A Year to Remember

Recent Legal Developments in Special Education

By Cherie L. Adams

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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).