history of a suit in order to determine if a plaintiff's midstream change of course is indicative of a strategic attempt to avoid the IDEA's exhaustion requirement."[36]

Finally, although the Third Circuit recognized that it is well established that a claimant may avoid the exhaustion requirement when "exhaustion would be futile or inadequate,"[37] it agreed with the lower court's conclusion that "the inability of a hearing officer to award monetary damages does not render the administrative process futile." The court added "the mere inclusion of monetary damages in a claim for relief does not establish the futility that would avoid the IDEA's exhaustion requirement, as any holding to the contrary would just encourage any plaintiff to avoid exhaustion merely by adding a claim for monetary relief, essentially creating a blanket exception that would eliminate the exhaustion requirement."[38] ■

Endnotes

1. 468 U.S. 992 (1984).
2. 468 U.S. at 1009.
3. 137 S.Ct. 743 (2017).
4. *Id.* at 750.
5. *Id.* at 752.
6. *Id.*
7. 788 F.3d at 625.
8. *Fry*, 137 S. Ct. 743, 752, *citing Fry v. Napoleon*, 788 F.3d 622, 627 (6th Cir. 2015).
9. 137 S. Ct. at 755.
10. *Id.*
11. *Id.*
12. *Id.*
13. 877 F. 3d 125 (3d Cir. 2017).
14. *Id.* at 129.
15. *Id.* at 132.
16. *Id.* at 133.
17. 877 F. 3d at 132, n.7.
18. *Id.* at 133.
19. 4 F.4th 179 (3d Cir. 2021).
20. *Id.* at 185.
21. *Id.* at 188.
22. *Id.*
23. 4 F.4th at 192-193.
24. *Id.* at 193.
25. *Id.* at 194.
26. *Id.* at 195.
27. 848 Fed. Appx. 75 (3d Cir. 2021).
28. *Id.* at 76.
29. *Id.* at 77.
30. *Id.* at 77-78.
31. *Id.* at 78.
32. 2021 U.S. App. LEXIS 37714, 2021 WL 6101356 (3d Cir. 2021),
33. *Id.* at 4 (*citing Fry*, 137 S.Ct. at 576).
34. *Id.* at 6.
35. *Id.*
36. *Id.*
37. *see D.E. v. Central Dauphin Sch. Dist.*, 765 F.3d 260 (3d Cir. 2014).
38. 2021 U.S. App. LEXIS 37714 at 7.

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A Year to Remember

Recent Legal Developments in Special Education

By Cherie L. Adams

A founding member of Adams Gutierrez & Lattiboudere, LLC, **CHERIE L. ADAMS** *has over 35 years of legal experience devoted to the representation of management in education and labor and employment matters. Cherie has also developed a particular expertise in the area of special education and regularly represents districts in due process proceedings and federal litigation involving students with disabilities.*

The last two years have been unprecedented in our lifetime. The impact of the pandemic on all students has been great; none greater than on students with disabilities. In an effort to address the many issues that have arisen, we were bombarded with executive orders that had a significant impact on the delivery of instruction to all school-age children. In addition, the New Jersey Legislature has enacted some new laws and procedures impacting students with disabilities along the way. Some of the significant measures are highlighted below.

With the beginning of school closures and remote learning, the guidance from the federal government was that districts were not excused from providing a free and appropriate education (FAPE) and that districts were to implement students' Individualized Education Programs (IEP) "to the greatest extent possible." Schools were closed and districts were pressed to develop online platforms to deliver instruction, including to those students with the most significant needs.

To respond to the school closures, the State Board of Education first authorized virtual or remote instruction to fulfill the state's 180 school day requirement. Special education students were to get the "same opportunities for virtual instruction" as general education students. While related services were not able to be given remotely prior to that time, the State Board then adopted regulations in early April 2020 permitting the delivery of speech language services, counseling, physical therapy, occu-

pational therapy and behavioral services through the use of electronic communication or a virtual or online platform. The New Jersey Department of Education (NJDOE) then issued a series of broadcast memos relating to the provision of extended school year services for students with disabilities and Guidelines for the Reopening of Schools. For the 2020–2021 school year, families were able to elect a fully virtual option, even as schools reopened.

In June 2020, the NJDOE issued a broadcast memo suggesting that school districts should consider providing additional services to the group of classified students scheduled to graduate or age out as of June 30, 2020, who may not have received all of their IEP services during school closure. It was suggested that this be discussed at an IEP meeting where the effects of the remote instruction could be considered.

Legislative Changes

As the pandemic continued, the state took more definitive measures to address the impact of school closures on students with disabilities. P.L. 2021, C. 109 (popularly referred to as S3434) was passed by the legislature and signed by the governor effective June 16, 2021. This law addressed the idea of compensatory education for losses due to school closures and hybrid instruction, including the loss of transition opportunities. For the first time under S3434, students with disabilities turning 21 during the pandemic and aging out of eligibility for services under the Individuals with Disabilities Education Act (IDEA) are given the potential of continuing services during the following school year. This is not automatic as some of the reporting around S3434 suggested—the decision is to be made by the IEP team, including the parent, as to whether the student requires additional or compensatory services, including transition services, during the following school year. While the law applied to students aging out in June 2021, additional provisions in the legislation provide the same opportunity for an additional year of services based upon an IEP team decision to students turning 21 during the 2021–22 and 2022–23 school years. A student receiving services under this act is limited to one additional year beyond the normal aging-out date. To alleviate the financial burden of the new legislation, the state directed that reimbursement be made available through federal and state funding to absorb the costs of the additional programming. Any additional services beyond that extra year would be available only through a claim for compensatory education through due process. On Dec. 1, 2021, the NJDOE also issued a guidance document relating to the implementation of P.L. 2021, c.109.

Additional state laws were passed providing the opportunity for parents to request a "bridge year" for graduating students detailing services that could be made available for the following school year and allowing parents to request grade retention for the 2021–2022 school year, subject to district approval. While both of these laws did not specifically exclude classified students from coverage, they do clearly indicate that the needs of the classified student are best addressed through the IEP process rather than generic application of these statutory measures.

Issues related to the impact of COVID-19 continue to be front and center in the state legislature. On March 3, 2022, the governor also signed S905/A1281, which extends the statute of limitations for filing due process petitions resulting from COVID school closures and/or remote or hybrid instruction. In general, a due process hearing is required to be requested by a parent or guardian within two years from the date the parent or guardian knew, or should have known, about the alleged action that forms the basis for the complaint. This new law extends the two-year statute of limitations for COVID-related due process claims and provides that such claims accruing between March 18, 2020, and Sept. 1, 2021, must be filed no later than Sept. 1, 2023.

In addition, the law codifies prior DOE guidance and requires that each district must hold an IEP team meeting no later than Dec. 31, 2022, to discuss the need for compensatory education and services for students with an IEP in effect during the March 18, 2020, to Sept. 1, 2021, time frame. Written notice of the determination at that meeting must be provided and the discussion and decision on compensatory services must be documented in the IEP. Parents have until Sept. 1, 2023, to challenge the determinations of the IEP team as it relates to these determinations.

One piece of legislation enacted on Jan. 18, 2022, may have a far-reaching impact on the dispute resolution process for special education cases. In a long overdue move to lessen the existing backlog in special education hearings, P.L 2021, c.390 creates a new special education unit within the Office of Administrative Law (OAL) and provides for an additional 15 administrative law judges who will have expertise in special education law and who will adjudicate all special education cases. Once it is up and running, this has the potential for streamlining the processing of cases through the OAL in a manner that will allow for the efficient and timely resolution of special education disputes. However, there is little detail provided as to how the change will be implemented, and the law allows up to two years following enactment for the process to be completed, so it may be some time until the impact is felt.

Federal Court Decisions

At the same time the legislature was considering a variety of bill proposals to address the impacts of school closures on all students, including students with disabilities, the federal courts were continuing to issue decisions interpreting the IDEA and state law as they relate to special education students. Some of the more significant recent cases are summarized below.

Stay-Put

In *Y.B. v. Howell Twp. Bd. of Educ.*,[1] the Third Circuit Court of Appeals determined that the district could meet its obligations under the intrastate transfer rules where it was able to provide comparable services to a student with Down syndrome who moved from another district. Initially, the school had been unable to accommodate the student's needs in the building and paid for private services, but stopped paying for the private services once it was able to accommodate the student in its own program. The parents had sought to use "stay-put" to require continued payment for the private program, but the court determined that stay-put was inapplicable where the district met its FAPE obligations in the case of a voluntary transfer between districts by offering comparable services to the student.

In *H.D. and N.R., obo N.D., v. West Orange Bd. of Educ.*,[2] the New Jersey District Court held that the school district can remove the student for a prior stay-put placement once there is an administrative decision in favor of the district provided there is no timely appeal filed, even if the parents subsequently file additional due process petitions. The court noted that the district's obligation to keep the student in a stay-put placement lasted until a new placement was established by agreement, by an unchallenged administrative decision approving it, or by a court.

Compensatory Relief

In an unpublished opinion in *Esposito v. Ridgefield Park BOE,*[3] the Third Circuit Court of Appeals affirmed a district court decision granting summary judgment to the board, dismissing a claim for denial of FAPE and compensatory damages dating back to 2005. Amicus briefs had been filed in support of the appeal by a group of various non-profit organizations, parent attorney and advocate associations on the issues of the scope of compensatory claims and criteria for parent experts as reflected in the administrative law judge (ALJ) decision.

Plaintiffs in *Esposito* had appealed the ALJ decision finding that the district offered FAPE, arguing that the ALJ applied an incorrect standard in limiting the remedial period under the statute of limitations. The plaintiff argued that once the claim was timely filed based upon the petitioner's "knew or should have known" date under *G.L. v. Ligonier*, the claim could cover the entire period of deprivation dating back to 2005. The Third Circuit rejected this argument and determined that the ALJ properly determined that the board "knew or should have known" date limited the potential remedy to the 2015–16 academic year under the IDEA and ADA.

Plaintiffs and amici had also argued that the ALJ erred in giving greater weight to the district's witnesses and in not relying upon the experts offered by the plaintiffs, suggesting this violated a student's right to benefit from an independent evaluation at a due process hearing. The Court of Appeals rejected this claim, finding that the IDEA does not give the student expert's testimony particular weight and *Schaffer* did not create such a substantive rule.

Another district court decision which could have significant implications as to claims for compensatory relief is *K.N. and J.N., obo J.N. v. Gloucester City Bd. of Educ.*[4] In that case, the school district had violated Section 504 and the American with Disabilities Act (ADA) by failing to provide the one-to-one aide to an elementary school student with autism needed to participate in an afterschool program. After the court determined the district could not remedy that violation by providing the student direct services, the court analyzed the calculation of compensatory relief. The district court ordered the school district to place $26,017 in a compensatory education trust fund for the student's benefit. However, the school district was able to challenge the parent's calculation of the sum needed to remedy an IDEA, Section 504, or ADA violation. Notably, the plaintiffs had attached a proposed order seeking a rate of $80/per hour for the compensatory education award calculation, based upon the 2017 case of *L.M. v. Willingboro Twp. Sch. Dist.* where that figure had been mentioned and applied. The *Gloucester* court rejected this initial rate based upon plaintiffs' failure to cite to any support in the record for calculating such rate. The court also rejected two other rates proposed by the plaintiffs. The court then reviewed a certification provided by the school district outlining the actual costs that the district would have incurred for retaining the services of a paraprofessional and/or substitute teacher during the relevant timeframe. The district court accepted this rate and applied it to the compensatory hours. The parents were awarded counsel fees as well.

Unilateral Placements

Other recent cases have shed additional light on a parent's right to reimbursement for a unilateral placement where the parent has not complied with the statutory notice prerequisites for reimbursement.

In *L.K. and K.L. ex rel. R.L. v. Randolph Township Bd. of Educ.,*[5] the federal district court reversed and remanded the ALJ decision dismissing the parents' claim for reimbursement of their private place-

ment. Because the ALJ denied reimbursement without considering the reasonableness of parents' actions before they unilaterally placed their son in a private school, the district court remanded the case so the ALJ could reconsider the parents' right to relief. While the court acknowledged that the parents failed to provide the school district the required notice of their intent to make a unilateral placement, it suggested that the ALJ should have considered the parents' attendance at numerous IEP meetings, their efforts to collaborate with the district, and their verbal disagreement with the student's IEP to determine whether a reduction in the parents' reimbursement award was more appropriate than a complete denial of relief.

Using a similar analysis, the district court in *I.G. et al., v. Linden City Bd. of Educ.*[6] denied tuition reimbursement to the parents of student where they did not cooperate with the district or communicate their opposition to their child's IEP and their intent to enroll the student in private school. Here, the court affirmed an ALJ's determination that the parents acted unreasonably by failing to collaborate in the development of the student's IEP, noting both the timeline of events and the parents' lack of communications with the district. Relevant considerations included the parents' attorney making a statement just two days after the IEP meeting that the parents wouldn't accept any placement other than their preferred private school. Significantly, the parents by that time had already signed a tuition agreement with the private school without notice to the district.

As reflected in the legislative and judicial actions discussed here, it is likely that the pandemic and its aftermath will continue to impact students with disabilities and the rights and responsibilities of school districts throughout the state. Practitioners in this arena are well-served by keeping an ear to the ground. ■

Endnotes

1. *Y.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196 (3d Cir. 2021).
2. *H.D. and N.R., obo N.D., v. West Orange Bd. of Educ.*, 80 IDELR 65 (D.N.J. 2022).
3. *Esposito v. Ridgefield Park BOE*, 78 IDELR 93 (3d. Cir. 2021, unpublished).
4. *K.N. and J.N., on behalf of J.N. v. Gloucester City BOE*, 78 IDELR 157 (D.N.J. 2021).
5. *L.K. and K.L. ex rel. R.L. v. Randolph Township BOE*, 78 IDELR 287 (D.N.J. 2021).
6. *I.G. et al., v. Linden City Bd. of Educ.*, 78 IDELR 273(D.N.J 2021).

Inclusive Education is a Civil Right—in New Jersey, Too

By Fred Buglione

New Jersey is the best state for public education, according to the *U.S. News and World Report*[1] in 2021.

We all want to take pride in such a lofty accomplishment. Oftentimes, the result of good news is to turn a blind eye toward the less glowing aspects of reality.

While we score very highly on measures that look at graduation rates and college acceptance, there is a measure in which we struggle—mightily.

According to the *43rd Annual Report to Congress on the Implementation of the Individuals with Disabilities in Education Act*,[2] submitted by the United States Department of Education on Jan. 24, 2022, New Jersey is the most restrictive state in the country followed by Hawaii. In other words, New Jersey has the highest rate of segregating students with disabilities in the country.

The Progression of Inclusive Education—or Lack Thereof

When I discuss inclusive education and restriction, I am largely referring to the placement of students based on the Individuals with Disabilities Education Act (IDEA) definitions. IDEA defines four placement categories: 80% of the day or more spent in general education classes with general education students, 40–79% of the

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day, less than 40% of the day, and out of district.

80% of the day or more spent in general education classrooms is what we refer to as an inclusive placement. For the moment, I will just focus on placement; I will discuss what actually occurs in those placements later.

Twenty years ago, New Jersey included 45% of students with disabilities in general education 80% of the day or more. Today, according to the 43rd Report to Congress, New Jersey still only includes 45% of students.

While New Jersey's inclusion statistic has hardly changed over the last two decades, the rest of the country has seen vast improvement in the percentage of students included. Twenty years ago, the national average for inclusive placement was 47.32%.[3] That average has increased almost every year. As of 2022, we include 64.8% of the students with disabilities nationally.

States across the country have made great efforts to become more inclusive. Florida, Maryland, and Virginia are examples of states that drove their rates of inclusive placement from around New Jersey's current inclusion rate (44%), 67-75%. Nevada went so far as to rename their Department of Special Education to the Office of Inclusive Education.[4]

The country is moving to more inclusive placements for students with disabilities for two simple reasons: research and results. In the 1991 version of IDEA, this statement is written in the law:

> "Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by...having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible."[5]

The challenge we face in New Jersey is daunting. To reach the national average of 64.8% of students included in general education classrooms 80% of the day or more, roughly 50,000 students statewide would need a change in placement. To reach the inclusion rates of Connecticut, Florida, or Maryland, over 100,000 students would need a change in placement.

The research they reviewed back then has changed. There is now much more research showing that inclusive education results in higher academic achievement, better behavioral results, and better post-secondary outcomes. Even students with the most severe disabilities show equal or better results in inclusive placements. This research has persuaded federal agencies to support inclusive education. In 2015, the Department of Health and Human Services and the Department of Education co-authored a white paper[6] calling for all Pre-K programs to be inclusive.

The challenge we face in New Jersey is daunting. To reach the national average of 64.8% of students included in general education classrooms 80% of the day or more, roughly 50,000 students statewide would need a change in placement. To reach the inclusion rates of Connecticut, Florida, or Maryland, over 100,000 students would need a change in placement.

Special Education is Not a Place. Neither is Inclusive Education

Inclusive education is not simply about placement; it is also a set of evidence-based practices that support all learners. In many of the states that have made inclusive education initiatives bear fruit, a major aspect of their change efforts was focused on implementing Multi-Tiered Systems of Support (MTSS). MTSS defines tiered interventions for students struggling academically and behaviorally. These interventions are provided in the general education setting prior to classification. They should also continue to be provided for classified students placed in general education settings.[7] The New Jersey Department of Education is a strong proponent of tiered interventions, which is referred to as the New Jersey Tiered System of Supports and explained in detail on the New Jersey Department of Education website.[8]

Great inclusive education is not a magical art form that only special educators know how to cast. Great inclusive education is great instructional practices for all students. Great inclusive instruction is utilizing Universal Design for Learning (UDL) as the foundation, differentiating as needed, and providing the modifications and accommodations in the Individualized Education Plan (IEP). The secret in the sauce for including students is just good instructional practices provided by caring teachers.

Unfortunately, there are fewer examples of inclusive education being practiced well in our state, and there are very few schools that have highly effective inclusive communities. These districts include over 80% of their students with disabilities in general education classes 80% of the day or more. The only identifiable cause that I can see for these dis-

tricts breaking free of the norm is they have had a Director of Special Education or directors who pushed their district to be more inclusive.

We are often asked to act as expert witnesses or to provide inclusive education reports for individual students, which would be used in a due process hearing. We do not provide either service, but I can direct you to people who do act as expert witnesses. We do however work with districts and parents in challenging situations to foster positive and supportive relationships. Our involvement requires both sides to agree to have us enter the conversation. Usually the root of the problem is a misinterpretation of inclusive education. We have a strong track record of success in these situations. We have been involved with court cases generally after decisions have been handed down, and the district is being required to include the child.

Inclusive Education Works

We would all be successful in school if whenever you had difficulty, the teacher taught slower and at a lower level. That is how our current system functions for students with disabilities. If you express any learning challenges, you are sent to slower and lower classes until you are sent out of the district entirely.

The reason students appear to "improve" with a change in placement rests largely on the ability of the segregated setting to forgo alignment with the core curriculum. Simply put, they are successful because they reduce the rigor of the curriculum and instruction. The more time students are in lower and slower classrooms, the less likely students will be to be as successful as they could have.

How do you grow or develop fully if you are not challenged with work at a higher degree of difficulty? How do you function as an adult, if you have never had a relationship or exposure to typically developing peers?

Both IDEA and the NJAC make it clear that there is a preference for inclusive education. The IEP process makes it clear that the IEP team only has to justify removing a student from general education, not the other way around. There is no criteria that a student needs to meet to be included. The only measure that impacts placement is progress toward IEP goals.

As the head of an organization that supports schools to include students with disabilities, we have yet to find a student or IEP goal that we could not meet in a general education classroom. And yes, even Applied Behavioral Analysis[9] can be provided in a general education classroom. ■

Endnotes

1. *U.S. News and World Report, Education Rankings Measuring how well states are educating their students, 2021,* usnews.com/news/best-states/rankings/education.
2. United States Department of Education, *43rd Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, 2021, Jan. 24, 2022, sites.ed.gov/idea/files/43rd-arc-for-idea.pdf.
3. See above, National average for inclusive placement was 47.32%.
4. Office of Inclusive Education, doe.nv.gov/Inclusive_Education/.
5. 1991 version of IDEA, *20 USC CHAP 33, SUBCHAP I: §1400).* https://www.congress.gov/108/plaws/publ446/PLAW-108publ446.pdf.
6. U.S. Department of Health and Human Services U.S. Department of Education Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs, Jan. 5, 2017. acf.hhs.gov/sites/default/files/documents/ecd/policy_statement_on_inclusion_of_children_with_disabilities_in_early.pdf.
7. MTSS will refer to "universal" classrooms, trying to avoid the terms general education and special education because such language may exclude students from the beginning.
8. nj.gov/education/njtss/.
9. ABA is therapy based on the science of learning and behavior, helping many kinds of learners gain different skills. paautism.org/wp-content/uploads/2019/01/ABA-Autism-Incl-7542-10-17-18wba.pdf

Point/Counterpoint

The Ethics of Negotiating Settlements in Special Education Litigation

By John D. Rue and David B. Rubin

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There is a split of opinion within the special education bar concerning the ethical ground rules for negotiating settlement of litigation under the Individuals with Disabilities Education Act (IDEA). Two attorneys with opposing views—one on behalf of school districts, the other on behalf of families—identify the issues and share their perspectives on the proper rules of engagement to resolve these disputes fairly and expeditiously.

Mr. Rubin

Parents' entitlement to prevailing-party counsel fees under the IDEA is often the biggest challenge in settling special education cases. There is an unresolved debate within the special education bar over the ethicality of school district counsel demanding a waiver of fee claims as a condition of negotiating settlements. Some family-side counsel, like my colleague, Mr. Rue, have argued it gives districts an unfair advantage by improperly driving a wedge between lawyer and client. I disagree.

The New Jersey courts haven't squarely addressed the issue in the context of special education litigation, but two Supreme Court decisions involving other fee-shifting statutes have provided guidance. In *Coleman v. Fiore Bros., Inc.*,[1] a Consumer Fraud Act (CFA) case, the Court considered the ground rules for negotiating settlement of fee claims by "public interest" law firms. After surveying state and federal law, the Court held that such firms may not negotiate fee claims until the merits of the case have been settled, and barred defense counsel from insisting on a waiver of fees as a condition of settlement.

In doing so, the Court noted the differences between public interest firms and the private bar. Public interest firms, such as Legal Services of New Jersey, are not permitted to accept fees from clients. Private for-profit firms, on the other hand, have the freedom to structure their fee arrangements (*e.g.*, upfront retainer, hourly billing, pure or partial contingency) based on their own chosen business model.

Subsequently, in *Pinto v. Spectrum Chem. and Lab. Prod.*,[2] a Conscientious Employee Protection Act (CEPA) case, the Court abandoned *Coleman*'s prohibition on simultaneous negotiation of merits and fees by public interest counsel but reaffirmed *Coleman*'s ban on defendants conditioning settlement on fee waivers in cases involving public interest firms.

Most firms representing families in special education cases are private practices operated for profit. Some contend that they and their clients also should enjoy protection from an insistence on fee waivers on the ground that such demands create a conflict of interest for them as well, and in the long run would discourage competent counsel from accepting cases from families of limited means. Some have even advanced the argument that they are, in fact, public interest firms because their representation of these clients serves the public interest.

A fair reading of *Coleman* and *Pinto* compels the conclusion that the "public interest" firms the Court had in mind there are non-profit, legal services-type organizations that cannot accept fees from their clients. They may not be able to take on these cases at all if they routinely face the prospect of no compensation when clients feel compelled to accept offers without at least some fees included. On the other hand, private firms operated for profit are free to structure their fee arrangements to reflect whatever risk of non-payment they're prepared to assume.

The supposed potential for conflicts in special education cases is no different than in any other case where the attorney's fee is contingent on the outcome. Parties of limited means often bring personal injury cases, or actions under the Law Against Discrimination, CEPA or CFA, where a global settlement offer on the table may not fully compensate the attorney for all effort expended in the matter. Plaintiffs and their counsel both have an incentive to maximize the recovery, but ultimately it's the client's decision whether an offer is too good to pass up.[3]

Naturally, the client's settlement decision will account for any obligations to the attorney under the terms of their engagement, but there is nothing about special education litigation *per se*, or the attorneys representing families in those matters, that calls for a different rule than applies in civil rights, employment discrimination or any of the other types of cases involving claims that may be just as important to the lives of the clients involved.

I've also seen no evidence that such a special rule is necessary to attract competent representation for families in special education cases. IDEA's fee-shifting provision has attracted numerous capable attorneys to the field. The public record is replete with six-figure fee awards at private sector hourly rates to counsel who are successful on behalf of their clients. For families unable to retain private counsel with fee arrangements they can afford, the Rutgers Law School Special Education Clinic, Education Law Center and other non-profit organizations regularly make low- or no-cost counsel available to those families. There is also a growing number of able, lower-cost non-attorney advocates permitted to practice special education law by permission of the Supreme Court and the Committee on Unauthorized Practice of Law.[4]

In sum, there's no cogent reason for prohibiting demands for counsel fee waivers and one compelling reason not to: The simple truth is that many cases won't settle if districts are required to agree to a counsel fee award in cases they feel don't warrant it, or be exposed to another round of negotiation over fees after they've bound themselves to a settlement on the merits.

That's why many family-side attorneys oppose such a rule as well. Parents and their attorneys are under no obligation to accept a fee waiver demand if they feel the strength of their case warrants payment of fees. Negotiations can, and should, take place on a level playing field. The prospect of a fee award if the case goes to a hearing is already a valuable bargaining chip motivating districts to increase settlement proposals to buy off that risk. But if districts are unable to negotiate for closure with a bottom line result that's acceptable, many more cases would be forced to trial instead of allowing for prompt settlements that are agreeable to both sides. In the long run, it will be the families of special needs children and their families who will suf-

fer from the delay and risks they will face if early settlements are harder to reach.

Mr. Rue

Clarence Darrow once famously (perhaps apocryphally) said he would argue either side of any case, if only he could frame the question presented. My difference with Mr. Rubin's position starts with his question. He starts from the premise that "Parents' entitlement to prevailing-party counsel fees under the (IDEA) is often the biggest challenge in settling special education cases."

I disagree that the law itself, which includes a fee shifting provision for powerful public policy reasons, is itself the problem. The problem, as I see it, is that New Jersey school boards, driven by insurance carriers who indemnify their illegal conduct, routinely demand a waiver of this statutory right as the price of any settlement at all.

I would reframe Mr. Rubin's initial statement. We can agree that special education legal disputes face unusual, if not unique, challenges in reaching settlement. But the "biggest challenge" to such settlements is not (as Mr. Rubin posits) in the law itself. I submit that there are three such challenges, which vie for the title of the "biggest."

1. New Jersey's "Profoundly Broken" Due Process Hearing System.

When an IDEA special education dispute arises between a parent and a school district, the parent has the right to a due process hearing, and to a final, written decision within 45 days. But in New Jersey, such proceedings routinely take nine months to a year. This problem is neither new, nor subject to any serious debate.

The problem has existed for decades. In 2014, then-Chief Judge of the Office of Administrative Law (OAL) Laura Sanders published a white paper explaining the extremity of the problem. In 2016, the New Jersey Department of Education (NJDOE) resolved an investigation into delays by finding itself out of compliance with the 45-day rule. In 2018, a federal class action was filed against NJDOE seeking relief for violations of the 45-day rule. In 2019, the U.S. Department of Education, after an on-site investigation of NJDOE, found New Jersey to be out of compliance with federal law. And weeks later, a consortium of parent-side special education attorneys (led by this author) filed a second class action, styled *C.P. v. N.J. Dep't of Educ.*[5] In denying NJDOE's motion to dismiss in *C.P.*, Judge Noel Hillman found that "Plaintiffs have made out plausible claims that the system for the adjudication of IDEA disputes by the administrative state in New Jersey is profoundly broken and routinely violates the federal laws designed to insure that our most vulnerable children remain the priority we all should agree they are." A trial in federal court on the merits was scheduled, at this writing, in February.

So how does the "profoundly broken" due process hearing system in New Jersey interfere with settlements? First, the endemic delays undermine the ability of parents to obtain pro bono counsel, because even in light of the prevailing party fee provisions of the IDEA (undercut by insurance carriers and school boards, as discussed below), competent attorneys are reluctant to accept even the most meritorious cases, knowing that resolution will likely take nine months to a year. Both ELC and the Rutgers Clinic would surely take issue with Mr. Rubin's suggestion that anyone qualified for pro bono counsel can get one; the lines are long, and most qualified clients go unserved. And second, the delays place enormous, sometimes hydraulic, pressure on the party seeking a change (usually, but not always, the parents) to make substantive concessions unwarranted by the merits. Both of these create an obstacle to consensual resolution of cases that, by ordinary metrics, absolutely should settle.

2. School Board Insurance Coverage.

School boards have enormous institutional advantages (information, resources, staff, and so on) over parents in litigation. The additional fact that school boards in New Jersey routinely have insurance indemnifying them for the cost of defense, and often also for prevailing party fees awarded (but not in settlement), worsens the power imbalance.

When insurance was first developed, in the early twentieth century, a theory called "moral hazard" arose, cautioning that, if an actor knows it is indemnified from consequences, it will feel free to engage in activities that meet with societal disapprobation. So a restaurant generally cannot insure against fines from the Health Department. And a driver generally cannot purchase insurance against drunk driving penalties. But in New Jersey, a school board that voluntarily accepts federal funding conditioned on compliance with the IDEA is permitted to purchase insurance that covers both the cost of defense in litigation asserting a violation of that law, and also prevailing party fees, if the parent actually *proves* the violation. This creates a perverse incentive for a school board sued by a parent, to the great detriment of children with disabilities.

At the outset of any litigation, a defendant is faced with a choice. Should it seriously try to settle, or just hunker down and fight? Where insurance has not perverted the incentives, defendants behave rationally. They seriously consider settlement at the outset – weighing the cost of litigation (paying their own lawyers) and the risks of losing (liability for the merits plus, in some cases, prevailing party fees), against the benefit of proceeding. On that

basis, most defendants proceed rationally, based on informed self-interest.

But insurance skews the incentive in school law. When an insured school board is sued, it is must compare, on one hand, a potential settlement (in which the cost of education services will be borne by the district) or, on the other hand, litigation, in which an insurance company will indemnify both the district's legal fees and the risk of prevailing party fees, if it is found to have violated the law. Providing the services required by federal law requires (sometimes significant) expenditures; but fighting tooth and nail to avoid those expenditures comes at no cost to insured districts. Even if the district is eventually found liable (and even if it is obvious from the start that it will be), the cost of compliance can be pushed into a future budget year. This, far more than federal law itself, disincentivizes early agreement in special education disputes. Moreover, because of the endemic systemic delays, even parents with good cases frequently give up and go away before getting relief. And of course, this fact further perverts the incentives.

3. A Tacit but Improper Agreement by School Board and Carriers to Leverage the Broken System to Avoid Liability for Prevailing Party Fees.

School boards routinely leverage systemic delays, and access to insurance, to force parents (usually the ones who are seeking relief in these cases) to settle for far less than the merits justify, including but not limited to an unwarranted waiver of statutory fees. Moreover, insured school boards routinely demand a fee waiver as a preliminary concession before even commencing negotiation of the merits. This forces parents without the means for all-out war to accept crumbs, even if legally entitled to the entire pie. And even parents able to pay counsel are routinely forced to waive the right to reimbursement of legal fees, as the price of a "compromise." All of this, if not caused, is certainly aggravated by the availability of insurance that indemnifies prevailing party fees.

Independent Educational Evaluation (IEE) disputes provide a perfect example of the distortion of incentives caused by insurance. When a parent requests an IEE, if the school board does not commence an administrative proceeding within 20 days, it must pay for the evaluation.[6] There are policy reasons for this. For a parent who needs an IEE, justice delayed actually is justice denied. Absent indemnification, any rational school board, having missed the 20-day deadline, would agree to fund the evaluation (usually costing from $2,000 to $5,000), and even pay a few thousand dollars in attorneys' fees (if they had accrued). But the insured school board assumes neither cost nor risk by a scorched earth litigation strategy. At worst, it will have to pay for an evaluation, months or years later, that it should have funded initially. Meantime, insurance will cover the cost of its attorney, as well as prevailing party fees if it is found to have broken the law. And so, insured school boards often demand an agreement, in advance of any substantive exchange, to a fee waiver, as a condition even of negotiation. And the parent's alternative is to wait nine to 12 months for a hearing. This is nothing more, pure and simple, than school boards and insurance carriers tacitly agreeing to leverage the broken due process system, by forcing parents to choose between equally valid federal statutory rights.

Fee shifting, also called "private attorney general," provisions are enacted to promote private enforcement of government policy, in this case, the policy in favor of the enforcement of parent and student rights under the IDEA. Nothing argued by Mr. Rubin warrants undermining this policy in cases brought by "private lawyers," as opposed to "public interest lawyers." Attorneys willing to take on representation with the expectation of statutory fee shifting play a necessary role, expressly contemplated by the IDEA. The argument that "private lawyers" can contract with their clients to protect *their own* interests ignores the fact that many clients lack the means to guarantee payment to the lawyer if (when) the district and its insurance carrier insist on a waiver of the statutory right to fee shifting. These clients have no choice but to rely on meaningful fee-shifting provisions to secure competent counsel. But the tacit agreement to demand fee waivers renders that statutory right illusory. And when the IDEA statutory right to fee shifting is undermined, the harm inflicted is on children with disabilities and their parents, not on their lawyers. As Mr. Rubin rightly points out, the lawyers can take care of themselves.

Mr. Rubin

Mr. Rue is correct. As one distinguished jurist once put it, "[i]n the law, as in other professions, it is often how the question is framed that determines the answer that is received."[7] But his reframing of the question presumes the deck is so stacked against students and their families that they require advantages at the bargaining table unheard of in any other type of civil rights litigation. Again, I respectfully disagree.

I take no issue with IDEA's fee-shifting provision, but the fact remains that fee claims are often the most formidable stumbling block in reaching settlements. Mr. Rue doubles down on his opposition to fee waivers, arguing that districts also should be denied access to insurance coverage. The measures are necessary, he claims, to level the playing field for stu-

dents and their families routinely victimized by school districts and their insurance carriers nefariously leveraging delays in the hearing process for tactical advantage. Having litigated special education cases since the 1970s when the original version of IDEA was enacted, including the one resulting in the reassignment of due process hearings from the Department of Education to OAL 40 years ago,[8] I have a different perspective.

There are delays in the hearing process, to be sure, for reasons that are beyond the scope of this article. The federal courts will decide in due course whether those delays violate IDEA's timelines, but I dispute Mr. Rue's premise that they invariably work to school districts' advantage. In many cases, families benefit from those delays as well. That's because under IDEA's "stay put" clause, districts are required to continue the "current educational placement" until the dispute is resolved.

For example, let's say a district agreed to an out-of-district placement initially, because it did not have an appropriate program in-district, but later creates one that meets the student's needs. Under the Third Circuit's version of "stay put" all a family need do to delay that transition for years is request a due process hearing. Even if they're unsuccessful at OAL, "stay put" remains in effect at least until appeals to the U.S. District Court and the Third Circuit are exhausted, even if they lose there too. School districts don't get the benefit of the same rule, by the way. If the family prevails before OAL, the administrative law judge's decision automatically becomes the "stay put" placement.[9] This built-in double standard is yet another bargaining chip families have in negotiating settlements.

Stripping districts of insurance coverage isn't warranted either. Special education cases should be decided, or settled, on their merits without either side having an unfair advantage in the process. Districts without insurance are often financially unable to withstand even the remote chance of a six-figure counsel fee award and forced to succumb to families' demands for that reason alone. Mr. Rue suggests that's as it should be since the parents are the only parties who care about the student's welfare. Again, I disagree. From personal experience, I can attest that some districts will fight to spend *more* money to provide students with what they feel is the proper education. That doesn't make their position correct, but the vast majority of disputes involve honest disagreements over what's sufficient, not attempts by districts to deprive students of vital services.

Bottom line, most special education practitioners who actively litigate these cases, including many parent-side attorneys, agree that forbidding demands for fee waivers will only cause further delays in the disposition of cases and, in the end, hurt the families Mr. Rue seeks to protect. ■

Endnotes

1. 113 *N.J.* 594 (1989).
2. 200 N.J. 580 (2010).
3. *See* RPC 1.2(a).
4. *See* Court Rule 1:21-1(f); Committee on the Unauthorized Practice of Law Op. 57 (April 9. 2021).
5. (D.N.J. No. 19:12807).
6. *K.K. v. Parsippany Troy Hills,* 21 LRP 35472 (D.N.J. 2021) (Arleo, J.).
7. *Taxman v. Board of Educ. of Tp. Of Piscataway*, 91 F.3d 1547, 1567 (3d Cir. 1996)(Sloviter, C.J., dissenting).
8. *East Brunswick Board of Educ. v. New Jersey State Board of Educ.*, 554 IDELR 122 (D.N.J. 1982).
9. *See N.J.A.C.* 6A:14-2.6(u)(1).

President's Message

Continued from page 5

issues specific to young attorneys at a meeting we held recently with the managing partners of New Jersey firms. We also have a host of reference materials designed specifically to address the needs of new attorneys. The information covers everything from what they need to do to fulfil mandatory continuing legal education and *pro bono* requirements, to how to tackle student loans, to driving directions to courthouses and where to find discounts on clothes, technology and other tools necessary for launching into the profession.

Just as we jumped into action without hesitation to help the new attorney who showed up late to the swearing-in ceremony, the NJSBA stands ready to be a partner to the next generation of attorneys. ■

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COMPENSATORY EDUCATION AND THE COVID-19 PANDEMIC

Counter Perspectives on Available Relief

By Joanne Butler, Denise Rekem and Judith Weinstock

Since March 2020, students in New Jersey and across the country have been impacted by school closures due to the COVID-19 pandemic. From March 18, 2020, through the remainder of the 2019–2020 academic year, it became clear that what at first seemed temporary, was in fact going to require a significant pivot in the provision of education. During the 2020–2021 academic year, students throughout New Jersey experienced a mix of remote, hybrid and in-person learning as a result of the pandemic. Throughout this significant length of time, students with special education needs were not able to access and/or benefit from many of the services and supports outlined in their Individualized Education Plans (IEP) under the Individuals with Disabilities Education Act (IDEA). On March 12, 2020, at the start of the pandemic, the United States Department of Education (USDOE) issued guidance requiring "to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504."[1] Shortly thereafter, on April 27, 2020, former United States Secretary of Education Betsy DeVos notified Congress that she was not requesting a waiver of "any core tenants of the IDEA"[2] and Congress has not waived students' entitlement to a free appropriate public education (FAPE), including implementation of their IEPs.

Both the USDOE and the New Jersey Department of Education (NJDOE) have since issued various guidance that discuss

the need for school districts to assess the need of each student to determine if they require compensatory education as a result of their not receiving FAPE.

What is Compensatory Education?

The IDEA requires that school districts provide students with disabilities with FAPE to meet their individual needs. To accomplish this goal, a student is provided with an IEP which is specifically designed to meet that individual student's needs and allow them to make meaningful educational progress. Compensatory education is not included among the protections of the IDEA, but is an equitable remedy long recognized by courts to provide additional services and support to students who have been denied FAPE or whose IEPs have not been fully implemented as written. The Third Circuit Court of Appeals held that compensatory education "aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of IDEA, by providing the educational services children should have received in the first instance."[3]

It is important to note, especially when discussing compensatory in the context of COVID-19, an award of compensatory education does require fault on the part of the school district and its purpose is not to be a levy of damages. Rather, compensatory education focuses on the student's needs and seeks to remedy the loss of special education services regardless of the cause of the loss.

COVID-19 Compensatory Education: NJDOE Guidance

On March 3, 2021, the NJDOE issued Guidance for Determining Compensatory Education for Students With Disabilities.[4] The NJDOE advised that students with disabilities who did not receive the services included in their IEPs may be entitled to compensatory education if it is determined that the failure to provide those services caused a denial of the student's right to FAPE. The NJDOE discussed some of the ways in which school districts and parents could analyze whether the provision of special education and related services during COVID-19 denied the individual student's entitlement to FAPE, including review of formative and summative, as well as formal and informal assessment, data to determine progress toward each student's IEP goals and objectives during the period of remote and hybrid instruction. The analysis was to have taken place at the next IEP meeting, whether virtual or in person, or at a meeting once in-person instruction resumes, to determine the services that were not provided during remote or hybrid instruction and the impact of those missed services on the student's progress toward their IEP goals and objectives. If the student's progress was impacted by missed services, compensatory education is required. The IEP team would then determine the nature, frequency and duration of services.

COVID-19 Compensatory Education: USDOE Guidance

In its Sept. 30, 2021, Return to School Roadmap Guidance, the USDOE provided its most specific recommendations to address compensatory education entitlements due to the impact of COVID-19.[5] The USDOE stressed that all compensatory education decisions must be made on the individual student's present level of academic and functional performance

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such that the IEP team can determine whether, and to what extent, compensatory services may be needed to mitigate the impact of services received during the pandemic on the student's receipt of appropriate services required under the IEP. USDOE also provided guidance for using extended school year (ESY) services (which need not be limited to the summer months) as compensatory education services, although the compensatory services cannot be used in place of ESY services to which a student may be entitled under their IEP.

New Jersey Legislative Action Extending Educational Access

The IDEA requires that students who are eligible for special education and related services be offered such programs through the end of the school year in which they turn 21. New Jersey's Legislature acted to combat COVID-19's school and business restrictions by extending services to eligible students beyond age 21. Commonly referred to as S-3434, the legislation provides that students turning 21 during the 2020–2021, 2021–2022 or 2022–2023 school years could receive additional or compensatory special education and related services, including transition services, during the next school year.[6]

While the Bridge Year Pilot Program is not limited to classified students, its protections enable parents and local school districts to agree that individual students in the graduating classes of 2021 and 2022 could access an additional year to address learning loss and missed opportunities for extracurricular activities due to COVID-19.[7]

New Jersey Legislative Action Extending Statute of Limitations for COVID Claims

On March 3, 2022, Gov. Phil Murphy signed S905/A1281, which extends the statute of limitations for filing a due process petition regarding the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE, during the COVID-19 school closure or periods of virtual, remote, hybrid, or in-person instruction between March 18, 2020, and Sept. 1, 2021. The latest date you can now file due process for these claims is Sept. 1, 2023.

The new law directs school districts to hold IEP team meetings no later than Dec. 31, 2022, to discuss the need for compensatory education and services for all students who had an IEP at any time between March 18, 2020, and Sept. 1, 2021. Districts must provide notice to parents or guardians that a purpose of the meeting is to discuss the need for compensatory education and services for the period from March 18, 2020, to Sept. 1, 2021. Following the meeting, written notice must be provided indicating all compensatory education determinations made by the IEP team and all compensatory education services agreed to must be documented in the IEP, including frequency, duration, location, and agreed upon time period for delivery. A parent or guardian may thereafter file for a due process hearing if they disagree with the compensatory education determination at any time, up to and including Sept. 1, 2023. The law specifically does not apply to students covered by S-3434 discussed above.

COVID-19 Compensatory Education: Board Attorney Perspective (Joanne Butler)

COVID-19 changed education forever. Educators and providers learned and implemented largely unfamiliar ways to instruct, relying on technology more than textbooks, sharing screens instead of blackboards. This Herculean effort, however, sometimes is overlooked by those who focus on what was not done, or what was not done to the complete satisfaction of those voicing their opinions. There can be no presumption that all students, across the board, in all school districts, were harmed by the metamorphosis of elementary and secondary education occasioned by COVID-19. Similarly, there can be no presumption that all students who experienced difficulties due to hybrid or remote instruction were denied FAPE and, therefore, are entitled to compensatory education.

The compensatory education analysis requires an identification and quantification of what services were missed, followed by a comparison of the student's anticipated progress and actual progress. The former is relatively simple. The latter, however, comparing expectations and reality, is the more complex analysis. Data is critical here, whether formal or informal assessments. Input from the student's teachers and providers as to the student's day-to-day functional performance also is an integral part of the analysis. Teams also must consider information provided by the parents. There is no disagreement that there will be gaps between where some students were expected to function at the end of their annual IEPs and where the students actually functioned. The presumption, however, that all lack of progress is solely attributable to a deficiency in the educational services received is too simple.

Just as pre-COVID IEP teams would consider factors completely independent of a student's educational program that may have negatively impacted the student's performance, COVID-era IEP teams must do the same. Our children were hurled into a whole new world in March 2020, a world which not only kept them home from school but kept their parents or child care providers home

from work. Families were huddled together, sometimes jockeying for Wi-Fi, but were otherwise isolated. In too many instances, families also were battling, and losing, the war that is COVID. Compensatory education obligations arise only where there was a failure by the local public school to provide the services required by the IEP and that failure impeded the student's progress.

There is a wealth of case law that discusses how and when to provide compensatory education. In 2015, the Third Circuit in *G.L. v. Ligonier Valley School District Authority* acknowledged that compensatory education aims to place disabled children "in the same position they would have occupied but for the school district's violation of the IDEA."[8] However, there appears to be a misconception that the Third Circuit mandates a one-to-one compliance. This is erroneous. In *Lester H. by Octavia P. v. Gilhool*, the Third Circuit upheld a District Court award of 30 months of compensatory education services, representing more than a year that the student remained in his day placement and more than a year and a half that he received five hours of home instruction per week instead of being placed in the residential placement required by his IEP. The Third Circuit affirmed the District Court's determination, noting that the District Court "left ample room for the exact contours of the remedy to be shaped."[9] Neither pre-COVID Court ordered that the school district provide all the services missed as compensatory education, which included residential services, each day, for 30 months.

In the COVID era, the NJDOE specifically declared that "Neither the IDEA nor the State's special education regulations require a 1:1 ratio when calculating the amount of compensatory education to be awarded to a student with a disability."[10] One-to-one correspondence is not required, but the IEP team must make individualized decisions based on missed services due to the public school's action, the impact of those missed services, and how to ameliorate the loss. Using all of the information critical to the compensatory education analysis, New Jersey IEP teams, including parents, have determined whether, how much, and how to implement compensatory services. Targeting the areas where anticipated progress was not met, additional services have been provided, and will continue to be provided for some time, based upon individual needs. Many local school districts started providing compensatory education services well before the NJDOE March 2021 guidance, providing ESY and extended day services as early as Summer 2020, targeting those individual students whose learning losses were most significant and tailoring the programming to address those deficits. During the 2020–2021 and the current 2021–2022 school years, schools have continued to work toward addressing the needs of those specific students whose ability to derive meaningful benefit during COVID has been hampered.

COVID-19 Compensatory Education: Parent Attorney Perspective (Denise Rekem, Judith Weinstock)

The IDEA ensures that "all children with disabilities are entitled to a free appropriate public education (FAPE) to meet their unique needs and prepare them for further education, employment and independent living." FAPE is provided through the development of the IEP, which contains the individual services a student requires to make meaningful educational progress. IDEA's statutory definition of FAPE includes providing special education and related services in conformity with the student's IEP.[11] As a result of the COVID-19 pandemic, the receipt of FAPE was compromised for most students when student IEPs were not fully implemented. When the pandemic started in March 2020 during the last months of the 2019-2020 academic year, most schools were providing asynchronous learning via worksheets or online videos, and many students lacked the technology to even access that instruction.

A student is entitled to compensatory education if the student's IEP did not provide FAPE or the IEP was not implemented as written. According to Third Circuit precedent compensatory education should be provided on a 1:1 basis.[12] For example, if 30 speech and language sessions were not provided, the student is entitled to have those sessions provided as compensatory education. In the example of *Lester H.*, the court clearly used a 1:1 approach, awarding 30 months of compensatory education for 30 months of not receiving a FAPE. Unlike most COVID cases where parents are looking for compensatory services now, though, in *Lester H.*, the services were to be added to the end of the student's eligibility or after the student turned 21. Since the student was only 12 at the time of the decision, the court said the parents and school personnel could decide closer in time as to what specific services the student needed during the 30 months of additional education. In *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260 (3d Cir. 2014), the student was awarded compensatory education in the amount of "one hour for each hour of each school day for each year he attended [Central Dauphin and]...fifteen hours for each of the six weeks for missed summer programs for the years from 2000 to 2004." This hour-for-hour approach totaled 10,000 hours of compensatory education using a 1:1 ratio. In *G.L. v. Ligonier Valley School Dis-*

trict Authority, the court stated that the aim of compensatory education is to place the student "in the same position they would have occupied but for the school district's violation of the IDEA 'by providing the educational services children should have received in the first instance.'" During the COVID-19 pandemic many, if not all, students did not receive their IEP services for the frequency set forth in their IEPs thus entitling them to compensatory education.

Another common occurrence during the pandemic was services provided virtually as opposed to the in-person instruction required in the IEP. New Jersey State Board of Education enacted temporary regulations effective April 1, 2020, allowing IEPs to be implemented virtually, through online platforms or telephonically but only "as appropriate."[13] While some students benefited from the virtual model, for others virtual instruction was not appropriate and did not allow the student to make the same rate of progress they were expected to make with in-person instruction. Here again, compensatory education is indicated. In addition, students referred for evaluation and not evaluated within IDEA timelines may be entitled to compensatory education for the period of time of the delay if they were subsequently found eligible for special education and related services.

Given that Congress did not choose to waive IDEA requirements during the pandemic, students that did not receive FAPE due to COVID-19 disruptions are entitled to all rights and remedies as students that were denied FAPE prior to the pandemic. The use of a regression/recoupment standard, such as is used to determine ESY services and suggested by the NJDOE in its March 3, 2021, guidance, is not the appropriate standard for determining compensatory education. A regression standard would deny students a year and a half of learning as a student who retained knowledge from prior to March 2020 but learned no new skills since then would be left with no remedy. Compensatory education is required when a student's IEP has not been fully implemented or the virtual instruction was not appropriate for them.

Congress chose not to waive any of IDEA's core requirements during COVID and it requires that students with disabilities who were affected be made whole. This is the law. Compensatory education is not meant to punish the school district or to suggest that teachers, administrators, parents and school boards did not work tirelessly to limit the impact of the pandemic on students. Compensatory education should not be viewed as a failure by the school. It is simply the entitlement of the student under the IDEA to have their IEPs fully implemented and to receive instruction that is appropriate.

Conclusion

As our schools move forward serving our special needs students with enhanced creativity and technology, the issue of compensatory education will continue to dominate discussions between and among board and parent attorneys. This debate will not disappear until well after the pandemic has ended, and we can expect to see new case law on COVID-era compensatory education in the years to come. ■

Endnotes

1. 34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504). sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf
2. www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf.
3. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 608 (3d Cir. 2015). nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminingCompensatoryEducationforStudentswithDisabilities.pdf
4. nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminingCompensatoryEducationforStudentswithDisabilities.pdf.
5. *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals With Disabilities Education Act*; OSEP QA 21-06.
6. P.L.2021, c.109, enacted 6/16/21, legiscan.com/NJ/text/S3434/2020.
7. P.L.2020, c.41, enacted June 26, 2020 njleg.state.nj.us/2020/Bills/PL20/41_.PDF.
8. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d at 608.
9. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).
10. nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminingCompensatoryEducationforStudentswithDisabilities.pdf
11. 20 U.S.C. § 1401(9).
12. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)
13. nj.gov/education/sboe/meetings/agenda/2020/April/public/5d%20Item%20D%20Special%20Education%20revised.pdf.

Unilateral Placements

Private School Tuition Reimbursement in New Jersey

By Debra A. Clifford and Mary Frances Palisano

When the parents of a student with a disability and the student's public school district disagree about the child's special education program, the parents are often at a crossroad about what to do. Some may choose to unilaterally place their child in a private or nonpublic school at their own expense and, subsequently, seek reimbursement from the district through a due process proceeding. Parents in such instances must follow very specific notice requirements before proceeding to avoid forfeiting their right to tuition reimbursement. This article reviews the applicable statutory provisions at issue when considering a unilateral placement.

The need for a change in a student's placement occurs in many situations. A school district may not have the appropriate program to meet the child's educational needs. Children may have behavioral issues that are not adequately addressed because the district does not have the appropriate facilities, staff, or programs to meet the child's needs. A child may also have an appropriate Individual Education Plan (IEP) in place, but it may not be properly implemented. Other children may have mental health

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issues that require a unique program or more intensive interventions. In addition, the return to school after virtual learning implemented during COVID-19 proved challenging due to learning loss, regression and/or mental health issues as the result of or exacerbated by the COVID-19 pandemic.[1] In such instances, the question becomes whether the child's current public school can provide what is needed through appropriate programs, services, and accommodations.

Ideally, when such a situation arises, the school district and parents would agree that the current school setting does not and cannot provide what the student needs, and the student's IEP is amended to provide an out-of-district placement. This simply means that, on the recommendation of the district's child study team, the student is placed at a specialized school or program outside the local school district at the district's expense, unless there is an agreement that the parents contribute financially. Out-of-district placements are schools outside of the home district, including placements at another public school district, specialized education schools, charter schools, parochial schools, and residential schools. Some schools are specialized for a particular disability (*e.g.*, St. Joseph's School for the Blind), while others provide learning for students with various disabilities (*e.g.*, ADHD, dyslexia, auditory processing disorder). Students with more pervasive disabilities or significant mental health issues may require a residential placement, some of which are located outside the state. These placements may be on New Jersey's approved private school lists[2] or students may also be placed in accredited nonpublic schools, which are not specifically approved by the state.[3]

When a public school district and parents disagree about whether a child is receiving an appropriate education in the public school district, the situation becomes more challenging, and a unilateral placement may be considered by the parents.

Defining a Unilateral Placement

A unilateral placement simply means the student is placed out-of-district by the parents, who believe their child is not being provided with a free and appropriate public education (FAPE),[4] after a disagreement and without a referral from the home public school district, at their own expense. The parents may then seek reimbursement from the public school district through a due process proceeding.[5] The Individuals with Disabilities Education Act (IDEA) and New Jersey regulations specifically authorize the remedy of private school tuition reimbursement where a public school district has failed to offer an appropriate education to a student with disabilities who has been deemed eligible for special education services.[6] Ultimately, New Jersey parents who unilaterally place their children out-of-district are responsible for tuition absent a settlement agreement with the school district, a ruling by an administrative law judge, or a decision by an appellate court after an appeal has been filed.[7]

Requirements for Tuition Reimbursement

There are three factors courts consider in determining whether reimbursement is required: (1) whether the district provided FAPE; (2) whether the private school chosen by the parents is appropriate; and (3) whether equitable considerations favor an award of tuition, including whether the parents followed proper notice requirements.[8] The first step in determining whether reimbursement is required is whether the school district made FAPE available to the student in a timely manner prior to the enrollment in private school.[9] New Jersey regulations track the federal requirement that a school district is not required to pay for the cost of education of a student with a disability if the district provided FAPE.[10] A child's FAPE is implemented through an IEP, which allows for an array of placement options.[11]

The court next considers whether the unilateral placement is appropriate, which the parents are required to demonstrate at the due process proceeding.[12] Notably, a unilateral placement does not need to be a school specifically approved by the state for the education of students with disabilities for it to be deemed appropriate.[13] Moreover, unilateral placements are not held to the same FAPE standards as public schools.[14] The appropriateness determination is fact-sensitive and includes a review of the student's individual educational needs, academic progress, and emotional needs. The Third Circuit Court of Appeals has determined that parents seeking reimbursement for a unilateral placement show that the private placement "provides significant learning and confers meaningful benefit."[15]

Finally, equitable considerations are addressed, including whether the parents complied with the notice requirements under applicable laws.[16] Reimbursement may be reduced or denied if the following procedural requirements are not met:

Formally Reject the IEP

In New Jersey, if parents intend to seek tuition reimbursement, they must reject the IEP at the most recent IEP meeting.[17] If the IEP has not been rejected *at an IEP meeting*, annual or otherwise, parents should first request an IEP meeting in writing to discuss their concerns and determine whether the district will agree to an out-of-district placement. If the IEP team determines that the school district is not able to provide FAPE, and, as such, agrees to an out-of-district placement, the parents will not need to pursue a unilateral placement. To the extent that the district disagrees with the parents that an out-of-district placement is necessary, the parents should formally reject the

IEP proposed by the district. It is also recommended to notify the team of their concerns and intent to make a unilateral placement, then follow up with a letter as detailed below.

10-Day Written Notice

Parents must provide the district with written notice at least 10 days (excluding weekends and holidays) *prior* to unilaterally placing the student in a private school, advising the school district of the intent to enroll the student in a nonpublic school at public expense and detailing parental concerns.[18] This 10-day notice requirement is designed to permit a school district sufficient time to propose a new IEP in an attempt to remedy the parents' concerns prior to the student leaving the school district. To preserve the possibility of tuition reimbursement, neither removal nor enrollment should occur until the 10-day time period has expired. Although there is some debate by practitioners about what "removal" means, to avoid a denial or reduction of reimbursement, it is recommended that parents should not sign an enrollment contract, make a down payment or deposit, or engage in any other activity to reserve a student's place in a private school, as this may be viewed as a "removal" under the 10-day notice rule pursuant to IDEA and corresponding New Jersey law.

Parents Must Act Reasonably

Federal and state law both provide that reimbursement may be reduced or denied if parents are not reasonable.[19] While a determination of unreasonableness is fact-specific, compliance with the above requirements may preclude such a finding. Before requesting an out-of-district placement, parents should document their concerns and cooperate with the district in an effort to meet the child's needs, such as trying a different program offered by the district or agreeing to additional services. Documenting any lack of progress and efforts to obtain further support is also important to a tuition reimbursement request. Also, if the district has provided written notice of its intent to evaluate the child before removal from the public school, parents should make the student available to the district for evaluation in order to protect the claim for reimbursement.[20]

Administrative law judges have reduced or denied tuition reimbursement on the grounds of parental unreasonableness where the parents failed to, for example, reject the IEP during the most recent IEP meeting, provide a 10-day written notice, and/or make the child available for evaluation.[21]

Differences Between State and Federal Notice Requirements

New Jersey laws appear to be more stringent than IDEA regarding unilateral placements. Prior to placement, the IDEA provides parents the option to either notify the IEP team at the most recent meeting that they are rejecting the IEP, including stating their concerns and intent to enroll their child, at public expense, in a nonpublic school *or* provide 10 business days written notice of same.[22] New Jersey regulations appear to require both rejection at the IEP meeting *and* 10 days written notice as the regulations do not include an "or" in between those requirements.[23] If an IEP meeting needs to be scheduled, the IEP meeting requirement affords the school district more time to remedy the parental concerns, but also causes the child to temporarily remain in a school setting where they are not getting what they need. Although there is some debate in New Jersey about whether both forms of notification are required for a unilateral placement because New Jersey's requirements appear to require more of parents than federal law, it is recommended that parents and practitioners comply with both the formal rejection of the IEP at the most recent IEP meeting and the 10-day notice requirement to avoid a denial or reduction in tuition reimbursement.

Exceptions to State and Federal Notice Requirements

The IDEA and New Jersey regulations also have different exceptions.[24] Both state that reimbursement shall not be reduced or denied for failure to provide notice if the school district prevented the parent from providing notice and the parents were not advised of the statutory notice requirements.[25]

The IDEA further states that reimbursement may not be reduced or denied in the discretion of a court for failure to provide notice if the parent is illiterate *or* would likely cause serious emotional harm to the child.[26] New Jersey regulations provide that, at the discretion of the administrative law judge or court, reimbursement may not be denied if the parent is illiterate *and* compliance with the notice requirements would likely result in serious emotional or physical harm to the student.[27]

Due Process Proceeding

Compliance with the aforementioned requirements does not automatically trigger tuition reimbursement. If the parents and the school district do not amicably resolve the parental concerns during the 10-day notice period, the parents must then seek tuition reimbursement by filing a due process petition against the school district. Pursuant to New Jersey regulations that track the IDEA, a due process request, "shall be filed within two years of the date the party knew or should have known about the alleged action that forms the basis for the due process petition."[28] At that point, the matter will be resolved by way of settlement agreement or after a due process hearing. In New Jersey, a due process hearing is considered an administrative proceeding that takes place in the Office of Administrative Law before an administrative law judge. Parents can file a due

process petition *pro se* or hire an attorney to assist with the process, which, given the procedural requirements discussed in this article, is highly recommended.[29]

Conclusion

In an ideal world, parents and school districts would agree on the proper placements for children, but this is often not the case. In the face of a disagreement, parents may decide unilaterally to place the child at a private school and file an administrative due process proceeding seeking reimbursement of tuition costs. Because these cases are highly fact-sensitive and the law details specific procedural requirements, it is critical that parents and practitioners be familiar with the process before making the unilateral decision to place a child in a private school. ■

Endnotes

1. *See* cnbc.com/2021/03/30/learning-loss-from-virtual-school-due-to-covid-is-significant-.html; jerseycan.org/blog/jerseycan-releases-first-new-jersey-public-study-on-covids-impact-on-learning-loss/; rutgers.edu/news/back-school-brings-mental-health-challenges-rutgers-steps-efforts-help.
2. homeroom5.doe.state.nj.us/apssd/; nj.gov/education/specialed/outofstate/.
3. *See* N.J.A.C. § 6A:14-6.5; N.J.S.A §18A:46-14. Placements at an accredited nonpublic school are commonly known as Naples placements and must be done with the consent of the Commissioner of Education or ordered by an administrative law judge in a due process proceeding.
4. N.J.A.C. § 6A:14-1.1 tracks the federal FAPE standard set forth in the IDEA at 20 U.S.C. § 1401(3)(A)(9) and the Code of Federal Regulations at 34 C.F.R. § 300.17; *see also Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 232 (2009). Moreover, the seminal case *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017), found that a public school must provide an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."
5. *See* N.J.A.C. § 6A:14-2.10; 20 U.S.C. § 1412(a)(10)(C); *see also Munir ex rel. O.M. v. Pottsville Area Sch. Dist.,* 723 F.3d 423, 426 (3d Cir. 2013).
6. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); N.J.A.C. § 6A:14-2.10(b); *see also Forest Grove*, 557 U.S. at 247; *see also generally Sch. Comm. of the Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985) (finding reimbursement available to parents when a public school program was inappropriate).
7. *See* N.J.A.C. § 6A:14-2.10.
8. *See generally*, *Sch. Comm. of the Town of Burlington,* 471 U.S. at 359; *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *see also T.R. ex rel. v. Kingwood Twp. Bd. of Educ.*, 205 F. 3d 572, 582 (3d Cir. 2000); *Forest Grove*, 557 U.S. at 230.
9. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa); N.J.A.C. § 6A:14-2.10(b).
10. *See* N.J.A.C. § 6A:14-2.10(a); 20 U.S.C. § 1412(a)(10)(C)(i).
11. *See* N.J.A.C. § 6A:14-4:3.
12. *See* N.J.A.C. § 6A:14-2.10(b); 20 U.S.C. § 1412(a)(10)(C)(i); *see also T.R. ex rel.*, at 205 F.3d at 582.
13. *See* N.J.A.C. § 6A:14-2.10(b) and N.J.A.C. § 6A:14-6.5.
14. *See* N.J.A.C. § 6A:14-2.10(b); *see also Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1078 (D.N.J. 2011).
15. *Mary Courtney T. v. Sch. Dist.*, 575 F.3d 235, 242 (3rd Cir. 2009)(quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 276 (3d Cir. 2007)).
16. *See* N.J.A.C. § 6A:14-2.10(b)-(d); 20 U.S.C. § 1412(a)(10)(C)(iii).
17. N.J.A.C. 6A:14-2.10(c)(1)
18. N.J.A.C. 6A:14-2.10(c)(2).
19. 20 U.S.C. § 1412(a)(10)(C)(iii)(III); N.J.A.C. 6A:14-2.10(c)(4); *see also Forest Grove*, 557 U.S. at 247.
20. *See* N.J.A.C. 6A:14-2.10(c)(3).
21. *See* N.J.A.C. 6A:14-2.10(c)(4); see N.J.A.C. 6A:14-2.10(c)(4); *I.G. et al. v. Linden City Bd. of Educ.*, No. 20-12761, 78 IDELR 273 (D.N.Y. June 8, 2021)(upholding finding that the parents failed to act reasonably because they did not collaborate with the district to resolve the issues); *M.I. ex rel. M.I. v. North Hunterdon-Voorhees Reg'l High Sch. Dist. Bd. Educ., No. 20-870, 78 IDELR 259* (D.N.Y. Apr. 30, 2021)(rejecting finding that a parent acted unreasonably where parent and student attended meetings with district personnel and visited the public school the student would attend).
22. 20 U.S.C. §1412(a)(10)(C)(iii)(I) (aa) and (bb).
23. N.J.A.C. 6A:14-2.10(c)(1) and (2).
24. 20 U.S.C. § 1412(a)(10)(C)(iv); N.J.A.C. 6A:14-2.10(d).
25. *Id*.
26. 20 U.S.C. § 1412(a)(10)(C)(iv).
27. N.J.A.C. § 6A:14-2.10(d).
28. N.J.A.C. § 6A:14-2.7 (a)(1); *see also* 20 U.S.C. § 1415(f)(3)(c).
29. The IDEA has a statutory fee-shifting provision that allows courts to award attorneys' fees to a prevailing party. *See M.R. v. Ridley Sch. Dist.*, 868 F.3d 218, 224 (3d Cir. 2017).

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HOME INSTRUCTION

A Practitioner's Guide

By Karen Edler

N.J.A.C. 6A:16-1.3 defines home instruction as "the provision of one-to-one, small-group, or online instruction in the student's place of residence or other appropriate setting due to a health condition, need for treatment, court order, or exclusion from general education for conduct or safety reasons." This definition is straightforward, but its implementation has a myriad of variables.

Medical Home Instruction

All enrolled[1] students with temporary or chronic health conditions or who need treatment are entitled to receive home or out-of-school instruction[2] "when the student is confined to the home or another out-of-school setting."[3] This medical home instruction is available for general education students from kindergarten through 12th grade and special education students ages 3 to 21. Parents seeking medical home instruction must provide the school district with written medical documentation requiring for home instruction for "more than 10 consecutive school days or 20 cumulative school days during the school year."[4]

This medical documentation must include the student's diagnosis, the medical necessity for the request and the expected date of return. Parents should contact the child's guidance counselor or principal prior to submitting the medical documentation to ensure that it will comply with their school district's specific requirements. The school district must forward it to the school's physician for approval. The school's physician may contact the student's doctor to determine the medical necessity for home instruction. The school's physician will either approve the request or advise the Board of Education of the reason for its denial.[5] The district must notify the parents within five school days of its receipt of the school physician's determination. If approved, home instruction must start within five school days of the district's receipt of the determination.[6]

Once approved, school districts must provide a plan of

home instruction which allows the continuation of the student's academic progress and documents the student's instructional services and progress. For general education students this plan is an Individualized Program Plan (IPP)[7] which "sets forth the student's present level of performance, measurable goals and short-term objectives or benchmarks that encompass behavioral and social competency as well as curriculum, and individually designed instructional activities to achieve the goals and objectives."[8] This home instruction plan must meet the district's requirements for promotion to the next grade and the New Jersey Student Learning Standards. The school physician must refer the student to the child study team if the student's home instruction will exceed 60 calendar days.[9] For special education students, medical home instruction must be consistent with the student's individualized education plan (IEP) "to the extent appropriate"[10] and the New Jersey Student Learning Standards. The IEP team must convene an IEP meeting to review and potentially revise the students IEP if home instruction will exceed 30 consecutive school days.[11]

Medical home instruction must, at a minimum, be given by a certified teacher who provides instruction "for the number of days and length of time sufficient to continue the student's academic progress" depending on "the student's ability to participate."[12] Additionally, whenever home instruction is done at the student's home, a parent or an adult designated by the parent must be present.[13]

Disciplinary Home Instruction

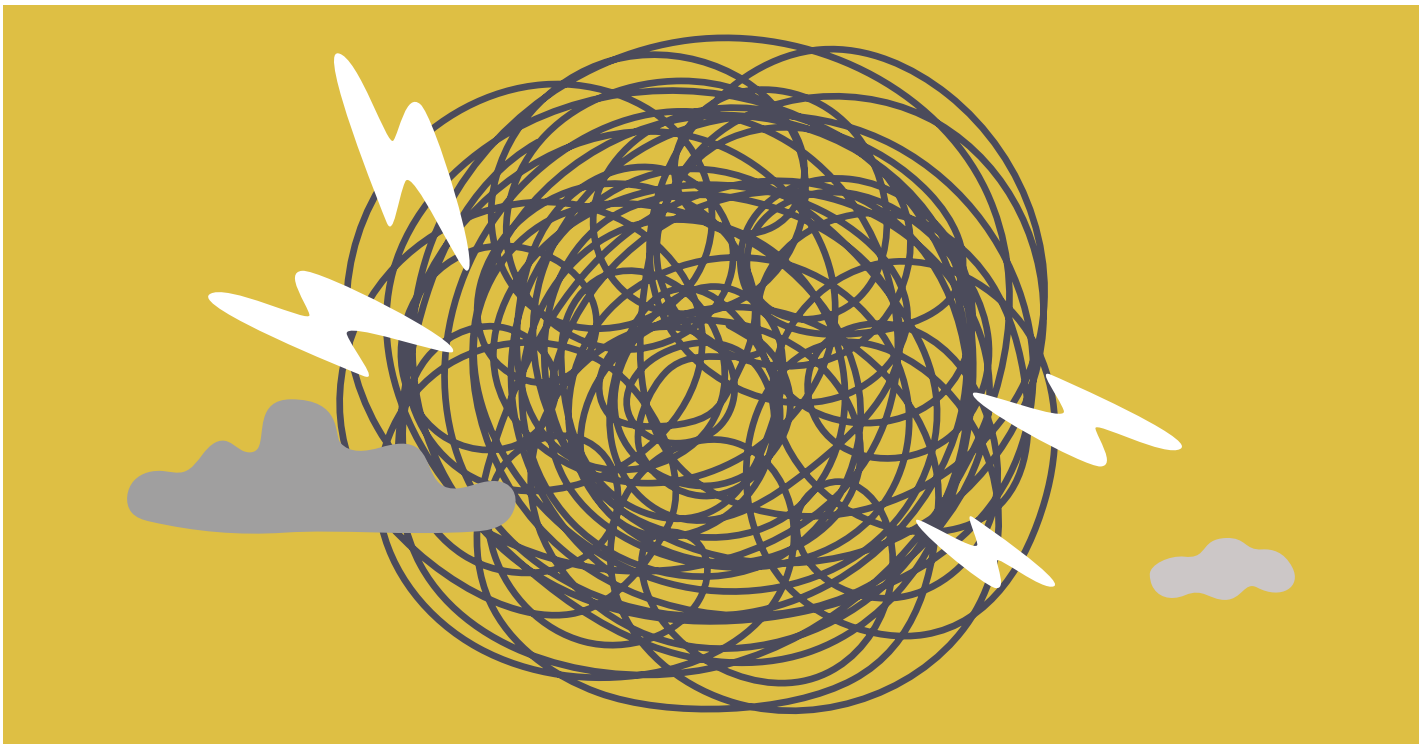
Home instruction for general education students for reasons other than health conditions may be at the student's home or other out-of-school setting if: (1) the student is placed in an alternate education program but the program is not available; (2) the student's discipline results in a short- or long-term suspension; or (3) a court orders the student's instruction to be provided in the home or other out-of-district setting.[14] This disciplinary home instruction must commence "no later than 5 school days after the student has left the general education program."[15] The school district must still have an IPP, use a certified teacher, and meet the district's requirements for promotion to the next grade and the New Jersey Student Learning Standards;[16] however, the minimum standards for provision of disciplinary home instruction are different. The certified teacher must provide "one to one instruction for no fewer than 10 hours per week on 3 separate days of the week and no fewer than 10 hours per week of additional guided learning experiences that may include the use of technology to provide audio and visual connections to the student's classroom."[17]

Special Education Home Instruction

Pursuant to N.J.A.C. 6A:14-4.8, special education students' IEPs may be implemented through home instruction if the IEP team agrees that no other less-restrictive placement is appropriate. The school district must give the New Jersey Department of Education, through the county education office, both prior written notice of this home instruction placement and renewal notices every 60 days during this IEP home instruction placement. The school district must maintain "[a] written record of the student's home instruction, including dates and times during which home instruction is provided."[18] The certified teacher must be certified as a teacher of students with disabilities or certified for the subject matter or level of instruction provided to the student. The delivery of services must be for a minimum of 10 hours per week on no less than three separate days of the week. The district must: (1) provide instruction "at a location conducive to providing educational services, taking into consideration the student's disability and any unique circumstances;"[19] and (2) consult with the parents in determining the location. If given at home, a parent or designated adult must be present. If a parent refuses to make the student available for home instruction, the school district must decide if the student qualifies as truant.[20] ■

Endnotes

1. The district also has an obligation to provide home instruction to students enrolled in a non-public school located within the area served by the district Board of Education. N.J.S.A. 18A:46A-1 *et seq.*; N.J.A.C. 6A:16-10.1(b).
2. "Home or out of district instruction" is referenced as just "home instruction."
3. N.J.A.C. 6A:16-10.1(a)
4. N.J.A.C. 6A:16-10.1(a)(1)
5. *Id.*
6. N.J.A.C. 6A:16-10.1(a)(2)-(3)
7. N.J.A.C. 6A:16-1.3
8. *Id.*
9. N.J.A.C. 6A:16-10.1(c)(5)
10. N.J.A.C. 6A:16-10.1(c)(4)
11. *Id.*
12. N.J.A.C. 6A:16-10.1(c)(3)
13. N.J.A.C. 6A:16-10.1(d); N.J.A.C. 6A:16-10.2(e)
14. N.J.A.C. 6A:16-10.2(a)
15. N.J.A.C. 6A:16-10.2(b)
16. N.J.A.C. 6A:16-10.2(d)
17. N.J.A.C. 6A:16-10.2(d)(3)
18. N.J.A.C. 6A:14-4.8(a)(3)
19. N.J.A.C. 6A:14-4.8(a)(5)
20. N.J.A.C. 6A:14-4.8(a)(6)



School Districts Compelled to Face Head-On a Rise in Emotional Regulation Impairments

By Mariann Crincoli

More than a year of living in a pandemic with fear and anxiety about the uncertainty of the disease, feeling isolated, lonely and sad about the loss of loved ones, experiencing social distancing and novel learning platforms has taken a toll on many students' mental health. In fact, pediatricians, child and adolescent psychiatrists, and children's hospitals have declared a national state of emergency for child and adolescent mental health.[1] Adolescents, young children, LGBTQ youth and children of color have been particularly vulnerable to the consequences of the pandemic. More than 25% of high school students reported worsened emotional and cognitive health and more than 20% of parents with children ages 5–12 reported their children experienced a decline in emotional health. A survey of LGBTQ youth found that 73% LGBTQ respondents aged 13–17 reported symptoms of anxiety and 67% reported depression while a staggering 48% reported serious thoughts of suicide.[2]

The significant impact to school-aged children throughout the 2020–21 school year has been consistently confirmed across the country by educators, parents, and administrators who continue to cite social and emotional well-being as major obsta-

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cles facing their students.[3] Amid logistical challenges, budgetary and staffing shortages, school districts have faced ongoing difficulties to meet the needs of struggling students. According to the National Association of Elementary School Principals, nearly 70% of school principals who participated in a survey conducted early in 2021 said they could not meet the needs of this population.[4]

What School Districts are Doing to Help

In response to the rise in emotional regulation impairment among school-aged children, school districts have been compelled to confront these cases head on. One way in which school districts have attempted to combat the stressors associated with the COVID-19 pandemic is to institute more intensive social emotional learning initiatives. Social emotional learning has become a critical part of the curriculum in many schools across the country where mindfulness and responsive classroom instruction are taught. Additionally, some public school districts are partnering with therapeutic day schools or other therapeutic entities to provide individual and group counseling to students during the school day while other districts have established therapeutic learning environments within their public school buildings for the emotional regulation impaired population. School-based therapeutic programs may even offer family therapy as part of the curriculum, recognizing that parents/guardians and other caregivers can help to support improved emotional regulation skills in their children across all settings. Some school-based therapeutic interventions can also include specialized therapeutic modalities like dialectical behavior therapy which teaches emotional regulation and distress tolerance skills. While these supports and services demonstrate movement toward recognizing the importance of the social and emotional well-being of students, like any other disability, there cannot be a one-size-fits-all approach for students with emotional regulation impairment.

Governing Laws

Whether a student with emotional deficits qualifies for reasonable accommodations under a Section 504 Plan or an individualized educational plan (IEP), the services and supports must be individualized and confer upon the student a free and appropriate public education.

Under Section 504, a student with a physical or mental impairment (i.e. anxiety, depression, etc.) that substantially interferes with one or more major life activities (i.e. concentrating, learning, attending school, participating in class) is entitled to reasonable accommodations and a 504 Plan.[5] The first key to entitlement under Section 504 is a diagnosis. If a child is suffering from anxiety or some other form of emotional impairment that is impacting her educationally, a diagnosis from a psychologist or medical doctor as well as proof of a substantial limitation on one or more major life activities is necessary in order for accommodations to be warranted. For some children with anxiety, accommodations could include extra time on assignments, frequent breaks, modified work, clear and concise directions, copies of class notes, supplemental instruction, flexible schedules, or even counseling. The accommodations should serve to level the playing field for the student with the impairment as compared to her neurotypical peers.

Emotional Regulation Impairment Defined

When accommodations pursuant to a 504 Plan are not sufficient to allow a child to meaningfully access education, or a child's anxiety (or other emotional impairment) is so severe that specialized instruction becomes necessary, a referral to the child study team is justified. Of the 14 categories of classification, there is one category specifically applicable to students with emotional deficits, namely, emotional regulation impairment (formerly, emotional disturbance). Despite the change in name, the definition has remained the same. Emotional regulation impairment is defined as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance due to:

i. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
ii. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
iii. Inappropriate types of behaviors or feelings under normal circumstances;
iv. A general pervasive mood of unhappiness or depression; or
v. A tendency to develop physical symptoms or fears associated with personal or school problems.[6]

Only one of the five criteria need be present to qualify for classification under the category emotional regulation impairment. Similar to the impact showing for a 504 Plan, under the IDEA, the emotional disability must adversely impact a student's educational performance. This does not mean that only if a student's grades suffer will she qualify for an IEP. Education is a broad concept and *includes not only academics* but also social, emotional, behavioral and other skills that a child requires in order to function independently in the school setting and beyond. If a child has a disability and her education is adversely impacted by it, a child must require special education and related services in order to be eligible for an IEP. Having a disability and an educational impact is not enough! This final hurdle—determining whether a child requires special education and related services—is often the most challenging to overcome because the definition of special education

can be narrowly interpreted to preclude eligibility for students who truly need it.

What is Special Education?

Many of the disputes underlying due process complaints involve the third prong of the eligibility test, that is, does the child require special education and related services. School district child study team members may contend that since a student does not need modified academics or a change in how academic instruction is delivered, the student does not require special education. Attorneys for parents will argue that the special education needed by a student with emotional regulation impairment is instruction in that child's specific area of deficit (i.e. emotional regulation skills) and/or a change in educational setting. The law is clear that special education is not limited to modified academic instruction. In fact, many students who are plagued by an emotional regulation impairment continue to succeed academically because they are typically high achievers with strong cognitive ability, aka, the perfectionists.

While specialized instruction can include modifications to academic instruction or a change in classroom setting (i.e. resource or language learning disability classes), it can also include instruction in coping, motivation, self-regulation, social, behavioral, and executive functioning skills. Specialized instruction could include a change in a student's learning environment to include a setting that is smaller and more nurturing, flexible, and more entrenched in therapeutics such as a therapeutic day or residential therapeutic school that offers individual and group therapies using multiple modalities such as cognitive and dialectical behavioral therapy as well as animal-assisted therapy throughout the school day and beyond.

Signs that Trigger Child Find

For students who have never been previously classified or in receipt of accommodations but who are currently struggling with emotional deficits, astute child find efforts become critical. Students struggling emotionally for the first time may fall under the radar in school as they will often maintain good grades and academic standing at first. The deficits may initially not be apparent to school personnel while at home; these same students are isolating, not sleeping properly, failing to engage in proper hygiene, experiencing low to no motivation, engaging in dysregulated behaviors and emotional distress, and withdrawing from social situations. It is not uncommon for these students to hold it together during the school day and to implode when they return home because the pressure of school is simply too much to handle.

It is essential for signs and symptoms to be reported to school personnel promptly—transparency is necessary in order to trigger child find. Once the school district is aware of the educational impact and a potential disability, the child find obligation is triggered. Students who struggle emotionally without appropriate supports can experience a rapid decline in functioning, so it is important not to turn a blind eye to this population. To the contrary, addressing the needs of students with emotional deficits early on can make all the difference and ultimately prevent the downward spiral which can result in full-blown emotional distress, school refusal and even suicide. An evaluation plan for students suspected of having an emotional regulation impairment should be just as comprehensive as it is for those with suspected learning disabilities, keeping in mind that a child must be evaluated in all areas of suspected disability. In fact, because students with emotional deficits are suspected of having an emotional disability, psychiatric evaluation ought to be included in the evaluation plan as well as ruling out any potential learning disability. Communication between child study team members and treating providers is also crucial to developing appropriate interventions.

While the fate of the COVID-19 pandemic remains uncertain, what we do know is that it has created a mental health crisis among school-age children. For some, the effects of the pandemic have exacerbated preexisting disabilities necessitating additional supports and services, and for others, the effects have triggered the need for accommodations, special education and related services for the first time. Parents and school districts must remain super vigilant and collaborative in order to identify signs and symptoms of emotional regulation impairment, to comprehensively evaluate, and to develop and implement appropriate programs to address the needs of this ever-growing fragile population. ■

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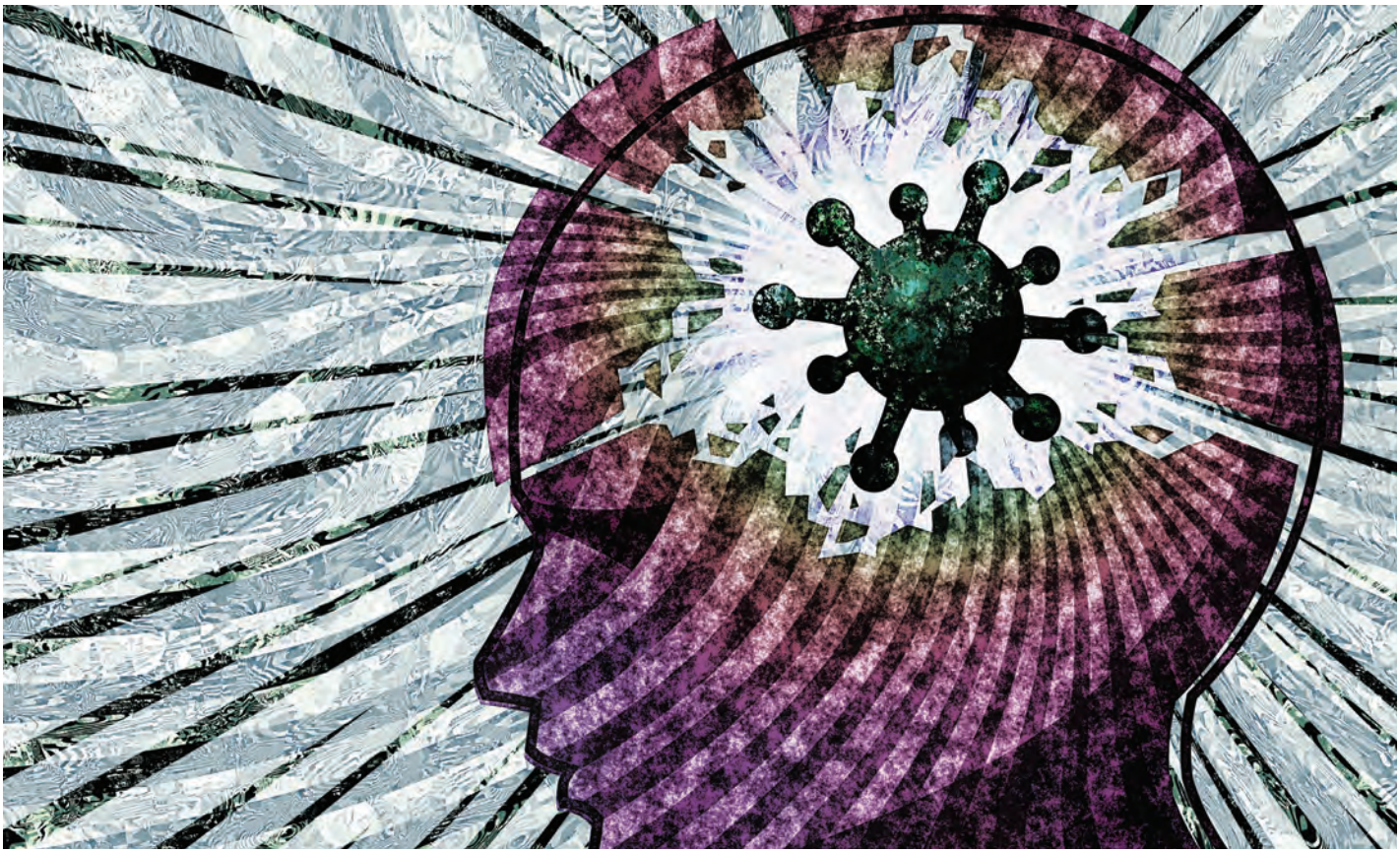

Beyond COVID-19 Pandemic

Special Education for Mental Health Problems Under Disability Law

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By Dr. Ilise Feitshans

Everyone has a disability. Everyone has a gift. Your job is to find the gift and remove the obstacles of disability

—Sylvia Feelus Levy, 1974[1]

Mental Health is a Problem of Global Health, an Outlier No Longer

Mental health issues have perennially loomed important but too often ignored in special education programming and in the greater society. Mental health issues represented between 10–13%[2] of the global disease burden[3] before COVID-19 devastated global health. Pandemics produce anxiety and exacerbate preexisting mental illness while overwhelming existing infrastructure that locates and treats patients, and reduces tax revenues that pay for care. No one has been untouched by the pandemic of 2020-2022. Therefore in 2022 and beyond, mental health caseloads may skyrocket.[4]

Time to Embrace Mental Health Issues Within the 'New Normal'

Pandemic distress spotlights the urgent need for a unified approach to mental health care across the globe. Due to mental illness, impacted populations are often

Although everyone is at risk for negative mental health impacts of the pandemic of 2020–2022, few efforts have been made to prepare the students and their school systems for important mental health challenges, ranging from post-traumatic stress disorder, survivors' guilt and the impact of untreated psychological problems that might otherwise receive attention had there been no pandemic to close schools and confine students in isolation from their teachers and their peers.

excluded from mainstream clinical trials and research efforts because it is presumed that they will not be able to withstand experimental treatments and that their experience is not representative of the larger, seemingly healthy population, and stigma against welcoming people with mental health problems abounds. Ironically, ignoring these problems allows the problems to fester under the radar of most special education programming. Thus, few programs exist that embrace mental health issues in small children and adolescents, allowing these problems to manifest in major mental health challenges when children grow up into untreated disabled adults.

The World Health Organization (WHO) goodwill ambassador for mental health is Cynthia Germanotta. Shortly before the COVID-19 pandemic began, and continuing these efforts throughout the pandemic, she started a campaign for increasing access to mental health services and reducing stigma. And with good reason: the need is increasing in the pandemic aftermath. Maintaining stable mental health is always a challenge but the pandemic legitimizes some fears that would otherwise be considered irrational. For example, fear of transmitting the disease to grandparents is a real problem, not a delusion that keeps families separated with some members in isolation during pandemic circumstances.

Disability, although universal in its likely incidence in the life span of any given human being, also challenges the operationalization of a fundamental tenet of equality: that every person is the same and, consequently, all people—men, women, and children (as protected in separate international conventions)—have equal rights and should be treated the same. If anything, disability does not treat any two people equally.

Although everyone is at risk for negative mental health impacts of the pandemic of 2020–2022, few efforts have been made to prepare the students and their school systems for important mental health challenges, ranging from post-traumatic stress disorder, survivors' guilt and the impact of untreated psychological problems that might otherwise receive attention had there been no pandemic to close schools and confine students in isolation from their teachers and their peers.

International Law Protecting the Right to Mental Health

The WHO Constitution states "Health is a ***state of complete physical, mental and social well-being*** and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being."[5]

This language is clear, but application of these principles is thorny because mental illness is elusive. Fearing stigma, people do not seek treatment[6] and others do not disclose their diagnosis. Meanwhile, the human rights community has documented abuses of mental illness labels that disempower political dissidents or keep them in psychiatric facilities; misinformation about mental illness also harms marginal communities, LGBTQ people and vulnerable populations, so they don't seek help. Added to underreporting of late-onset dementia from HIV/AIDS, Huntington's disease, Alzheimer's disease, or orphan diseases means that the population in need of mental health care is manifold larger than estimated.

U.S. Law: Limits Due to Risk of Threatened Harm to Oneself or Others

U.S. federal laws[7] recognize a traditional limit for mental health problems: services such as public education are not necessarily part of Free and Appropriate Public Education (FAPE) requirements for special education that are otherwise imposed on school districts under federal laws. Indeed, there may be mental health exceptions to this obligation by school districts, for uncontrollably ill children and young adults if the school district can

establish that they are substantial risk threat of harm to themselves or others.

A vague notion of what constitutes a credible threat is a polite way of stating that some mental illness is so far removed from reality that it is not possible to force peers and school staff to interact with such students as they would be compelled under regular special education laws. Indeed, self-destructive behaviors and the ability to act out in violent episodes without intent or volition and often without recalling the episode itself is a characteristic of some intractable mental health conditions.

But these situations contemplated by the law are increasingly as rare as they are extreme because of the amazing ability of technology to provide both medicines and assistive tools that enable fully-diagnosed mentally ill students to express themselves without resorting to violence. For example, a New Jersey student with schizophrenia who graduated high school in 2004 had a rocky road but completed her studies thanks to modified demands on her academic performance, implementation of a regime for new drugs for treatment, intensive training for self-discipline using daily training in karate and musical instruments, and watchful loving eyes that offer ongoing supervision and monitoring. Technology providing electronic monitoring means that oversight and compliance does not require the intensive professional staffing that such a program would have required when the "threat of risk of harm" language was written into U.S. law. As a result: 10 years after college graduation and 17 years after aging out of programs for children, this student has earned a college degree and is working in the Pottstown public school system, earning a living wage and participating in church and social events, despite mental health issues that are recognized as touching the limits of special education programming under federal disability laws.

What Does This Mean for Children Who are Identified as Needing Special Education?

Because of the impact of COVID-19 pandemic force majeure upon the mental health of students whose classification in special education means they are already identified as a vulnerable population, it behooves school districts, lawyers and special education professionals to seek programming in IEPs that will proactively address mental health concerns. On a systemic level, mental health issues must be recognized as a practical necessity long before the threat of risk of harm limitation has been reached under U.S. special education programs. At the same time, non-judgmental programming for outreach and dissemination of information about early warning signs of mental health issues that can be addressed within the rubric of special education should be launched, with the dual purpose of reaching at-risk pandemic survivors who are children and reducing the stigma surrounding their identification. Strategies under special education law to offer services can be crafted to address an exponentially greater mental health burden without requiring new legislation.[8]

Current disability law allows programming to address mental health issues such as anxiety, post-traumatic stress disorder, and depression, all of which are logical ramifications of surviving the pandemic. By embracing the needs of fragile students at a tender age and normalizing discussion of those needs, it will be possible to significantly reduce destructive long-term impacts of the pandemic. Furthermore, educators, evaluators, and school districts should take an expanded inclusive view of child find and classifications for special education in the wake of COVID-19. Nothing in the existing disability laws prohibits granting services to all or most of the population if needed. COVID-19, therefore, should trigger reassessment of general education students who were not previously classified, especially if they experienced the death of a loved one during the pandemic. ■

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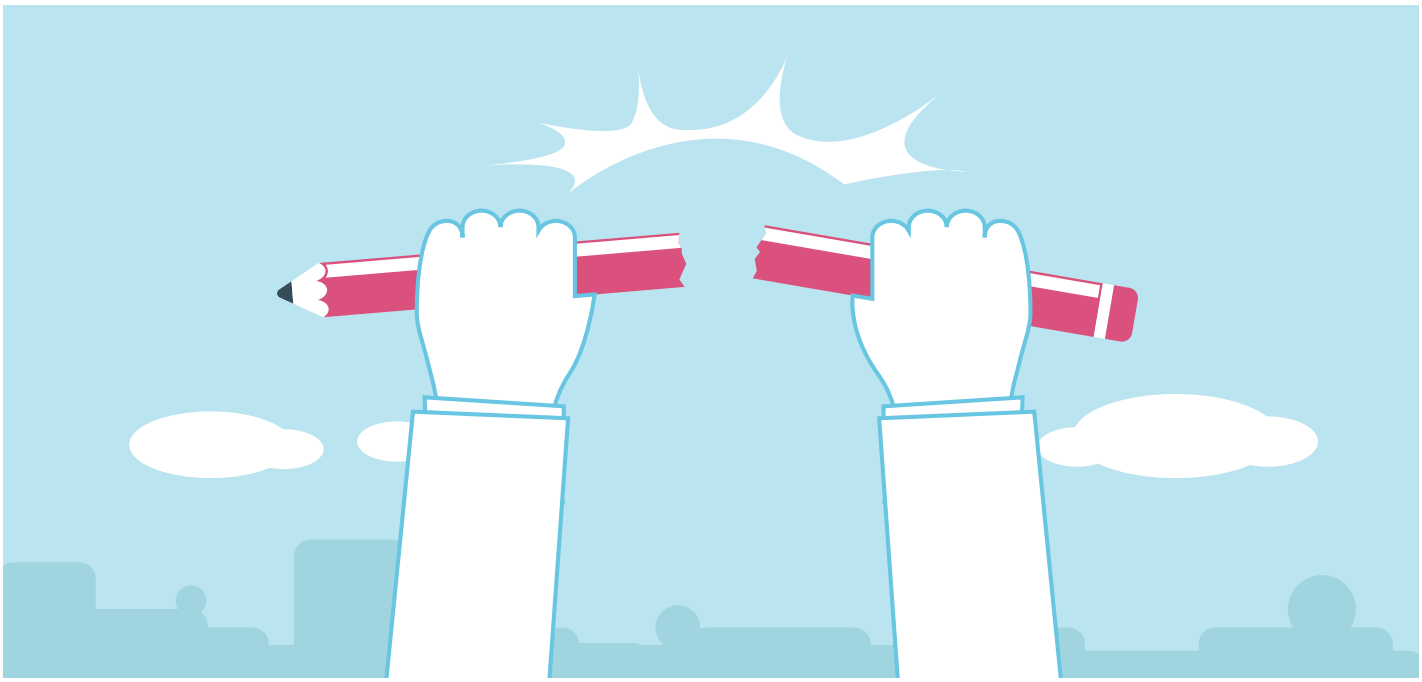

How New Jersey's Special Education Complaint Resolution System Fails Students

By Rebecca K. Spar and Elizabeth Athos

The enactment of a federal statute governing special education in 1975, currently codified as the Individuals with Disabilities Education Act (IDEA),[1] opened public schoolhouse doors to countless students with disabilities who were previously denied access to equal and appropriate educational opportunities. This article will explore New Jersey's implementation of the federally-mandated complaint resolution process that has been established under IDEA to afford parents of students with disabilities a "prompt and expeditious," as well as "less costly and less litigious," means of correcting violations of their children's special education rights.[2] We do so in the context of the pandemic, when parents expressed concerns that their children with disabilities were not receiving all the services in their Individualized Education Programs (IEP) during partial or full school closures.

Others reported that IEP services during this time were inappropriate, with students receiving only paper packets or activity sheets or struggling with virtual instruction. Thus, we decided to examine how New Jersey's complaint system investigated and resolved allegations of violations of IDEA during COVID-19. Sadly, we find that New Jersey's system falls short in several significant ways, and we hope that our findings and recommendations will spotlight and promote the reform that is needed.

IDEA's Complaint Resolution Requirement

Many are familiar with IDEA's requirement for special education due process hearings through which parents litigate complaints on their own (or, if fortunate, with legal representation). Less well known is the federal regulatory requirement for states to establish and implement state complaint procedures, separate and in addition to the due process hearing procedures established by IDEA.[3] Since 2006, these federal requirements have been codified within the IDEA regulations at 34 CFR §§300.151-300.153; as an alternative to due process, they obligate a state educational agency (SEA), such as the New Jersey Department of Education (NJDOE), to investigate and resolve complaints of special education violations and to provide compensatory services and monetary reimbursement when appropriate. The significance of this alternative procedure cannot be overstated: it provides an important and feasible option for parents

Apart from its due process hearing system, New Jersey has indeed established state procedures to address special education complaints through a process known as "complaint investigation," codified at N.J.A.C. 6A:14-9.2. While mirroring the federal requirements in many respects, the New Jersey regulations diverge from, and narrow, those federal requirements in several significant ways.

without financial resources to enforce their children's rights. Unlike due process, complaint resolution need not involve parentally retained attorneys or experts, or time off work to attend hearings.

As a general matter, the IDEA regulations mandate that states adopt procedures to do the following:

- Resolve any signed, written complaint that alleges a violation of IDEA's requirements for school-aged children by a public agency, including one filed by an organization or individual from another state;[4]
- Widely disseminate the state's complaint procedures to parents and other interested individuals and entities;[5] and
- Address the failure to provide appropriate services to a child or children with disabilities through "corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement)" and through "appropriate future provision of services for all children with disabilities."[6]

The IDEA regulations further establish a 60-day time limit (absent exceptional circumstances or agreement to engage in mediation) and basic minimum procedures for resolving the complaint: conducting an independent on-site investigation, if necessary; making an independent determination as to whether a violation of IDEA has occurred; and issuing a written decision that addresses each allegation in the complaint and contains findings of fact, conclusions of law, and reasons for the decision.[7] If needed, "technical assistance activities," "negotiations," and "corrective actions to achieve compliance" must be included among the "procedures for effective implementation of the SEA's final decision."[8] In addition, the IDEA regulations specify that the SEA must set aside any issue in a complaint that is also the subject of a due process hearing until the conclusion of the hearing;[9] resolve all other issues using the state complaint time limit and procedures,[10] and resolve a complaint "alleging a public agency's failure to implement a due process hearing decision."[11]

With regard to the contents of the complaint, it "must allege a violation that occurred not more than one year prior to the date that the complaint is received."[12] Notably, the scope of the complaint resolution process is intended to be exactly the same as the scope of the due process hearing process and to encompass complaints that a student has been denied the free appropriate public education (FAPE) required by IDEA.[13] The United States Department of Education (US ED) has described state complaint procedures as a "powerful tool" to be used for both "systemic and child-specific issues."[14]

Deficiencies in New Jersey's Complaint Investigation System

Apart from its due process hearing system, New Jersey has indeed established state procedures to address special education complaints through a process known as "complaint investigation," codified at N.J.A.C. 6A:14-9.2. While mirroring the federal requirements in many respects, the New Jersey regulations

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diverge from, and narrow, those federal requirements in several significant ways. Several of these differences are relevant to this article.

First, neither the New Jersey regulations nor the Parental Rights in Special Education Handbook (PRISE)[15] that the state provides to parents set forth procedures for "widely disseminating" state procedures for complaints to parents and other interested individuals.[16]

Second, while requiring "findings" and "conclusions," the New Jersey regulations omit the explicit federal requirements that the written decision of the SEA address "each allegation in the complaint" and contain "[t]he reasons for the SEA's final decision."[17]

Third, neither the New Jersey regulations nor PRISE inform parents of the potential remedies available through the state's complaint investigation procedures. Although the New Jersey Department of Education uses the term "corrective action," unlike its federal counterpart, it makes no reference to "compensatory services," "monetary reimbursement," or the "appropriate future provision of services for all children with disabilities."[18]

Finally, neither New Jersey's regulations nor its PRISE clearly inform parents that its complaint investigation system will address denials of FAPE caused by a failure to appropriately address an individual child's abilities and needs.

Our Review of New Jersey's Pandemic Complaint Investigation Reports

Through OPRA requests, we obtained 13 complaint investigation reports that addressed two issues of particular concern during the pandemic: 1) failure to implement student IEPs and/or 2) the appropriateness of virtual instruction.[19] Eleven of the complaint investigations were filed by parents, one by a non-custodial aunt and one by a former teacher claiming systematic violations in an approved private school for students with disabilities. The complaints involved 10 districts and one private school and covered the time period when school facilities began closing in March 2020 through July 12, 2021.[20] During this time period, complaint investigations were handled by NJDOE's Office of Special Education Policy and Dispute Resolution (SPDR).[21] All the reports were issued on a timely basis.

SPDR Found Multiple Failures to Fully Implement Student IEPs

In 11 of the 13 complaints we examined, SPDR found there were violations of core federal or state requirements. Although SPDR found that the remaining two districts were "compliant," the primary issue raised in those two complaints was that the virtual instruction was not working for the student which, as discussed below, SPDR would not investigate.[22]

SPDR found districts did not implement multiple components of student IEPs including: (1) not providing the related services in the student IEPs;[23] (2) not providing students with their one-on-one paraprofessional; (3) not providing in-class support by the special education teacher; (4) leaving a student without a working augmentative communication device; (5) placing students in classes for students with behavioral disabilities when their IEPs required placement in a class for students with multiple disabilities; (6) not providing a transition service consisting of a structured learning experience; (7) not providing the accommodations and modification contained in the student's IEP. In one case, a student was not able to attend their extended year program because the district did not respond to repeated requests from the parent asking for information on how to access the program.

The failures to implement student IEPs were significant, with most occurring for months. For example, a district left a first-grade student without a working augmentative communication device for eight months.[24] Two students were left without any in-class support by their special education teachers for around three months.[25] In three cases, the students were left without their one-on-one aides between March 18, 2020, to Sept. 16, 2020,[26] March 2020 to sometime after Oct. 5, 2020,[27] and April 28, 2020, to May 26, 2021, respectively.[28]

In its investigation of a complaint filed by a former teacher against the private school, SPDR reviewed 10 sample IEPs selected by the private school and found that none of the nine students whose IEPs included related services consistently received them during the 2019-2020 school year. SPDR also found that two students whose IEPs called for placement in classes for students with multiple disabilities were instead placed in classes for students with behavioral disabilities and that one student did not receive their structured learning experience.[29]

SPDR Did Not Investigate and Make Findings with Respect to All Issues Raised in Complaints

Two of SPDR's most egregious failures to investigate and make findings concerning *all* allegations were: 1) not determining whether activity sheets and/or work packets complied with state or federal requirements; and 2) refusing to investigate and determine whether the virtual instruction was individualized and appropriate for the student.

In one case, in lieu of in-person or virtual instruction, home instructors only sent assignments to the student from March 18, 2020 to May 18, 2020.[30] In another case, a 4-year-old student received work packets for all their services (special education and related services) from March 18, 2020 until school

ended in June 2020.[31] In three cases, some related services consisted of activity sheets starting around March 17, 2020, and continuing until school closed in June 2020.[32] In all of these cases, SPDR failed to exercise its oversight responsibilities and directly address this issue.

As for virtual instruction, temporary regulations were approved on April 1, 2020, which allowed special education and related services to be provided virtually, online or telephonically, but only "as appropriate."[33] Three families complained that the student was not doing well with virtual instruction and requested changes, including some in-person support.[34] In some cases, students with disabilities were prevented from receiving all their IEP services in virtual general education classes because districts chose to provide asynchronous or recorded instruction by the general education teacher for language arts and math, which precluded simultaneous in-class support or the provision of accommodations and modifications required by the student's IEP.[35] In addition to violating IDEA by failing to implement the student's IEP, providing virtual instruction in this way did not give students with disabilities the equitable access offered to students without disabilities.

Instead of making an independent determination as to whether the virtual instruction was individualized and appropriate for a student, and enabled the child to have equitable access, SPDR essentially ruled out *ever* investigating the appropriateness of virtual instruction for individual students, saying:

> "Without an individual assessment of the student's progress, **which is beyond the scope of this investigation**, conclusions cannot be drawn about the relative efficacy of the student's programming or the student's ability to benefit from the delivery of special education and related services in a remote setting." (emphasis supplied)[36]

The scope of the complaint investigation system is intended to be the same as the scope of a due process hearing and to encompass claims that a student has been denied an appropriate education.[37] Unwillingness to decide allegations that a program is not appropriate is not a new problem for NJDOE. On March 9, 2012, the U.S. ED ordered NJDOE to expand its state complaint system to include disagreements over the appropriateness of a child's educational placement.[38] After continued advocacy by groups representing students and parents, NJDOE finally removed language from PRISE limiting its investigations to whether the education agency followed the correct procedures, involved the required persons, and made a determination in a timely manner with procedural safeguards. Yet, the removal of the limiting language in PRISE has not cured the problem, as evidenced by SPDR's refusal to address allegations of the inappropriateness of virtual instruction for individual students during the pandemic.

SPDR Told Districts They Must Fully Implement Student IEPs During COVID-19

Despite significant investigative failures, in its complaint investigation conclusions, SPDR said that "neither [US ED] nor the [NJDOE] have granted local educational agencies the ability to waive or be exempted from the regulations concerning the delivery of special education and related services to students with disabilities."[39] It went further and told districts and the private school that during COVID-19, they must fully implement student IEPs in order to provide FAPE as required by N.J.A.C. 6A:14-4.1(a). As for those students whose parent chose for them to attend a remote setting, SPDR told their districts that they were not released of their responsibility to provide a FAPE as detailed in the student's IEP. Similarly, when the student's IEP required an in-class resource program, SPDR required it be provided by a certified special education teacher, with modifications in accordance with the student's IEP.

In addition, SPDR told districts that they could not unilaterally decide not to provide services in the student's IEP but must either hold an IEP meeting and give written notice before implementing any changes or, with the parent's consent, follow the procedures for amending an IEP without a meeting. Finally, SPDR told districts they were required to maintain documentation that they had provided all the services in the student IEPs as required by N.J.A.C. 6A:14-1.1(h).

Instead of making an independent determination as to whether the virtual instruction was individualized and appropriate for a student, and enabled the child to have equitable access, SPDR essentially ruled out *ever* investigating the appropriateness of virtual instruction for individual students...

Despite Finding Significant Violations, SPDR Provided Relief to Only One Student

Federal regulations require states in resolving complaint investigations to address "the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement)."[40] SPDR found in 11 cases that the districts did not fully implement the student IEPs, thereby violating IDEA requirements. Despite telling districts that they must implement student IEPs during COVID, however, SPDR provided relief to only one student, requiring that district to offer the student a specific amount of compensatory services. Even in that case, though, the district was not required to provide compensatory services for its failure to implement the student's IEP but rather for violating a state regulation requiring a minimum 10 hours of instruction when a student is on home instruction.[41] SPDR told the district to make up instruction on a one-on-one basis for any week that the district provided fewer than 10 hours of home instruction by a certified teacher.[42]

As discussed below, districts are just as obligated to fully implement student IEPs and to provide compensatory services when they fail to do so. Instead, SPDR only told the districts who had not implemented student IEPs to convene an IEP meeting to "consider" or "determine" whether to provide any compensatory services to the student. Thus, SPDR left the decision about relief in the hands of the district against whom the complaint had been filed.[43]

SPDR's Criteria for Deciding if Students Should Receive Compensatory Services Conflicts with Judicial Precedent

The US ED reminded SEAs in its September 2021 guidance that a state's role with regard to compensatory services included making school districts aware of applicable case law that impacts how compensatory services are identified and determined.[44] SPDR does not, however, refer to any case law in its reports. Instead, SPDR further abrogated its responsibilities by telling districts to use criteria that conflicted with judicial precedent when deciding whether to provide any compensatory services.

Compensatory education is mentioned only once in IDEA's federal statutes and regulations and that is in the complaint resolution procedures as a remedy along with monetary reimbursement.[45] Compensatory education is a judicially created remedy based on the federal statute and regulation that gives broad discretion to "grant such relief as deem[ed] appropriate when a student with a disability's rights under IDEA have been violated."[46]

Judicial precedent from the United States Supreme Court, as well as the Third Circuit, controls what courts, hearing officers, NJDOE and school districts must do when deciding whether a student is entitled to compensatory education. Not only did SPDR fail to inform districts as to the relevant judicial precedent pertaining to compensatory education, the minimal "guidance" SPDR did provide in its complaint reports was contrary to precedent in several ways.

First, when one parent requested monetary reimbursement, SPDR incorrectly responded that "under the regulations governing special education in New Jersey, the parent is not entitled to monetary compensation."[47] There is no New Jersey regulation prohibiting monetary reimbursement to parents. Further, the federal regulations governing state complaint investigations expressly list monetary reimbursement as an available remedy.[48] There are also multiple United States Supreme Court and Third Circuit Court of Appeals cases holding that monetary reimbursement is an appropriate remedy in IDEA cases.[49]

Second, SPDR improperly told districts to consider "insufficient progress" resulting from the reduction in special education services required by the student's IEP in determining whether compensatory education was warranted. Because IDEA's definition of FAPE mandates that special education and related services be provided in conformity with a student's IEP,[50] the failure to do so means — by definition and as the United States Supreme Court has recognized — the student will not receive a FAPE.[51] Although some circuits have held that there must be more than a *de minimis* difference between the services in the IEP and those actually provided, the Third Circuit has yet to establish precedent on this issue. Even if there were such precedent, though, the implementation failures in these cases were more than *de minimis*.

Further demonstrating that "insufficient progress" should have no role in deciding whether these students were entitled to compensatory services, the Third Circuit has held that the aim of compensatory education is "'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA,' by providing the educational services children should have received in the first instance."[52] Here, in most complaints, SPDR made factual findings as to what services students should have received, but didn't, yet failed to obligate districts to provide the missing services as compensatory education in accordance with judicial precedent.

Third, and equally invalid, SPDR told districts to consider whether the student exhibited "any regression without recoupment in a reasonable amount of time."[53] Regression is a factor that may

require additional compensatory services but is not a prerequisite or required factor in order for a student to be entitled to compensatory services.[54] Adding recoupment as a required factor is antithetical to the purposes of compensatory education and to established precedent in the Third Circuit.[55] Simply looking to whether students can recover from lost instruction does not account for the new skills that were not taught and will never put the student where they would have been had they received all the services in their IEP. At most, it would only return the student to where they were when IEP services were stopped.

Finally, SPDR incorrectly told school districts that if they did decide to provide compensatory services, they didn't need to provide the services on a one-to-one basis. The long and well-established judicial precedent in the Third Circuit requires use of a quantitative approach to determine the amount of compensatory services a student should receive.[56] New Jersey federal courts comply with this precedent, holding that when a school district fails to provide any education for a specified period of time, the student is entitled to compensatory education on an hour-for-hour basis for each day without schooling.[57] If a district only implements some portions of student IEPs, the student is entitled to an hour-for-hour replacement for services not provided unless the failure to fully implement the student's IEP pervades and undermines the entire day, entitling the student to a full day of compensatory services for each day their IEP was not fully implemented.[58] A parent or adult student can always request that something other than the quantitative approach be used, or the parties can agree to something different, but absent this, the precedent in the Third Circuit requires a quantitative approach.

SPDR Did Not Take Corrective Action to Prevent Districts from Continuing to Violate State and Federal Requirements

In addition to providing corrective action to address the needs of an individual child (such as compensatory services or monetary reimbursement), states, pursuant to their general supervisory authority, must consider and, if need be, investigate whether the violations raised in the individual complaint are systematic violations impacting other students in the district. If so, the state must address "appropriate future provision of services for all children with disabilities" by providing corrective action needed to remedy systematic issues.[59]

The factual findings made by SPDR show that none of the districts, including the two which SPDR found compliant, fully implemented the student IEPs. In addition, SPDR's investigations showed that districts were unilaterally deciding (without IEP meetings and written notice to the parents) to not provide core IEP services such as one-to-one aides, in-class support by special education teachers, and accommodations and modifications. One board attorney erroneously told SPDR that their district was not obligated to fully implement student IEPs when the parent chose remote learning, and the district was at least partially open.[60] SPDR still did not impose any corrective action to ensure that all student IEPs in the districts were fully implemented and IEP meetings were held, and written notice provided, when a district believed that changes to the IEP were warranted.

Similarly, despite the private school's pervasive failures to implement student IEPs during the 2019-2020 school year, all SPDR required it to do was send copies of all student logs to the sending districts and ask the districts to hold an IEP meeting and consider the need for compensatory services. SPDR took no steps to ensure that the private school did not continue to fail to implement student IEPs going forward. SPDR did not even require the private school to provide a copy of the complaint investigation report to the parents of the 10 students discussed in the report.

Although SPDR found that multiple districts as well as the private school were not documenting the provision of IEP services in accordance with state regulations, it only required one district to take corrective action by reviewing its procedures and revising them as necessary to ensure that provision of IEP services was documented in accordance with the regulations.[61] The only other corrective action taken by SPDR was imposed on the district that did not respond to a parent's repeated requests for how their child could access their extended year program. In that case, the district was directed to send a memorandum to all child study team members and special education supervisors informing them of the process for responding to parent requests when CST members were on vacation.[62]

Concluding Thoughts

In reviewing the 13 complaint investigation reports, the most significant positive finding was that, although recognizing the difficulties districts might experience during COVID-19, SPDR was emphatic that districts must still fully implement student IEPs. A second positive result was that SPDR's reports were completed on a timely basis.

Other results are disappointing and show that significant changes and work is needed if New Jersey is to have an effective state complaint resolution system. First, state regulations and New Jersey's PRISE must be changed so that they are consistent with federal regulations, including informing parents that compensatory

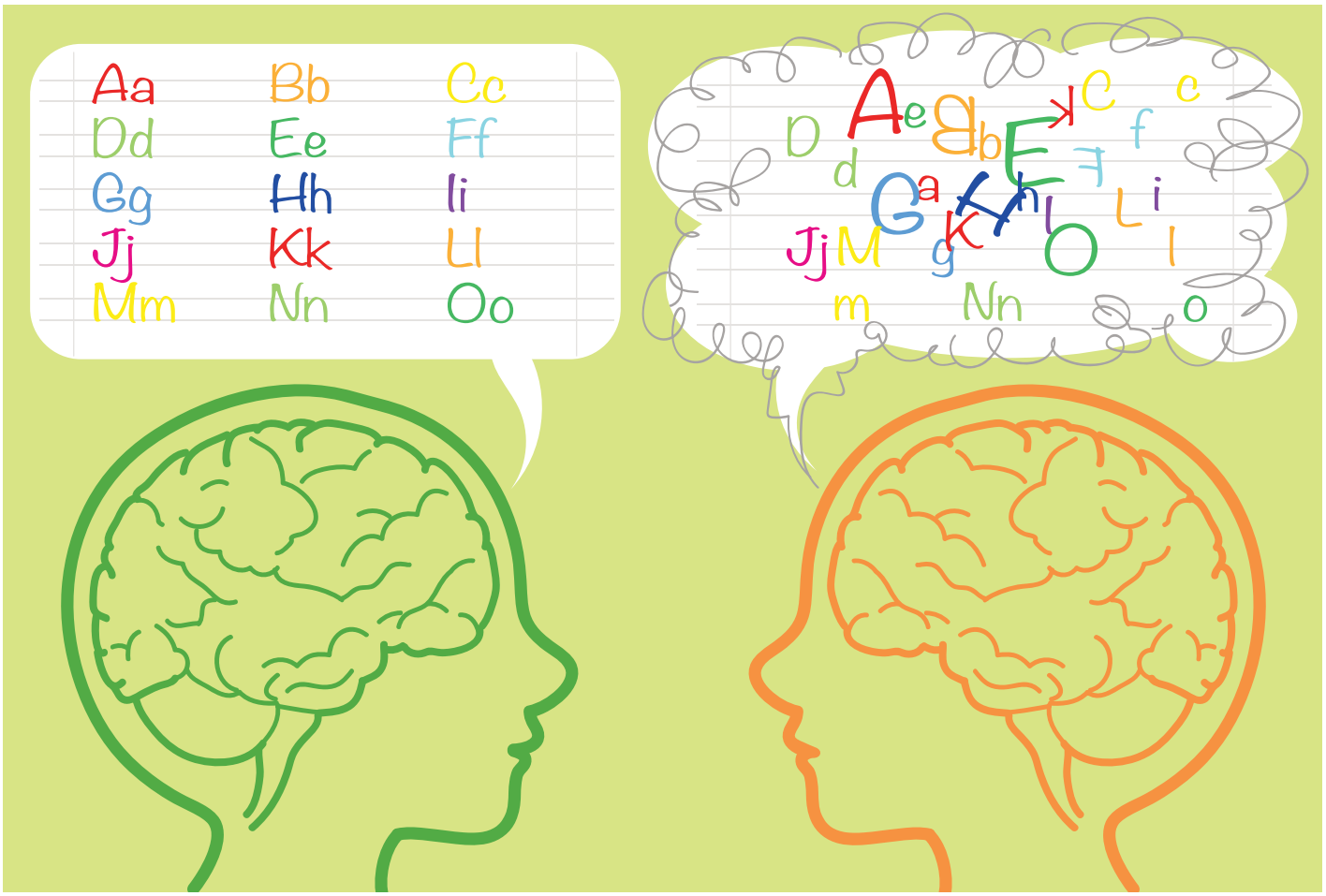
services and monetary reimbursement are possible remedies. Next, the state must comply with federal requirements by: 1) widely and accurately disseminating complaint procedures to parents and other interested individuals; 2) providing compensatory services, monetary reimbursement or other appropriate relief to individual students when their IDEA rights are violated; 3) taking corrective action to ensure "appropriate future provision of services for all children with disabilities;" 4) conducting thorough and independent investigations; and 5) investigating and making findings on all issues raised in a complaint including claims that virtual instruction is not appropriate for the student. Third, the state's conclusions must conform to judicial precedent. Finally, posting complaint reports on NJDOE's website, as other states do, will educate both parents and school districts about student rights and district obligations.

Having a viable state complaint system is too important, particularly for those parents who lack the financial means to pay for an attorney and the expert needed to achieve a positive outcome in a due process hearing, to leave in its current ineffective state. ■

Endnotes

1. 20 U.S.C. §§ 1400 to 1482.
2. *Beth V. v. Carroll*, 87 F. 3d 80, 87 (3d Cir. 1996); *Lucht v. Molalla*, 225 F. 3d 1023, 1029 (9 Cir. 2000).
3. This requirement, enacted under the general authority of the U.S. Secretary of Education, 20 U.S.C. §1221e-3, has existed in one form or another since 1977. *See* United States Department of Education Memorandum and attached Q&A, Complaint Resolution Procedures Under Part B of the IDEA (July 23, 2013), 13-08, p. 15 (hereinafter, "US ED 2013 Complaint Resolution Q&A").
4. 34 C.F.R. 300.151(a)(1), incorporating *inter alia*, 34 C.F.R. 300.153(a) and (b).
5. 34 C.F.R. 300.151(a)(2).
6. 34 C.F.R. 300.151(b).
7. 34 C.F.R. 300.152(a).
8. 34 C.F.R. 300.152(b)(2).
9. 34 C.F.R. 300.152(c)(1).
10. *Id.*
11. 34 C.F.R. 300.152(c)(3).
12. 34 C.F.R. 300.153 (c).
13. US ED 2013 Complaint Resolution Q&A, p. 19.
14. *Id.,* p. 20.
15. The most recent August 2019 version of PRISE (available only in English) can be accessed on the New Jersey Department of Education's website at nj.gov/education/specialed/form/prise/.
16. 34 C.F.R. 300.151(a)(2). In addition, New Jersey does not explicitly provide, as does the federal government, that an organization or individual from another state may file a complaint. Compare N.J.A.C. 6A:14-9.2(b) with 34 C.F.R. 300.151(a)(1).
17. Compare N.J.A.C. 6A:14-9.2(e) with 34 C.F.R. 300.152(a)(5).
18. Compare N.J.A.C. 6A:14-9.2 (e), (f), and (g) with 34 C.F.R. 300.151(b).
19. Throughout this article, we use the term "virtual" to encompass instruction or related services provided virtually, online, telephonically or through electronic communications as allowed by temporary amendments. *See* Providing Special Education and Related Services to Students with Disabilities During Extended School Closures as a Result of COVID-19, NJDOE (April 3, 2020).
20. We did not have access to copies of the complaints that individuals filed during this time period and do not know how many were not accepted by SPDR or were settled or withdrawn by the complainant.
21. The office handling State Complaint Investigations has also been known as "OSEPP" and "OSEP." At present, SPDR is subsumed under the Office of Special Education (OSE).
22. C2021-6359 Old Bridge Sch. Dist. (Sept. 29, 2020) & C2021-6392 Clifton Sch. Dist. (Feb. 22, 2021). In finding the district "compliant" in the first case, SPDR ignored that the student was given activity sheets for related services and left unresolved whether the student was without a digital device for five months. In the second case, SPDR found that the district didn't provide the student with the one-on-one aide in their IEP until sometime after October 2020 and left unresolved whether the student received any related services from March through June 2020.
23. SPDR did not always indicate if the related services were provided for the required time, leaving it unclear whether students received the full amount of related services.
24. C2021-6414, Paterson Sch. Dist. (May 24, 2021).
25. C2021-6361, Hillsborough Twp. Sch. Dist. (Jan. 15, 2021); C2021-6382 Highland Park Sch. Dist. (Jan. 8, 2021).
26. C2021-6372 Willingboro School District (Dec. 7, 2020).
27. C2021-6392 Clifton Sch. Dist. (Feb. 22, 2021). Despite finding the district did not provide the aide for at least six months, SPDR said this district was "compliant."
28. C2021-6429 Paterson Sch. Dist. (June 17, 2021). In two cases, the failure to implement was shorter: there were no counseling services during the student's extended year program in C2021-6464 Bernards Twp. Sch. Dist. (Sept. 13, 2021) and two counseling sessions which the district agreed to make up in C2021-6435 South Orange-Maplewood Sch. Dist. (Sept. 10, 2021).

29. C2021-6354 Mary A. Dobbins School (Oct. 26, 2020).
30. C2021-6397 Wanaque Sch. Dist. (April 20, 2021).
31. C2021-6429 Paterson Sch. Dist. (June 17, 2021).
32. C2021-6359 Old Bridge Sch. Dist. (Sept. 29, 2020); C2021-6414 Paterson Sch. Dist. (May 24, 2021); C2021-6354 Mary A. Dobbins Sch. (Oct. 26, 2020).
33. *See* Providing Special Education and Related Services to Students with Disabilities During Extended School Closures as a Result of COVID-19, NJDOE (April 3, 2020).
34. C2021-6392 Clifton Sch. Dist. (Feb. 22, 2021); C2021-6359 Old Bridge Sch. Dist. (Sept. 29, 2020); C2021-6372 Willingboro Sch. Dist. (Dec. 7, 2020).
35. *See, e.g.*, C2021-6361 Hillsborough Twp. Sch. Dist. (Jan. 15, 2021); C2021-6372 Willingboro Sch. Dist. (Dec. 7, 2020); C2021-6392 Clifton Sch. Dist. (Feb. 22, 2021); C2021-6382 Highland Park Sch. Dist. (Jan. 8, 2021).
36. C2021-6392 Clifton Sch. Dist. (Feb. 22, 2021).
37. US ED 2013 Complaint Resolution Q&A, p. 19.
38. Education Law Center obtained this document through an Open Public Records Act request.
39. C2021-6382 Highland Park Sch. Dist. (Jan. 8, 2021).
40. 34 C.F.R. 300.151(b)(1).
41. N.J.A.C. 6A:14-4.8(a)4.
42. C2021-6397 Wanaque Sch. Dist. (April 20, 2021). SPDR's ruling was consistent with an Appellate Division decision, *New Jersey Dept. of Educ. Complaint Investigation*, C2012-4341, No. A-1000-11 (N.J. App. Div., Oct. 11, 2012) (unpublished).
43. Most of the parents had requested changes and/or relief and been denied by district administrators or IEP teams before filing their complaint or had participated in failed mediation after filing.
44. *See* "Return to School Roadmap: Development and Implementation of Individualized Education Program in the Least Restrictive Environment Under the Individuals with Disabilities Education Act" at page 28 (Sept. 30, 2021).
45. 34 C.F.R. 300.151(b)(1).
46. 20 U.S.C. § 1415(i)(2)(c)(iii); 34 C.F.R. 300.516(c)(3).
47. C2020-6338 Mahwah Sch. Dist. (Aug. 17, 2020).
48. 34 C.F.R. 300.151(b)(1).
49. *See, e.g., Sch. Committee of the Town of Burlington v. Dept. of Educ. Of Mass.,* 471 U.S. 359, 369 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *D.F. ex rel. A.C. v. Collingswood Borough Bd. Of Educ.,* 694 F.3d 488, 498-99 (3d Cir. 2012); *Ferren C. v. Sch. Dist. of Phila.,* 612 F.3d 712, 715 (3d Cir. 2010); *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 266-267 (3d Cir. 2014); *Bucks County Dept. of Mental Health/Mental Retardation v. Penn.,* 379 F.3d. 61, 62-63 (3d Cir. 2004) (holding that reimbursing parent for their time providing LOVAAS services was appropriate relief).
50. 20 U.S.C. § 1401(9); 34 C.F.R. 300.17.
51. *Hendrick Hudson Dist. Bd. Of Educ. v. Rowley,* 458 U.S. 176, 188-89 (1982); *Endrew v. Douglas Co. Sch. Dist., Re-1*, 137 S. Ct. 988, 994 (2017).
52. *G.L. v. Ligonier Valley Sch. Dist. Auth.,* 802 F.3d 601, 608 (3d Cir. 2015); *Ferren C. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-718 (3d Cir. 2010).
53. The New Jersey Department of Education suggested districts use this "policy" on page 74 of its *The Road Back, Restart and Recovery Plan for Education*, June 2020.
54. For a discussion on what to do when formulating a compensatory award and the student has lost skills or regressed, *see B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.D.Cir. 2016).
55. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 608 (3d Cir. 2015) & *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-718 (3d Cir. 2010).
56. *See, e.g., Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990) (30 months of compensatory education for 30 months student was without the agreed-to residential placement); *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260 (3d Cir. 2014) (student received "one hour for each hour of each school day for each year…totaling 10,000 hours of compensatory education); *M.C. o/b/o J.C. v. Central Reg'l Sch. Dist.,* 81 F.3d 389, 396-398\ (3d Cir. 1996) (compensatory education for the period of time school district knew or should have known the IEP did not provide FAPE).
57. *P.N. v. Greco*, 282 F. Supp. 2d 221, 236 (D.N.J. 2003) (where there was complete cessation of school for 17 days, student entitled to 17 days of compensatory education).
58. *Tyler W. v. Upper Perkiomen Sch. Dist.,* 963 F. Supp. 2d 427, 439 (E.D. PA 2013).
59. 34 C.F.R. 300.151(b)(2). *See also* US ED 2013 Complaint Resolution Q&A, p. 19 (whenever violations are identified for individually named children, "the SEA's complaint resolution **must** include measures to ensure correction of the violations for **all children affected** by the alleged systemic noncompliance described in the complaint") (emphasis added).
60. C2021-6382 Highland Park Sch. Dist. (Jan. 8, 2021).
61. C2021-6397 Wanaque Sch. Dist. (April 20, 2021).
62. C2022-6476 Paterson Sch. Dist. (Sept. 10, 2021).



School Districts in New Jersey Have a Legal Obligation to Identify Struggling Readers and Provide Effective Instruction

By Denise G. Verzella and Anne Reynolds

Most, if not all, special education lawyers and advocates have worked with families who seek their assistance for a child who struggles to read or cannot read. Obstacles exist in terms of early identification of students struggling to read and obtaining appropriate school-based reading instruction. The frustration typically centers around the use of systematic, evidence-based, structured literacy, or multisensory instruction. Providing the right instruction to struggling readers and those with dyslexia is the ultimate goal, but it is just as important to identify those students who are in need of specialized instruction to learn to read.

In September 2017, the New Jersey Department of Education published *The New Jersey Dyslexia Handbook,* with the intent to provide a framework of best practices for identifying, instructing, and accommodating students who have reading difficulties, like dyslexia.

Dyslexia Defined

Richard Branson is dyslexic, so were Albert Einstein, Pablo Picasso, and possibly George Washington. This impressive list of individuals serves as nothing more than a glimmer of hope for parents whose children struggle to learn to read. Dyslexia is not defined by a small subset of our population who are geniuses in their own right but is defined by a deficit in processing the phonological component of language which results directly in difficulty with decoding, spelling, accuracy, and fluency that, in turn, impact comprehension and the reading experience. Simply put, an impoverished reading experience negatively impacts the development of vocabulary and background knowledge, which is detrimental to comprehension for these struggling readers that often have average to above-average intelligence. We have seen firsthand from the children for whom we advocate, that not only do children become frustrated with their reading deficits but it often leads to anxiety and school avoidance, rendering a child unavailable for learning altogether.

The New Jersey Dyslexia Handbook

In September 2017, the New Jersey Department of Education published The *New Jersey Dyslexia Handbook,* with the intent to provide a framework of best practices for identifying, instructing, and accommodating students who have reading difficulties, like dyslexia.[1] Unfortunately, for children with reading deficits like dyslexia, New Jersey school districts are often not well-versed in the components of this handbook, including how and when to screen for dyslexia, and the need to provide structured literacy intervention to children identified as "at-risk" for a reading disability. Identifying students who are struggling to learn how to read before they suffer failure and providing them with informed instruction is the ultimate goal.

Screening Measures

School districts in New Jersey are mandated to screen students for dyslexia or other reading disabilities if they have one or more potential indicators of dyslexia or other reading disabilities, using a specific screening assessment, by the end of the first semester of the second grade.[2] That does not mean that school districts should wait until mid-second grade to screen struggling readers. Rather, school districts can, and should, utilize results from earlier grade level reading assessments to inform if a child should be formally screened for dyslexia, or not. Universal Screening measures used in grades K–2 should include age/grade assessments that focus on the skills that those students in that age/grade range should master. For example, kindergartners should be able to blend onset-rime and segment words (i.e., pulling apart the word CAT into "C" and "AT"). Assessments in K–2 should be done several times a year, using different screeners.[3] Unfortunately, many school districts use outdated methods of assessments that are not homing in on these vital signs that a student could have a reading disability, including dyslexia.

Structured Literacy Approach

The handbook repeatedly refers to "struggling readers" and the need to "offer appropriately differentiated instruction to

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all students." Popular programs often found in schools offer a balanced literacy or guided reading approach that may be appropriate for some students struggling with reading, but they are typically not effective for students with dyslexia.[4] In a recent article, *Education Week* noted the instruction provided by these programs, including Teachers College Reading and Writing Project, and Journeys by Houghton Mifflin Harcourt, do not always include systematic phonics instruction and the method of instruction may actually undermine the phonics instruction students receive.[5] Valuable years of important literacy instruction are essentially wasted on these inappropriate reading methods. The handbook relies on research provided by the International Dyslexia Institute to suggest that what works for struggling readers (and non-struggling readers) is a structured literacy approach; one that focuses on decoding words in an explicit and structured manner, that is systematic, cumulative, and multisensory.

Delivery of Structured Literacy

If we know that structured literacy works for struggling readers, why are we not providing it across the board in our schools? School districts either cannot provide this level of instruction due to staff shortages, or they are unwilling to allocate resources to hire trained reading instructors and/or train existing teachers how to provide the instruction in the manner and frequency intended, with ongoing assessments to provide a measure of success. The handbook provides guidance for the delivery of this type of instruction, including, providing a program that is data-based to be effective for dyslexia instruction, taught with fidelity, by a certified or trained instructor, for a sufficient amount of time to make progress, and which is frequently assessed for progress.[6] Many school districts are not in a position to provide this intensive method of instruction in-house.

Are NJ School Districts Paying Sufficient Attention to Dyslexia?

Maybe. As recently as October 2021, in *T.S. and M.S. on behalf of T.S. v. Ridgewood Village Board of Education*[7], Acting Director and Chief Administrative Law Judge, Ellen Bass referenced the handbook several times in her findings, setting a precedent that school districts must start identifying struggling readers and ascertaining the appropriate delivery of instruction. In that case, Judge Bass concluded that the out-of-district school for language-based learning disabilities into which a family unilaterally placed their child was appropriate, in part, because of the school district's inability to identify the student as a struggling reader, and failure to offer an appropriate program based on the requirements found in the handbook. Judge Bass noted the school district was "obligated by law to screen for dyslexia"[8] [and that the] "failure to conduct the required screening clearly denied a FAPE [free appropriate public education] to T.S. because he was misclassified and for years was deprived of an IEP that focused on his overriding educational deficit; his inability to learn to read.[9]"

What Next?

This recent decision in New Jersey, and a similar decision in Nevada, where a Judge ruled that the district violated federal education disability law by not providing services that would have adequately met the needs of a student with dyslexia and awarded the parents reimbursement in excess of $400,000, are keeping dyslexia in the public eye, and holding school districts accountable to their struggling readers.[10] Every day, parents, reading specialists, and education advocates and attorneys are lobbying for legislative changes at the state and federal level, and better reading instruction in the schools. These recent decisions indicate that progress is being made. Unfortunately, the number of children whose reading struggles are not being addressed is still staggering. Fortunately, in New Jersey, we have the Dyslexia Handbook. Our Judges are taking it seriously; therefore our schools need to also or they may be held financially responsible for their inattention. ■

Endnotes

1. *The New Jersey Dyslexia Handbook A Guide to Early Literacy Development & Reading Struggles*, state.nj.us/education/specialed/dyslexia/NJDyslexiaHandbook.pdf. (2017).
2. N.J.S.A. § 18A:40-5.3 (LexisNexis, Lexis Advance through New Jersey 219th Second Annual Session, L. 2021, c. 308, and J.R. 8)
3. *The New Jersey Dyslexia Handbook A Guide to Early Literacy Development & Reading Struggles*, state.nj.us/education/specialed/dyslexia/NJDyslexiaHandbook.pdf, page 10-11.
4. *Id*. at 21.
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Juvenile Justice Involved Youth May Be Denied Freedom, But Not FAPE[1]

By Lacia Japp

Special Education Affects Juvenile Justice

In New Jersey, 44.3% of detained youth have a disability requiring special education.[2] The Juvenile Justice Commission (JJC) estimates half of the 500 children in custody daily are eligible for special education.[3] Specific learning disabilities, emotional and behavioral disabilities, and other health impairments are prevalent.[4] Special education concerns can (1) impact arrest and charging, (2) inform court proceedings, (3) clarify FAPE for detained youth, and (5) assist with school re-entry.

Impacting Arrest and Charging

Children with disabilities are disproportionately criminally charged. In 2018, students with disabilities represented 28% of students referred to law enforcement or arrested for school-based offenses, but only 12% of students.[5] Black males with disabilities are 3.5 times more likely to be referred to law enforcement by schools.[6]

If a school reports a crime by a child with a disability, it must send the student's special education and disciplinary records to the responding law enforcement.[7] If information received by police makes the need for disability accommodations "open and obvious," police must make the reasonable accommodations.[8] Accommodations may include: simplifying inaccessible language, reading writing aloud, providing breaks, allowing standing or fidgeting, or other reasonable changes. Disability information may also affect decisions regarding arrest, interrogation, and charging.

Consider Thomas, a hypothetical student with ADHD and PTSD, making him more impulsive, more likely to have a startle response, and less able to regulate emotions. Thomas has an individualized education plan (IEP) documenting his (1) disability (2) behavioral intervention plan (BIP), and (3) other school accommodations. Thomas also works with school specialists familiar with how his conditions manifest. If Thomas slapped a teacher, the decision to charge him with aggravated assault for physical violence against school staff[9] may depend on whether the slap was a manifestation of his disability, whether school personnel followed the BIP, and what needs his IEP reveals. Advocates can request, present, and explain school records to law enforcement, therefore decreasing inappropriate arrests and charging.

Informing the Juvenile Court

After charging, the case moves to Juvenile Court. Public defenders may use disability information to negotiate pleas, request accommodations, suppress evidence or statements, and dismiss charges. Prosecutors may use it to direct juveniles toward appropriate intervention programs. Judges may consider it when determining mitigating factors and disposition.

Returning to Thomas: Public defenders may explain (1) how Thomas' conditions make it difficult to control impulsivity and regulate emotions and (2) school records indicate staff did not follow Thomas' BIP. These factors may weigh against Thomas' culpability. Prosecutors may suggest therapeutic rather than purely punitive interventions. The court may be better informed by an educational advocate to understand these disability related implications.

Clarifying FAPE

The Juvenile Court may place students outside their home school district. At an out of home detention alternative, the home district remains responsible for providing FAPE.[10] However, detention centers are responsible for *executing* FAPE.[11]The JJC's Office of Education ("OOE") mandates detention facilities provide an appropriate education including special education IEP services.[12]

Imagine Thomas went to a secure facility with residential units, behavioral units, and classrooms. Thomas is removed from the residential unit and placed in a behavioral unit because he fought with other residents. Thomas cannot attend the classroom while on the behavioral unit. Instead, he is provided a packet with classwork and letters from teachers. This does not follow his IEP. As a result of the lack of appropriate services, Thomas falls behind educationally. A special education advocate could recommend appropriate educational access and compensatory education.[13]

Assisting with Re-entry

Upon re-entry, students with IEPs experience significant delays enrolling in school, and further delay while school personnel review IEPs, conduct evaluations, and issue a class schedule. Moreover, schools may inappropriately use juvenile justice information. Such information may only be used by staff as the principal deems necessary to maintain order, safety, discipline, and to plan programs relevant to the student's social and educational development.[14]

Imagine Thomas was released from the detention facility without being reenrolled in school. Since Thomas fell behind while detained, he needs new evaluations and an updated IEP. He will be without education until reenrolled, new evaluations occur, recommendations and plans are made, and a schedule is issued. Unlike a general education student, the school board will review his individualized needs at their next monthly meeting, therefore Thomas will not start classes for an additional month. Moreover, Thomas was released with an ankle monitor. Upon learning this, the principal stated Thomas could not return to school, despite the fact Thomas did not exhibit any school behavior warranting suspension. To explain his absence, the principal told Thomas' teachers about the ankle monitor. The principal's behavior inappropriately spreads awareness of Thomas' juvenile justice information and denies FAPE.

Ask Questions and Be Informed

Juvenile justice conversations need special education information. Start asking: *Does this youth have an IEP? Is offending a manifestation of disability? Are there appropriate educational services and accommodations? What re-entry needs remain?* ■

Endnotes

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A Quick Look

How the S3434 Year Can Make a Difference in Postsecondary Outcomes

By Lisa A. Hernandez

The Benefits of S3434

With the passing of S3434 in June 2021, New Jersey has attempted to offset the negative impact of the COVID-19 pandemic on thousands of students with disabilities by offering an extra year of special education eligibility to those who will turn 21 during the 2020–21, 2021–22, or 2022–23 school years.[1] Announcing the passage of the law, Gov. Phil Murphy said, "We recognize that the pandemic has been especially hard on the roughly 8,700 students this will impact and who may not have the full set of transitional skills and job training they need for adulthood." The question posed in this article is whether an extra year of the same transition services will bring students with disabilities any closer to competitive employment or financial independence.

According to the *2020 Progress Report on National Disability Policy: Increasing Disability Employment*, published in July 2020 by the National Council on Disability (NCD),[2] significant changes in special education career training and transition services are needed to improve employment outcomes and the possibility of financial independence for students with disabilities.

S3434 has given us the opportunity to better prepare special education students for their postsecondary lives, but that goal requires more than an extra year of the same transition services and job trainings these students have historically received. History tells us that if we don't change the way we educate and train special education students

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for their transition out of public education, their employment and postsecondary outcomes will remain grim compared to their non-disabled peers.

Career Training Can Help Close the Employment Gap

There are approximately 50 million people with disabilities in the United States. Twenty percent of families have a family member with a disability. But individuals with disabilities represent a much larger percentage of the unemployed population. Statistics from the Bureau of Labor Statistics show that between 2008 and 2017, people with disabilities were employed at an average of only 18%, while people without disabilities were employed at an average of 65%. In 2019 those numbers remained steady, with 19% of people with disabilities being employed and 66% of nondisabled people being employed.[3] As the NCD noted, "[p]eople with disabilities have endured, in good times as well as bad, unemployment rates that would be considered a national crisis if experienced by other groups."

The NCD identified three main problems that impede the employment of disabled individuals: (1) access to workplace accommodations; (2) the impact of employment income on the ability to receive SSI and SSDI benefits; and (3) weak employer engagement efforts. I suggest that there is another problem that we can address through special education law and advocacy efforts right now —career training as part of school-based transition services.

Students With Disabilities Need Training for Competitive Employment

Much job training for students with disabilities prepares them for low-earning jobs with little room for growth with a focus on rote or manual skills. The problem with this approach is that these skills are becoming obsolete in our current economy. Typical school-based vocational programs are not preparing students with disabilities for jobs that will remain important to our economy into the future. In fact, many manual and rote-skill jobs are at risk of being displaced by automation and other technological advances. S3434 promises an additional year of transition services, but how can we make those services effective for competitive employment?

Economic trends have caused job requirements to shift toward information, knowledge-based, and technological skills training.[4] Our economy is increasingly digital and information-based. Without access to more advanced skills training and credentialing, students with disabilities will not see substantial increases in employment opportunities and the employment gap will continue. Students need more training in the areas of health care, technology, coding, computers, and environmental sciences—all areas experiencing growth and expected to continue expanding over the next decade. They also need skills training that will equip them for jobs in the private sector, where individuals with disabilities are drastically underrepresented.

In considering economic recovery from the COVID-19 pandemic's impact on jobs, the New Jersey Department of Labor and Workforce Development reported on Dec. 16, 2021, that November gains on non-farm wage and salary employment were concentrated in the private sector of the state's economy.[5] In fact, in November 2021, employment gains were recorded in eight out of nine major private industry sectors. Over the same month, public sector employment decreased. There needs to be meaningful job shadowing and internships in the private sector for students with disabilities.

Regardless of industry, special education students need to learn skills with positive economic returns, which means tasks that remain resistant to automation like creativity and ideation, social and emotional intelligence, and tasks related to perception and manipulation.

The S3434 Year Can Improve Employment Outcomes

An extra year under S3434 to focus on physical or manual skills for which economic demand is waning will not result in better long-term outcomes for students with disabilities. Special education law and advocacy can help to change the outcomes for these students by demanding that they receive skills training that is pertinent to the fastest-growing sectors of our economy, including skilled labor, information and communication technology. The opportunities for future employment are there, but they require more than one more year of the same transition strategies. They require new ideas, new types of training and high expectations for students with disabilities. ■

Endnotes

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A Roadmap for the Special Needs College Student

Moving from Child Find to Self-Report

By Laura A. Siclari

IDEA'S Child Find Obligation

For disabled students in grades pre-K to 12, many decades of hard-fought advocacy and court battles have yielded a vast body of case law, standards, regulations and guidance governing public school districts' duties and expectations for identifying disabled students and providing them with free and appropriate public educations enabling them to make meaningful educational progress. Central to these obligations is the federal Individuals with Disabilities Education Act (IDEA)[1]—our nation's special education law—which guides the lifecycle of a disabled grade school student and birthed the Individualized Education Program, or IEP, which is a disabled student's guidebook each school year for their education program and related school support services. Under the IDEA, school districts are held accountable for benchmarking whether a student classified as disabled has made meaningful educational

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One of the hallmarks of IDEA is its "Child Find"[2] mandate, laying responsibility on public schools to proactively seek out and identify potential students with disabilities from birth to age 21 in order to evaluate them and determine their eligibility for special education. Through Child Find, disabled students are meant to be assured that their school will find *them* if they are struggling and need academic supports.

progress in their program, as evidenced by meeting or exceeding the annual goals and objectives contained in their IEP.

One of the hallmarks of IDEA is its "Child Find"[2] mandate, laying responsibility on public schools to proactively seek out and identify potential students with disabilities from birth to age 21 in order to evaluate them and determine their eligibility for special education. Through Child Find, disabled students are meant to be assured that their school will find *them* if they are struggling and need academic supports.

College-Bound, Student-Led Disability Services

The experiences of classified students in grade school—with their annual IEP meetings attended by their parents, where their schools examine last year's progress and offer tailored and tweaked IEP services for the next school year—stand in stark contrast to the experiences that disabled students will have upon transitioning to college. Many students, coming directly from a school-led disability services mindset in high school, are startled to find that they are now on their own and that their IEPs do not follow them to college. Nor will their colleges necessarily even know—or care to know—which students require special educations services unless and until those students take the initiative by self-reporting their disabilities to their colleges and requesting accommodations.

Indeed, this is the reality for many post-high school (post-IEP) students, as data indicates a growing percentage of students with special needs attending college undergraduate programs in the United States, with nearly 20% of college students during the 2015-2016 school year reporting that they had a disability.[3] Arguably, the percentage of college students with disabilities is even higher when taking into account students who, for various reasons, did not report having disabilities.

The shift in disability services responsibility from *school*-led to *student*-led in the transition from high school to college is because IDEA, by design, only applies to grade school special education students and sunsets once a student graduates from high school. College students with disabilities are protected and governed by the legal obligations under our federal civil rights laws, primarily the Americans with Disabilities Act (ADA)[4] and Section 504 of the Rehabilitation Act of 1973 (Section 504),[5] which prohibit discrimination against disabled individuals and require places of public accommodation and schools that receive federal and/or state funds, to provide equal access and accommodations to students and other individuals with disabilities. Although these same laws also protect elementary and secondary school students, neither the ADA nor Section 504 are special education statutes, *per se*, and therefore do not offer the same levels of protections as those offered under the IDEA. However, since IDEA does not apply to post-secondary students, the protections afforded under the ADA and Section 504 are all that are available once a student enters college.

The Nuts and Bolts of the College Accommodations Process

Despite the emerging effort by academia and media to reshape disability resources on college campuses with a social justice lens,[6] at its core, such schools are bound by their basic legal obligations under federal law to provide *access* and *accommodations* to their disabled students, with Section 504 being the primary driver behind post-secondary schools' disability support obligations. Applicable colleges governed by Section 504 must designate staff members—or create disability service offices—to coordinate student disability support requests and letters of accommodation.

Self-Reporting a Disability

The first step for an incoming college student with a disability seeking supports is to contact the college's designated disability coordinator or disability

services office and advise that they are seeking accommodations for a disability. Many schools have a standard disability registration form, often found on the college's website, which invites the student to disclose their disability(ies) and provide paperwork documenting the disability. This step is critical, as only "qualified individuals"[7] who meet Section 504 and the ADA's definitions of "disability" are entitled to accommodations. The applicable definition of disability is as follows: "a physical or mental impairment that substantially limits one or more major life activities of such individual."[8] The definition goes on to state that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[9] "Major life activities" also encompasses limitations of "major bodily functions," such as normal cell growth (i.e. cancers), functions of the immune system, and neurological, among other functions.[10] Temporary conditions or injuries lasting six months or less are not considered permanent disabilities and generally do not qualify as a disability under these laws.[11]

Supporting Documentation

A critical next step to establishing a student's qualifying disability is to provide supporting documentation, typically a letter or report prepared by an appropriate professional, such as a medical doctor, psychologist or other qualified diagnostician. According to guidance provided by the U.S. Department of Education:

> the required documentation may include one or more of the following: a diagnosis of [the student's] current disability, as well as supporting information, such as the date of the diagnosis, how that diagnosis was reached, and the credentials of the diagnosing professional; information on how [the student's] disability affects a major life activity; and information on how the disability affects [the student's] academic performance. The documentation should provide enough information for [the student and the] school to decide what is an appropriate academic adjustment.[12]

The degree of documentation required to establish a qualifying disability and applicable accommodations varies by college. For example, Rutgers University has an extensive listing of disability documentation guidelines on its website, broken down by the most common disabilities.[13] For other schools, a simple letter from an evaluator diagnosing a disability will suffice. Certain colleges request that the documentation also list the specific accommodations that the doctor or diagnostician recommends, so, in such cases, it would be important for a student to educate themselves on the available accommodations and coordinate with their doctor to ensure that the applicable accommodations are included in the supporting letter or report for the college.

Determining the Accommodations

Once a qualifying disability has been established, colleges are required to provide reasonable and appropriate accommodations tailored to that student's needs. The Section 504 implementing regulations for accommodations in academic institutions outline the types of accommodations (called "academic adjustments") that colleges must make available to their disabled students in the areas of: (1) academic requirements, (2) course examinations and (3) auxiliary aids.[14] In the area of academic requirements, these accommodations may, by law, include: changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted. However, schools are not required by law to modify the "essential" academic requirements of a particular degree or licensing program.[15]

In the area of course examinations, the federal regulations generally state that schools "shall provide such methods for evaluating the achievement of students...as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills."[16] No specific examination accommodations are prescribed in the regulations. However, the U.S. Department of Education has issued guidance on appropriate accommodations for standardized tests, which is informative.[17] Such accommodations can include, but are not limited to, extended time, screen-reading technology, scribes, oral exams and distraction-free rooms.[18]

In the area of auxiliary aids, the federal regulations have provided a list of several auxiliary aids, making clear that the list is not to be considered exhaustive. The regulations state:

Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions.[19]

The federal government has issued guidance containing an even more expansive list of potential auxiliary aids, including talking calculators and specialized gym equipment, to name a few, illustrating that a broad range of potential

aids should be considered by colleges to meet the needs of their disabled students.[20]

Finally, it is important to note that colleges are not required to implement accommodations that would (1) "fundamentally alter" the nature of the program, services, or facilities[21] or (2) result in an undue financial or administrative burden to the school.[22] The appropriateness or burden of a requested accommodation is determined on a case-by-case basis. These significant parameters should be considered in any discussion concerning appropriate modifications or accommodations.

The Letter of Accommodation

After completing the accommodations approval process, a college typically issues a Letter of Accommodation (LOA), or similar document, listing the accommodations for which a student has been approved for the upcoming academic semester or school year. This letter is the college's official documentation establishing that the student is entitled to disability accommodations at their college. The LOA or similar document should be shared with each of the student's professors and potentially with exam proctors, as applicable. Some colleges have a process whereby the disability services coordinator handles the notifications to professors, and others leave that responsibility to the student. It is critical to note that, even with a Letter of Accommodation, there is no guarantee that all approved accommodations will always or automatically be provided in all courses and for all exams. Every college is different, and all will evaluate accommodation needs differently, sometimes on a course-by-course basis instead of on a blanket semester-by-semester basis. For high-stakes exams at larger universities, such as Rutgers, students may be required to submit individual exam request forms a certain number of days prior to *each and every* exam to affirmatively request accommodations (such as extended time, quieter alternate testing locations, use of a reader or frequent breaks).[23]

For these reasons, it is imperative that a student be proactive and develop a mindset of continuous self-advocacy to always be aware of which accommodations have been approved and ensure that each professor in each course has a copy of their Letter of Accommodation and is providing the agreed-upon accommodations. Any ongoing school-specific requirements to re-engage certain accommodations for each semester or for individual exams—such as a request for a note-taker or exam-specific accommodation request forms—must be adhered to by the student as well. While disability services coordinators are tasked with ensuring that their assigned students are informed of all ongoing requirements and processes for requesting accommodations, a student cannot always rely on timely information and should seek out that information. At minimum, even with the supports of the disability services coordinator, students should plan to always double-check all written disability services policies and requirements for their college, which are typically found on the college's website and/or in its student handbook.

Continued Barriers to Accommodations

Significant attention has been paid over the past decade and in more recent years to identifying why more disabled students do not fully avail themselves of college disability services and accommodations. One qualitative study that tracked a number of disabled college students identified five primary drivers for this outcome: (a) identity issues, (b) desires to avoid negative social reactions, (c) insufficient knowledge, (d) perceived quality and usefulness of services, and (e) negative experiences with faculty.[24] One research study also found that many students with disabilities first seek accommodations only after an academic crisis.[25] Closely related, the same research found that students who sought services earlier performed better academically than students who postponed seeking services. Although several of the identified barriers are student-imposed—i.e. wanting to

…[I]t is imperative that a student be proactive and develop a mindset of continuous self-advocacy to always be aware of which accommodations have been approved and ensure that each professor in each course has a copy of their Letter of Accommodation and is providing the agreed-upon accommodations.

"try" college without accommodations or being fearful of the stigma attached to self-identifying with a disability—other barriers are imposed by the academic institutions themselves. Indeed, students in several research studies reported disability services professionals who discouraged their use of accommodations or professors who claimed to be unable, or were unwilling, to implement approved accommodations.[26]

Based upon the identification of these varied barriers to college accommodations, a multitude of approaches could be implemented as best practices to help reduce these impediments. For example, at the high school level, more robust and informative transition services provided by child study teams would go a long way to help ensure earlier and greater student knowledge about the availability of disability services and the college accommodations process prior to entering college, with the goal of encouraging early self-reporting of disabilities during those students' freshman years of college. During freshman orientations at all college campuses, information about the availability of disability services and the process to seek accommodations should be part of the programming. Awareness campaigns led by a partnership between college disability services and their more senior disabled students may also assist in de-stigmatizing the concept of disability self-identification for underclassmen. Lastly, a change in mindset and/or further training may be required for disability service professionals and professors alike as to what the law requires academic institutions to offer to its disabled students.

With common-sense actions such as these and a shared goal between schools and students of creating a successful college experience for *all* students, future statistical outcomes will likely improve for disabled college students in hand with the growing movement toward ensuring more enhanced and earlier access to disability accommodations. ■

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MONEY

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