

Shake, Rattle, and Roll:

*Keeping Your Balance in Special Education
The Year in Review!*

Presented by

**Drummond Woodsum's
Special Education Team**

Presented to

The Directors' Academy

June 26, 2019
Sugarloaf Mountain



84 Marginal Way, Suite 600
Portland, ME 04101-2480
1-800-727-1941

erherlan@dwmlaw.com
atchao@dwmlaw.com
hking@dwmlaw.com

DrummondWoodsum

Part A

Shake, Rattle, and Roll: *Special Education Potpourri!*

As you will see in the next section, it has been a year with a large number of court rulings, in addition to the usual variety of hearing officer decisions. Other than litigation, however, it has been a relatively quiet year since the last Directors' Academy. Of course, we have a new Commissioner of Education and a new State Director of Special Education, with both developments being exciting for schools around the state. It also has been a year with a close focus on restraint and seclusion, and a few developments there. The Legislature has considered a fair number of bills that could have an impact on special education. And of course MaineCare developments continue to lurk around the edges of special education in concerning ways.

In any event, we will attempt to review some of these key developments here, before moving on to our new cases. All told, the Year in Review dances to only one tune: Shake, Rattle, and Roll!



NOTES

Legislative Proposals

As noted, the Legislature has been considering a number of proposals that could have impacts on special education. We review them here, and where we can, we note their status with the Legislature.

A. Changes to School Counselors/Social Workers Law

Maine's law relating to school counselors and school social workers, currently found at 20-A M.R.S.A. § 4008, has always been important, even though it falls outside of special education and applies to counselors generally. The definition of "school counselor" is broad:

"School counselor" means a person who is employed as a school counselor in a school setting and who:

- (1) Is certified as a school counselor by the department; or
- (2) Possesses a minimum of a master's degree in an approved program in guidance and counseling.

C. "School social worker" means a person who is employed as a school social worker in a school setting and who:

- (1) Is licensed as a social worker by the State Board of Social Worker Licensure; or
- (2) Possesses a bachelor's degree and has been granted a conditional license from the State Board of Social Worker Licensure.

Certainly this law encompasses social workers who are providing services to special education students, as well as certified school counselors, who also occasionally intersect special education issues.

Most readers know that this provision establishes an additional cloak of confidentiality to the information gathered by a counselor or social worker during a "counseling relation." This information cannot be released by the counselor/social worker except in accordance with their licensing code of ethics, or in emergency situations when there is a "clear and imminent danger" to the

NOTES

client or to others, or for reporting purposes to DHHS.¹ These restrictions do not prevent a social worker who provides services under an IEP from reporting on the student's progress with IEP goals, but the particular statements made by the client to the counselor would certainly be confidential under this law.

A new section has now been added to the law, found at 20-A M.R.S.A. § 4008-A, which clearly is intended to ensure that more of the counselor/social worker time is spent working with students, rather than meeting other responsibilities. The new provision, signed into law, requires that each counselor and social worker shall spend at least 80% of their time providing "direct services to and indirect services on behalf of students." The new law defines the key terms as follows:

A. "Direct services" means in-person interactions between a school counselor or school social worker and students that are within the scope of the duties of a school counselor or school social worker as established by the department by rule.

B. "Indirect services" means services provided by a school counselor or school social worker on behalf of students as a result of a school counselor's or school social worker's interactions with the students and others that are within the scope of the duties of a school counselor or school social worker as established by the department by rule.

We will have to see the rules issued by the Department on this matter, but one would certainly assume that time spent at IEP team meetings or in other team settings to review and address a student's concerns, time spent discussing the student with parents, and time spent discussing the student with state agency representatives would all meet the standard for "indirect services."

¹ See 20-A M.R.S.A. § 4008(2), (3).

NOTES

B. Teacher Employment Law

We do not generally report on changes in Maine’s teacher employment laws, but since many teachers are special education teachers, and directors are very concerned about having strong educators, we note here a change in the law on teacher non-renewal.

Probationary teachers in Maine are teachers who can be let go from their employment for any reason at all, as long as it is a non-discriminatory or otherwise lawful reason. There is no need for “just cause” to let probationary teachers go. The probationary period is a time to be sure that the particular teacher has the right fit for the school and the job.

Readers may remember that a few years back, the probationary period was extended by the Legislature from two years to three years – giving schools a longer period to review the teacher’s skills in the position. This new law, signed by the governor and found at 20-A M.R.S.A. § 13201, had moved the probationary period back to two years from the current three year standard – beginning with teachers first hired by the school unit for the 2020-2021 school year.

Make sure you do strong evaluations of your new hires (every year, but especially starting in 2020-2021), because starting with the 2020-2021 new hires, you will only have two years to determine whether you want to give them a continuing contract, which in turn will make it very difficult to change course with that hire.

C. Early Childhood Education (LD 512 and 1043)

At press, the Legislature is currently considering a number of provisions that address early childhood education. Apparently, these have been approved but are awaiting consideration of the financial impact. LD 1043 amends the State’s goal to have all 4 year old children attend a public preschool program,

NOTES

moving the goal from 2018-2019 to 2023-2024. The Department is to develop recommendations on how to accomplish that.

In addition, there is a resolve for addressing the needs of Maine’s early childhood education system, birth to school age five. Identifying this as a legislative emergency, the Resolve authorizes a request for proposals from entities “to address the effectiveness, efficiency, accountability and costs of early childhood special education systems” in Maine. In addition to authorizing a contract with an entity to enter into this study, the Resolve also creates an Independent Review Advisory Committee, which includes a variety of members, but including for public school purposes a principal of an urban school unit with early childhood education, a special education director from a “small school administrative unit”, and a superintendent of schools from a “rural school administrative unit” that has implemented early childhood education programming for children 4 years of age.

Among the issues the Advisory Committee must report on are the following:

- A. Models of best practices;
- B. Fiscally sound budget forecasting, including all possible revenue streams and updated costs;
- C. Transportation services;
- D. Data systems, including a billing system, a system that allows coordination with the MaineCare program and a case management documentation system;
- E. A timeline for the implementation of the plan under this section;
- F. A procedure for data collection and analysis conducted by the Maine Education Policy Research Institute;
- G. A method for assessing a school administrative unit's capacity for implementing early childhood special education programs;
- H. Training requirements for service providers and leaders;
- I. A public information communication strategy for implementation of the plan;
- J. Identification of potential revisions to the Department of Health and Human Services rule Chapter 101: MaineCare Benefits Manual; and
- K. Workforce capacity, including but not limited to the availability of certified teachers.

NOTES

And the Advisory Committee must also recommend a step-by-step implementation plan for the recommendations that they make.

Of course, this is a move to assist in the difficult decision of how best to serve children with disabilities who have not yet reached school age five and who are currently being served by CDS. Plainly, there is a strong move for pulling that population into public schools, but with no certainty on the specific mechanics for accomplishing this feat. Stay tuned!

D. Laws on Immunization

Most readers are well aware of the childhood immunization debate that has gone on in Maine and nationally. We do not mean to step into that thicket, but instead want to highlight Maine's own addition to that debate. As you likely know, the Legislature has approved and the Governor has signed into law changes to 20-A M.R.S.A. § 6355 regarding exceptions to the immunization mandate in Maine.

Maine law has long required every child who is to attend public school to provide a certificate of immunization in accordance with the law. This law previously had three exceptions: one was a physician's exception if immunization is "medically inadvisable", another was for a "sincere religious belief" that is contrary to immunization, and the third is for opposition to immunization "for philosophical reasons."

The Legislature was considering a total removal of the religious and philosophical exemptions to the immunization requirement. This raised a question about the impact of the change on students with disabilities. It appeared to our office that such a change would likely require schools to provide special education to excluded students outside of school, particularly in light of the Supreme Court's focus on the child's unique "circumstances" in

NOTES

providing a FAPE, with a likelihood that exclusion on these grounds could be considered part of the child's circumstances – and certainly it is something beyond the child's control.

In any event, the new law has removed the exemptions for philosophical or religious reasons, to take effect on September 1, 2021. To address in part the special education issues noted above, the new law does include an exemption for students who had a philosophical or religious exemption on or before September 1, 2021, AND who were covered by an IEP on September 1, 2021. This special education exception is limited. The student must have the IEP on September 1, 2021, and also claimed the religious or philosophical exemption by that date.

Plainly, this leaves the question alive regarding a possible duty to service special education students who are excluded from school under this law after September 1, 2021, if special education eligibility is first established after that date. Perhaps many of these children will be in home schooling or private school programming, which in turn alters the scope of a public school's duty to provide special education in any event. But schools should assume some duty will continue for these students, with its exact reach depending on what the child's educational status might be.

E. An Act to Improve Student Attendance

Readers may recall that there was a movement to extend earlier the age at which a child must begin attending school or an approved alternative to school. This has resulted in some changes to the law, but not as broad as initially discussed.

The mandatory age at which a child must be in public school or an approved alternative is remaining at 7 years old. But LD 150 has imposed a helpful new standard for children who have enrolled in public school earlier in

NOTES

time, stating that once a child has been enrolled, he or she is subject to the mandatory attendance requirements that have long been in the law. It reads:

A person 5 years of age or older and under 7 years of age who is enrolled in and who has not withdrawn from a public day school is required to attend that school during the time it is in session.

20-A M.R.S.A. § 5001-A(1-A) (as amended). So, if a child between school-age five and 7 enrolls in your school unit, the child is then subject to the mandatory attendance requirements and Maine's truancy laws.² Schools with non-attending students in special education between the ages of 5 and 7 are of course covered as well. This change should help schools address early on the problem of student non-attendance, eliminating one of the loopholes in the law that once existed for enrolled young children.

F. An Act to Amend Maine's Hazing Law

Maine has had a prohibition on hazing in the state laws for a number of years, found at 20-A M.R.S.A. § 6553. LD 1765, as amended, has proposed expanding the definition of hazing as follows, with the underlined language being new:

“Hazing” means any action or situation, including harassing behavior, that recklessly or intentionally endangers the mental or physical health of any school personnel or a student enrolled in a public school, or any activity expected of a student as a condition of joining or maintaining membership in a group that humiliates, degrades, abuses or endangers the student, regardless of the student's willingness to participate in the activity.

This hazing law applies the ban on hazing to private schools in Maine – a welcome addition to the law.

² See also 20-A M.R.S.A. § 5051-A (1)(D) (as amended) (applying truancy standard to students ages 5 to 7).

NOTES

Of course, this is not in any manner a special education law, but students with disabilities are occasionally somewhat more vulnerable to hazing activities and it is important for special education directors and personnel to know about this change.

G. Changes in the law relating to restraint and seclusion.

Maine’s standards on restraint and seclusion are mostly set forth in Chapter 33 of the state rules. But the Legislature has adopted a new provision that clarifies and expands certain reporting requirements relating to restraint and seclusion.

A new section 7008 has been adopted, which requires that the Commissioner shall report on the number of restraints and seclusions in certain categories, and accordingly, that each “covered entity” provide the same information to the Commissioner. A “covered entity” is:

An entity that owns, operates or controls a school or educational program that receives public funds from the department, including, but not limited to, public schools, public regional programs, public charter schools, private schools, private schools approved for tuition purposes, special purpose private schools, career and technical education programs, public prekindergarten programs and the Child Development Services System.³

Under this law, schools must report to the Commissioner the aggregate number of uses of restraints and of seclusion, in each case broken down by grade level or age group, and whether the student has an IEP, a 504 plan, a behavior plan, an Individualized Health Plan, or some other plan (perhaps like a MaineCare Individualized Treatment Plan. The breakdown must also include the aggregate number of students in the same categories who are subject to restraint or seclusion.

³ See 20-A M.R.S.A. § 7008.

NOTES

The reporting must also include the numbers of “serious bodily injuries” to staff related to physical restraint or seclusion. Presumably this term carries the same meaning as it does in the IDEA.

Finally, LD 1376 also requires the DOE to amend chapter 33 to make clear that local school policies on restraint and seclusion are consistent with the definitions found in Chapter 33 itself. Further, the DOE must develop a performance review system “to define and monitor all covered entities’ use of physical restraint and seclusion.” This review system must include unspecified accountability standards, and compliance plans to decrease the use of restraint or seclusion.

H. Maine’s Diploma Standards

Maine continues to amend its diploma laws. Toward that end, the Legislature has repealed 20-A M.R.S.A. § 4722-A, which had included many of the proficiency-based standards for the issuance of a high school diploma. That language has all been replaced with altered language in 20-A M.R.S.A. § 4722. In brief, the amended language requires that high schools have a minimum 4-year program, with instruction in a number of listed subject areas that must be satisfactorily completed, either through successful participation in the listed areas of instruction “or the equivalent in standards achievement.”⁴

The amended law includes the following critical language:

2-B. Policy. The following are the fundamental policies in the State's high school diploma standards:

A. To ensure that a diploma indicating graduation from a secondary school signifies that the graduate has completed the requirements described in this section and is ready to enter a postsecondary educational program or a career as a clear and effective communicator, a self-directed and lifelong learner, a creative and

⁴ See 20-A M.R.S.A. § 4722(2).

NOTES

practical problem solver, a responsible and involved citizen and an informed and integrative thinker;

B. To recognize that in order to help students to reach the goal described in paragraph A, school administrative units must align their instruction with the system of learning results established under section 6209; and

C. To encourage school administrative units to develop innovative multiple pathways that allow all students to learn and demonstrate their achievement through multiple means and measures pursuant to subsection 2-A.

3. Satisfactory completion. A diploma may be awarded to a secondary school student who has satisfactorily completed all diploma requirements in accordance with the academic standards of the school administrative unit and this section. All secondary school students must achieve the content standards of the parameters for essential instruction and graduation requirements established pursuant to section 6209. *A child with a disability, as defined in section 7001, subsection 1-B, who satisfies the local diploma requirements in the manner specified by the child's individualized education plan must be awarded a high school diploma.* Career and technical students may, consistent with the approval of the commissioner and the local school board, satisfy the requirements of subsection 2 through separate or integrated study within the career and technical school curriculum, including through courses provided pursuant to section 8402 or 8451-A.⁵

This change seems to make clear that the child's IEP team, through the IEP document itself, can make disability-related adjustments regarding how a student with a disability will complete the requirements for a diploma in each of the required areas. To the extent that a local school has requirements in addition to the state requirements, we believe that this same language would control, regarding the power of the IEP team.

⁵ See 20-A M.R.S.A. § 4722 (as amended)(emphasis added).

NOTES

I. Dangerous Behavior in the Classroom

LD 1370, as amended, has passed as emergency legislation and at the time this material is printed, is now awaiting signature by the Governor. This is a fairly controversial piece of legislation, and reflects strong feelings by the state teachers' unions. The LD purports to address a need to prevent or lessen dangerous behavior at school. It would be promulgated as 20-A M.R.S.A. § 6555, immediately following Maine's law on bullying found at Section 6554.

As currently drafted, the LD defines "dangerous behavior" as "behavior of a student that presents a risk of injury or harm to a student or others." If a teacher or school staff person reports an incident of dangerous behavior, the school unit is required to review it and develop an "individualized response plan" in accordance with the law. This review must be done by BOTH an assigned school administrator and a public school employee.

If the incident is substantiated, the school, in consultation with the employee subjected to the dangerous behavior (if any), must develop the response plan in an effort to "avoid future dangerous behavior." The response plan may include but is not limited to the following:

- A. Minimizing suspension and expulsion of the student;
- B. Prioritizing counseling and guidance services for the student and educators;
- C. Providing positive behavioral interventions and supports designed to address the consequences of trauma in the individual and training for the student and educators;
- D. Restorative practices;
- E. Training for public school employees who interact with the student; and

NOTES

F. Provision of adequate staffing and professional development necessary to implement the plan.⁶

Importantly, the proposed law declares that it shall not be interpreted in a manner that undercuts federally protected rights, including the rights of students with disabilities. And in the case of students in special education, any discussion of interventions that might relate to the student's identification, evaluation, educational placement, or the delivery of a FAPE, must occur through the IEP team process.

If a school employee has to miss work as a result of an injury caused by dangerous behavior, and the employee is unable to work for that reason, the time away from work cannot count against the person's accrued sick leave.⁷

There are problems with the language of this proposed law. It applies to any student behavior that "presents a risk of injury or harm to a student or others." It does not define "injury," so it is unclear if this includes emotional injury/harm along with physical injury/harm. And of course it applies to a "risk" of injury or harm, so presumably it encompasses credible threats as well. The reach of covered behavior here could be extremely broad.

The proposed law is not limited to the risk of injury or harm to staff. It also includes such risks toward students "or others." Perhaps this vague language will be limited to persons within a school setting. Let's assume so. But then the language around the review of the incident and the development of a response plan appears to presume that a "public school employee" was the victim, because it calls for consultation with "the public school employee who was subjected to the dangerous behavior, if any." It is unclear whether "if any" modifies the employee or the dangerous behavior.

⁶ See 20-A M.R.S.A. § 6555(2) (proposed).

⁷ See 20-A M.R.S.A. § 13601(5) (proposed).

NOTES

The requirement to do the response plan is interesting. Presumably if the perpetrator of the dangerous behavior is in special education, then the response plan process will usually be funneled through special education – whether for development of the plan, or if particular interventions are being recommended, for consideration by the IEP team. Schools will be faced with having to determine whether to assign the plan process directly to the IEP team, or whether to have the IEP team review the plan and consider ordering any interventions that would have to be a part of the IEP team process in any event. The best advice would likely be to have the response plan done separately and then reviewed by the IEP team if it would impact the IEP in any manner. The IEP team could then override the plan, if not consistent with special education standards.

This law raises a number of complex issues, and it is unclear why it had to be adopted. But assuming signature by the Governor, we will have to find a way to work it into the standards schools follow for addressing challenging behaviors.



Part B

Shake, Rattle, and Roll: Case Summaries!

Every year we give you a summary of new court and hearing officer rulings that come out of our own jurisdiction. This would include the Supreme Court (none this year), the First Circuit Court of Appeals, the Maine Federal District Court, and then Maine hearing officer rulings. And given that we are continuing to see a steady stream of complaint investigations, we are including a summary of some of those decisions, too. Enjoy!

I. First Circuit Decisions

This year we have several First Circuit decisions that speak to special education issues. These cases offer important rulings on FAPE, LRE, and on the age limits for FAPE. And for the last time, we have an end to the famous statute of limitations case out of MSAD 72. These are all important cases and worth reading!

A. *Johnson v. Boston Pub. Sch.*, 906 F.3d 182 (1st Cir. October 12, 2018)

FAPE

Meaningful Benefit Standard

Individualized Programming

Parent Conduct

In the wake of the Supreme Court’s decision in *Endrew F.*, parents’ attorneys in Maine and elsewhere had argued that the decision ushered in a higher FAPE standard—and altered the “meaningful educational benefit” standard in our circuit. Not so, according to the First Circuit. In a recent decision in Massachusetts, the First Circuit ended speculation: “In our view, the standard applied in this circuit comports with that dictated by *Endrew F.*”⁸ Here are the details of the decision in *Johnson v. Boston Public Schools*.

⁸ *Johnson v. Boston Pub. Sch.*, 906 F.3d 182, 194 (1st Cir. 2018).

NOTES

Factual Background

This case involved a hearing-impaired student with a cochlear implant who exhibited significant language delays. The student's cochlear implant worked inconsistently, including during a five-month period when it lacked a processor.

The IEP for the student's kindergarten year called for instruction in American Sign Language as well as sign-supported spoken English. The student initially made progress in signing but the mother asked the IEP team to limit his signing instruction since the family did not sign at home. The IEP team expressed concern but ultimately modified the IEP to reflect the mother's preference.⁹

The student made slow progress but his language skills remained significantly limited. Educators and clinicians later opined that the mother's resistance to signing instruction negatively affected the student's progress.

Eventually the mother filed for hearing seeking an out-of-district placement. After the hearing officer ruled for the school district, the mother appealed to federal district court, which also ruled for the school district. The mother then appealed to the First Circuit.

Ruling by the First Circuit

To understand the import of *Johnson*, we must first revisit the Supreme Court's decision in *Endrew F.* In that decision, the Supreme Court explained the FAPE obligation as follows: "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁰ In reaching its decision, the Supreme Court had explicitly overruled the FAPE standard adopted in another circuit—the "more than de minimis" standard. The Supreme Court did not specifically address the "meaningful educational benefit" standard adopted in the First Circuit and other circuits, however, leading to speculation as to the impact of *Endrew F.* on the First Circuit's standard.

In *Johnson*, the First Circuit concluded that the "meaningful educational benefit" standard comports with *Endrew F.* in that it "requires consideration of the individual child's circumstances." In so holding, the First Circuit rejected the mother's argument that *Endrew F.* had raised the bar for evaluating the

⁹ *Id.* at 186-87.

¹⁰ *Endrew F. v. Douglas County School District*, 137 S. Ct. 988, 1001 (2017)

NOTES

adequacy of IEPs in our circuit. As such, the “meaningful educational benefit” standard remains the standard by which IEPs are judged in our circuit.¹¹

In addition to affirming the continued relevance of its earlier FAPE jurisprudence, the First Circuit also provided important guidance as to how IEPs should be judged in light of *Andrew F.*

First, the court emphasized that slow progress alone does not automatically amount to a denial of FAPE. “To the extent that [the parent] implies that ‘slow’ progress is, in and of itself, insufficient to constitute a ‘meaningful educational benefit,’ we cannot agree.” The court explained that, “[i]nstead, the relationship between speed of advancement and the educational benefit must be viewed in light of a child’s individual circumstances.” The First Circuit concluded that the record supported the decision of the court below that the speed of advancement was appropriate in light of the student’s individual circumstances. As a result, the First Circuit saw no reason to overturn the decision despite evidence that progress was slow.¹²

Second, the Court took a broad view of the “individual circumstances” that can be considered under *Andrew F.* to evaluate the student’s speed of advancement. The court below had considered the conduct of the mother—specifically, her resistance to educating the student in American Sign Language—as one factor among others in evaluating the student’s speed of advancement. (Educators and clinicians had opined that the mother’s resistance to signing instruction negatively affected the student’s progress.) The First Circuit offered no explanation as to why a parent’s conduct could properly be considered in a FAPE analysis, but, nonetheless, cited approvingly to the district court’s consideration of this factor when it upheld the determination that the speed of progress was appropriate in light of the student’s circumstances.

It is not uncommon for parent conduct to be a relevant consideration in an IDEA dispute: courts have long viewed unreasonable conduct by parents as an equitable basis for denying reimbursement for a unilateral placement. But in *Johnson*, the First Circuit appeared to view parent conduct as a potential factor in judging the adequacy of a school’s FAPE offering itself. The First Circuit’s discussion of this topic was brief—and raised more questions than it answered. But it signals that parent conduct may now have a new relevance. Only time will tell whether this nod of approval from the First Circuit is a blip on the radar due to unique facts—or a harbinger of jurisprudence to come. Until then, we will eagerly await further guidance from the courts on this important topic.

¹¹ *Johnson v. Boston Pub. Sch.*, 906 F.3d at 194.

¹² *Id.* at 196.

NOTES

B. *K.L. v. Rhode Island Board of Education*, 907 F.3d 639 (1st Cir. Oct. 29, 2018)

FAPE

Age of Eligibility

Adult Education

In *K.L. v. Rhode Island Board of Education*, a recent and surprising decision out of our First Circuit Court of Appeals which could have significant implications for Maine, the Court expanded the age range for serving students with disabilities in Rhode Island. The Court held that because Rhode Island makes “public education” available to older students through adult education programs, the State has a duty to ensure the provision of FAPE to all disabled students up until age 22, the maximum age for services under the IDEA, rather than age 21, the limit identified in Rhode Island state law.

Legal Background

Special education administrators and staff are familiar with the eligibility requirements contained in the Individuals with Disabilities Education Act (“IDEA”). As an initial matter, eligibility to receive special education services depends on whether a student has one of the 14 disabilities enumerated in the IDEA, and consequently requires special education in order to make educational progress. Schools must also consider a student’s residency, and whether the student is homeschooled, attends private school, or is enrolled in their local public school. Of course, a student’s eligibility is also limited by their age – in Maine, a student is only eligible to receive special education services through their local public school between the ages of 5 and the end of the school year in which they turn 20.

The IDEA requires states to ensure the provision of a free appropriate public education, or “FAPE,” to all qualifying children “residing in the state between the ages of 3 and 21, inclusive[.]”¹³ Despite this general rule, the IDEA goes on to provide an exception for students aged 3 to 5 and 18 to 21, stating that “the obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children... [aged] 18 through 21... to the extent that its application to those children would be inconsistent with State law or practice, or with the order of any court, respecting the provision of public education to [such] children[.]”¹⁴ In other words, a state

¹³ 20 U.S.C. § 1415(a)(1)(A). This language has been interpreted to require the provision of FAPE up to a student’s 22nd birthday.

¹⁴ 20 U.S.C. § 1415(a)(1)(B).

NOTES

must serve students between 3 and 5 and 18 and 21 only to the extent that the state generally serves children within those age ranges regardless of disability. Eligibility for service also ends upon receipt of a regular high school diploma.¹⁵

The District Court Ruling

This case began in 2016, when K.L. sued the Rhode Island Board of Education on behalf of a class of disabled students who “but for turning 21, would otherwise qualify or would have qualified for a [free appropriate public education] until age 22 because they have not or had not yet earned a regular high school diploma.”¹⁶ The plaintiffs were challenging a Rhode Island regulation that permitted LEAs to terminate a disabled student’s special education services upon reaching age 21, claiming that this regulation violated their right to a FAPE under the IDEA between the ages of 21 and 22. In essence, the plaintiffs claimed that because Rhode Island regularly provides “public education” to persons over 21 through adult education services, under the terms of the IDEA, the state must continue to provide special education services to disabled students until they reach the age of 22 – the cutoff for services under the general rule in the IDEA.¹⁷ Rhode Island could not take advantage of the IDEA’s exception because the state’s adult education programs constituted “public education” under the IDEA.

The case was first argued in the U.S. District Court for Rhode Island, which issued a ruling in favor of the Rhode Island Board of Education. The Court’s decision hinged on its holding that adult education is not considered “public education” under the law, noting that “adult education” is distinguished from other types of “public education” throughout federal education statutes.

The First Circuit Court of Appeals

K.L. appealed the District Court’s decision to a three-judge panel of the First Circuit Court of Appeals. The panel issued a 2-1 decision on October 29, 2018, overturning the District Court and holding that Rhode Island was violating the IDEA by failing to provide services to qualifying students up to age 22.

Again, the Court’s decision hinged on the meaning of the term “public education,” and found that it has three core attributes: “(1) significant funding from a public source ... (2) public administration or oversight ... [and] (3) the education of students to the academic competence ordinarily associated with

¹⁵ 34 C.F.R. § 300.102.

¹⁶ *K.L. v. R.I. Bd. of Educ.*, No. 17-1517, 2018 WL 5329436, at *1 (1st Cir. Oct. 29, 2018).

¹⁷ The parties acknowledged that Rhode Island LEAs did not typically educate students in regular secondary schools past the age of 21.

NOTES

completion of secondary school.”¹⁸ The Court then examined the Rhode Island system of adult education services. The Court found that Rhode Island subsidizes approximately eighty percent of the costs of adult education and that the Rhode Island Department of Education oversees adult education programs – thereby meeting criteria one and two of the term “public education.”¹⁹ With respect to the third criteria – the educational objectives of adult education – the Court referred to a Rhode Island law that provides that adult education “must, among other things, establish [p]rograms and services that will provide opportunities for academic achievement up to grade twelve (12).”²⁰

Finding that adult education met all three criteria of their definition of “public education,” the Court concluded that the “IDEA’s requirement that states provide FAPE to students until their twenty-second birthday is not inconsistent with Rhode Island’s law or practice ‘respecting the provision of public education.’”²¹ Therefore, the Court held that the Rhode Island statute ending entitlement to special education at the age of 21 was invalid and noncompliant with the IDEA.

The Lynch Dissent

In a lengthy and important dissent, Judge Lynch, one of the judges on the panel who heard this case, explained the problems with the majority’s opinion. As an initial matter, Judge Lynch noted that the majority’s definition of public education was too broad, and well beyond what Congress intended when drafting and adopting the IDEA: adult education is classified in the IDEA as a “post-school activity,” and the IDEA is intended only to ensure equal educational opportunities for disabled students in preschool, elementary school, and secondary school.²²

Even had Congress intended “public education” to include adult education, Lynch reasoned, the Rhode Island adult education programs do not constitute public education under the definition adopted by the majority. Lynch noted that on average, adult education students pay 20% of the cost of obtaining a GED and thus, unlike public elementary and secondary schools, adult education programs are not “free.” In addition, adult education programs in Rhode Island are offered through “a network of community-based organizations or local non-governmental organizations which are not directly affiliated with the state or a local school district.”²³ Rhode Island does not administer the

¹⁸ *K.L.*, 2018 WL 5329436, at *7.

¹⁹ *Id.* at *9.

²⁰ *Id.* (internal quotations omitted).

²¹ *Id.* at *11.

²² *Id.* at *12.

²³ *Id.* at *16.

NOTES

programs or set their curricula, and so, Lynch argued, these programs cannot be said to be “controlled by the state.” Finally, adult education programs do not resemble preschool, elementary school, or secondary schools because the high school equivalency program “pairs a student with an assessor who can award credit for demonstrated skills and knowledge,” rather than requiring any classroom time. The similarity in purposes between these adult education programs and secondary school – receipt of a high school diploma – does not make the two programs equivalent under the IDEA.²⁴

Conclusion

Readers should be aware that this decision may impose significant new requirements in Maine. Maine operates adult education programs in a manner that some will argue meets the First Circuit’s description of “public education.” This may mean that students would have an ongoing right to FAPE until they turn 22.²⁵

We note that the court ruling was unclear about what entity in Rhode Island would be responsible for delivering these expanded FAPE services, which could hypothetically fall on adult education programs, or could instead create an ongoing right to attend school and receive FAPE consistent with IEPs that had been in place before the student turned 21. The decision also failed to address who had the ultimate duty to fund such services. If the ruling were to apply to Maine, all these issues would be unclear here as well.

Despite the ruling’s possible impact on Maine, it currently impacts only Rhode Island. We will have to see how the issue is advanced in Maine. But you can rest assured it will be.

C. Mrs. S. v. Regional School Unit No. 72, 916 F.3d 41 (1st Cir. February 15, 2019).

Statute of Limitations

You have all been following the ongoing litigation against Regional School Unit No. 72 regarding whether Maine’s statute of limitations covers a four year period or a two year period. That case began in 2013, and we have made note of it at many Directors’ Academies. Most recently, we told you that

²⁴ *Id.*

²⁵ The decision was unclear about what entity in Rhode Island would be responsible for delivering these expanded FAPE services, which could hypothetically fall on adult education programs, or could instead create an ongoing right to attend school and receive FAPE consistent with IEPs that had been in place before the student turned 21. The decision also failed to address who had the ultimate duty to fund such services.

NOTES

the federal district court in Maine had ruled that the limitation period was four years because the Maine DOE had changed the standard without obtaining proper legislative approval.

Well, that issue went back up to the First Circuit, and in February of this year that Court ruled that Maine's limitation period is in fact two years. The case is now final, and this will be our last report to you on it!

Background in Brief

The federal special education laws and the Maine special education rules both include a limitation period setting forth a time line for pursuing special education disputes. The federal law includes this limitation in two separate provisions that read somewhat differently.²⁶ The Maine rules do the same.²⁷ The federal law sets its limitation period at two years. Maine rules appear to do the same. Finally, the federal law says that its own two-year limitation period shall control, unless any individual state has a different time limitation, which would then control in that state.²⁸

This case arose out of a dispute over those provisions. The case itself has a very long history, arising originally back in 2013 with a parent claim that Regional School Unit 72 should reimburse the family for a private residential placement that cost roughly \$110,000. The parent anchored this argument in alleged inadequacies in school programming from as much as four years earlier in time. Maine's special education rules clearly stated in two different sections that families are required to file any due process challenge within two years of when they first learned of any possible inadequacies – not four years back in time. The original hearing officer dismissed claims older than two years and then ruled for the school system on the two most recent years.

The family's attorney noticed an interesting fact about the amendment of the Maine rules regarding the provisions setting forth the two-year limitation period. He had discovered that when the Department of Education had last revised those rules back in 2010 – dropping the limitation period from four years to two – the Department had initially made the change in only one of the two locations. No one noticed the oversight as the rules moved through the approval process, and after the Legislature approved the rules, the DOE recognized the mistake. The DOE then corrected the section it had earlier missed to make it consistent with the section that had actually been changed.

²⁶ See 20 U.S.C. §§ 1415(b)(6)(B), (f)(3)(C).

²⁷ See MUSER ch. 101, §§ XVI.5(A)(2), 13(E) (2017). The same language was in place in 2010, which was the key time period.

²⁸ See 20 U.S.C. §§ 1415(b)(6)(B).

NOTES

The rules were then formally issued, with the limitation period set at two years in both places in the rules.

The family's counsel then presented an argument that the two provisions actually do two different things. He asserted that one provision imposes a filing limitation running forward from the date that an alleged wrong was discovered, but that the other provision actually imposes a limitation on how far back a family could pursue claims about which they had had no knowledge. In essence, the argument was that Maine rules include both a traditional filing limitation provision and also a separate remedy cap on how far back in time parents could pursue recently discovered claims. The family in this case then argued that Maine had properly amended its rules in 2010 to change only the remedy cap period from four years to two, but had improperly changed the filing limitation provision, when the correction was made after the legislative process, reducing it from four years to two. Accordingly, they argued, Maine still has a four-year filing limitation period in effect, which should then have allowed the parent to move forward with the older claims.

Procedural History of Case

The family appealed the hearing officer's rejection of her claims up to the federal district court in Maine. The court at that level also rejected the parent's claims, ruling that Maine had properly adjusted its limitation periods from four years to two, and agreeing with the hearing officer that Regional School Unit 72 had provided appropriate services to the student during the two more recent years at issue.

The family appealed this ruling to the First Circuit, the first of two trips to that Court. The First Circuit also agreed with the hearing officer's rejection of parent claims about inappropriate services for the student's two more recent years. But the First Circuit was unsatisfied with the way that the District Court had analyzed the 2010 legislative process leading up to amendment of the two limitation provisions in the Maine rules. The Court wanted the record supplemented with more documentation of the legislative history behind the changes, and a full reconsideration of that part of the case.

The case went back to the District Court. At that point, the Maine DOE joined into the case and provided the entire legislative history around the 2010 changes. The District Court reviewed all the material, heard arguments, and then ruled for the family. The District Court concluded that the state and federal rules each included both a filing limitation and also a remedy cap, and that Maine had successfully changed only the remedy cap provision, leaving the filing limitation unchanged at four years. The Court stated that the family could now pursue the claims from the earlier years.

NOTES

This time Regional School Unit 72 appealed back up to the First Circuit. The school brought to the attention of the Court, like the school had done at the district court level, two recent rulings by the Ninth and the Third Circuit Courts of Appeals regarding the two identical limitation provisions in federal law. Both of these courts had ruled that the two IDEA provisions, even though they were worded somewhat differently, each set forth only a filing limitation time line – with both courts rejecting the argument that the law included a remedy cap on how far back in time a family could pursue claims that were previously unknown to them.²⁹

The school district argued that Maine rules should be interpreted the same way as the exact same federal provisions, that there was no “remedy cap” in the law, and that both provisions simply addressed the time period for filing claims. Therefore, even if one provision had not been successfully changed by the Legislature, the other one had – resulting in the creation of a two-year filing limitation.

The First Circuit Ruling

In a split decision, the First Circuit agreed with the arguments of the school, recognized that Maine’s limitation period is two years from the date that alleged claims are discovered, and threw out the family’s older claims.

All three judges on the panel agreed that the two provisions in federal law addressing the statute of limitations meant the same thing, even though worded differently, adopting the conclusions of the Third and Ninth Circuits that the IDEA does not include remedy cap language, with that provision instead being a clumsily written restatement of the filing limitation language clearly set forth in the other provision.

The majority then recognized that Maine had clearly stated and clearly intended to have its own statute of limitations language mirror the federal law. The Court also ruled that the family’s argument that one of the two provisions in Maine’s identical language was actually a remedy cap on student rights would likely amount to a violation of the federal law – which three courts of appeals had now decided does not include a remedy cap.

The Court then ruled that it had no need to address whether the Maine DOE, back in 2010, had made a mistake in its rulemaking process when it corrected one of the two limitation provisions to make sure it matched the other one that had been properly changed from four years to two. According to the First Circuit, even if the change had failed to follow a correct rulemaking

²⁹ See *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 937 (9th Cir. 2017); *G.L. v. Ligonier Valley Sch. Dist. Authority*, 802 F.3d 601, 604-05 (3rd Cir. 2015).

NOTES

process, then the limitation period would still be two years because in that event, Maine would have no explicit limitation period at all, with the limitation period then being the two-year period found in federal law.

In short, if the two provisions mean the same thing, and Maine had correctly changed one of them to two years but mistakenly left the other at four years – then Maine really has no limitation period at all. In essence, the two inconsistent provisions cancel each other out, or leave totally irreconcilable which time period controls. With Maine then not having a clear or explicit time period in effect, the federal two-year standard controls the case. And the family’s older claims then have to be dismissed under the two-year standard.

Conclusion

This is a complicated case. And the arguments are almost hopelessly arcane about whether the Maine DOE had met state rulemaking requirements when it corrected one of the two provisions to make sure that it was consistent with the one properly changed by the Legislature.

But some principles emerge perfectly clearly from this case. First, there is no remedy cap set forth in the two analogous provisions of federal law. Both provisions, although written differently, simply set forth a two-year time period for filing special education claims running from when the parent discovered the claim. Second, the Maine special education rules follow the federal law in its filing limitation language. This means that Maine does not and cannot have a remedy cap hidden in its limitation language – the position argued by the family here. Finally, even if Maine had failed to follow the rulemaking process in making this change back in 2010, it would not matter. Any substantive mistake in that process would simply result in the federal two-year limitation period controlling special education claims in Maine.

Schools will continue to face complicated statute of limitations issues, revolving not around the matters discussed in this case, but instead around when parents “knew or should have known” of the facts underlying their claims. We discuss that complicated issue elsewhere in the material. Hopefully you won’t have to experience it firsthand.

D. C.D. v. Natick Public School District, 2019 WL 2206265, No. 18-1794 (1st Cir. May 22, 2019).

***Delivery of FAPE
Least Restrictive Environment
Transition programming***

NOTES

This important ruling by our First Circuit took on many of the big issues that impact most special education decision making. In this case, the Court upheld a federal district court ruling and an earlier hearing officer, both in favor of the public school system, and rejected all of the parents' arguments. For the very first time, the First Circuit directly addressed what legal standard should apply to least restrictive environment disputes, on top of rulings about transition services and FAPE.

Background

The background for this case is relatively straightforward, and should sound familiar to many readers. The dispute centered on a number of the student's high school years. The student had "borderline intellectual functioning and significant deficits in language ability." We are told not much more about her. In middle school, she attended a public charter school and took all of her classes except math in the regular classroom. The parents hired two private tutors to attend middle school classes with her.

The parents and the Natick school system had a number of meetings to address her move to high school. Natick made clear the personnel have to work for Natick, not be privately employed, to be in the school, so the private tutors became unavailable. For the student's freshman year, Natick proposed placement in regular classrooms for elective courses, and placement in a self-contained special education program at the high school for core classes. That self-contained placement was designed for students with cognitive and communication deficits, and offered a "significantly modified curriculum." The family rejected this placement and wanted the student to have more mainstream programming. In response, they privately placed the student at a school that specializes in educating students with disabilities.

Natick offered a similar program for the student's second year in high school. For the third year in high school, Natick offered a mix of classes in the self-contained setting, some in the resource setting and some in general education. The parents rejected this.

The student's transition plan had first addressed the student's goal of graduating from high school. There was a formal transition assessment, which in turn led to an addition to the student's IEP for her junior year of an extended school day with speech and language therapy and career preparation services. As noted, the parent rejected the junior year IEP, and continued her in a private placement.

The parents requested a due process hearing. As noted, the hearing officer rejected the family's claim. The family appealed to the federal district

NOTES

court in Massachusetts, which upheld the hearing officer. The family then appealed to the First Circuit, leading to this ruling.

First Circuit Ruling

As noted, the Court addressed three issues. The first was the scope of the duty to provide a FAPE, given the Supreme Court's earlier *Andrew F.* ruling. The second issue was the breadth and nature of the school's duty to educate in the least restrictive environment (LRE duty). The third was the breadth of the duty to provide transition services. Each issue is summarized below.

FAPE after Andrew F.

Readers will recall that the Supreme Court revisited its 1982 *Rowley* ruling addressing the meaning of FAPE in a 2017 decision captioned *Andrew F. v. Douglas County School District, RE-1*, 137 S. Ct. 998 (2017). In that case, the Supreme Court largely reaffirmed its *Rowley* ruling, and concluded that an IEP offers a FAPE, if the services are "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001. There had been a question as to whether the Supreme Court's FAPE language meant that earlier rulings by the First Circuit were now out of date. The First Circuit has made clear for a good number of years that an IEP offers FAPE if it is "reasonably calculated to confer a meaningful educational benefit." *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012).

The First Circuit had already ruled this year that its own "meaningful benefit" standard was perfectly consistent with the Supreme Court's focus on progress in light of the child's circumstances. *Johnson v. Boston Public Schools*, 906 F.3d 182, 194-95 (1st Cir. 2018). In this new case, however, the family argued that the First Circuit had ignored the Supreme Court's language in *Andrew F.* about the important of "ambitious" and "challenging" goals in the FAPE standard, asserting that a hearing officer must address first whether the IEP offered meaningful benefit and second whether the IEP goals were ambitious and challenging.

The First Circuit in *Natick Public Schools* rejected the request for a two-part FAPE test, and stated that *Andrew F.* did not require such a test. The First Circuit instead said:

In short, *Andrew F.* used terms like "demanding," "challenging," and "ambitious" to define "progress appropriate in light of the child's circumstances," not to announce a separate dimension of the FAPE requirement...

NOTES

Under both *Andrew F.* and our precedent, a court evaluating whether an IEP offers a FAPE must determine whether the IEP was reasonably calculated to confer a meaningful educational benefit in light of the child's circumstances. Depending on context, determining whether an IEP is reasonably calculated to offer meaningful progress may or may not require a sub-inquiry into how challenging the plan is.

Natick Public Schools, at *5 (citations omitted).

Throughout this case, the First Circuit seemed to be emphasizing the broad nature of the FAPE concept, rather than to make it tighter, more rule bound, and legalistic. The team is charged with taking an individualized look at all the child's educational needs and coming up with an appropriate plan calculated to provide that child with meaningful benefit. How "challenging" and "ambitious" the goals should be depends on the child.

The LRE Standard, at last

The First Circuit has never discussed in a comprehensive manner the IDEA standard for least restrictive programming. The IDEA and MUSER both describe the essence of the LRE standard as follows:

To the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5); MUSER X.2(B) (2017).

Courts all over the country have attempted to come up with standards, or tests, for determining whether the LRE duty in the law has been met. One of the most commonly accepted tests was adopted by both the 5th and 3rd circuits was known as the *Daniel R.R.* test. See *Daniel R.R. v. Board of Education*, 874 F.2d 1036 (5th Cir. 1989); *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993). These courts applied a two-part test. First, the court or IEP team asks whether education in the regular classroom, with supplementary aids and services, can be achieved satisfactorily. If the child can't be educated in the mainstream, the next question is whether the child has been mainstreamed as much as possible. *Daniel R.R.*, 874 F.2d at 1048-49.

The family in this case said that the lower court had erred in not applying this *Daniel R.R.* test. The First Circuit upheld the lower court and rejected the applicability of the two-part test. Instead, the First Circuit went

NOTES

back to its own earlier language, which instead looked at the LRE issue as part of the broader FAPE standard, with the IEP team having to balance the levels of benefit obtained in various possible settings, in light of the child's circumstances. The First Circuit earlier described this as follows:

Correctly understood, the correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities. To determine a particular child's place on this continuum, the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement. Assaying an appropriate educational plan, therefore, requires a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum. Neither side is automatically entitled to extra ballast.

Roland M., 910 F.2d 983, 993 (1st Cir. 1990).

In the *Natick Public Schools* case, the First Circuit refused to apply a separate standard for when parents want more mainstreaming than is applied for when parents want less mainstreaming (or an out of district placement). The Court did not want a more complicated "two-part test." Instead, it viewed the IEP team's placement decision as a balancing choice for each particular child, recognizing that there are pros and cons to any placement decision, and the team must balance them all in deciding what placement is right for this child. The Court wrote:

Our cases have "weighed" this preference for mainstreaming "in concert with the" FAPE mandate. The two requirements "operate in tandem to create a continuum" of possible educational environments, each offering a different mix of benefits (and costs) for student's academic, as well as social and emotional, progress. For schools, complying with the two mandates means evaluating potential placements' "marginal benefits" and costs and choosing a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress.

Natick Public Schools, at *7.

When considering placement, therefore, the team must recognize that more mainstreaming might result in academic or educational costs, while at the same time providing inclusionary or social gains. The team must balance which is more important at a particular time for the particular child. The team is striving for the "appropriate balance" of these costs and benefits for the particular child. Like all team decisions, the proper outcome reflects the child's own unique circumstances. This pushes hard decisions back on the team

NOTES

process, and avoids mechanistic tests that may assume priority over the considering the individual student's needs.

The scope of transition services

The IDEA has long required that the IEP include “appropriate measurable postsecondary goals based upon age appropriate transition assessments relating to training, education, employment, and ... independent living skills” along with “the transition services (including courses of study) needed to assist the child in reaching those goals.” See 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); see also MUSER VI.2(C)(3) (2017). The family argued that the District had violated this standard, and had used inadequate transition assessments and offered inadequate transition goals and services.

The First Circuit refused to view the adequacy of transition goals and services as an independent IDEA duty, separate from the broader duty to provide an overarching FAPE. The Court first reiterated its earlier ruling that the IDEA does not require a “stand alone transition plan,” and does not require that transition assessments take any particular form. *Natick Public Schools*, at *8 (citing *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18, 24 (1st Cir. 2008)). The Court observed:

Indeed, there is no restriction on the means of gathering information about a student's interests or abilities that may be relevant to the development of postsecondary transition goals.

Id.

Perhaps most intriguingly of all, the Court described the team's transition planning and assessment process as a “procedural” requirement of the IDEA, not a substantive part of FAPE. *Id.* slip op. at 9 n.2. This means that violations of the transition duty are subject to the “no harm/no foul” standard of assessment. A court would therefore ask whether any violation of this procedural requirement resulted in a denial of FAPE or “a deprivation of educational benefits” for the student. *Id.*; see also 20 U.S.C. § 1415(f)(3)(E)(ii). The Court then agreed with the hearing officer and lower court, ruling that the IEP had included appropriate transition goals, services, and assessments.

Conclusion

This may be one of the more important First Circuit rulings in years. Taking on a number of important IDEA issues, the Court seemed to insist on avoiding mechanistic tests for reviewing particular components of the IEP and its process. From 30,000 feet, the case seems more to insist that the IEP process must remain highly focused on the student, and must be more global in nature – that is, FAPE and LRE are both overarching concepts that require considerable

NOTES

balancing based on the child's own needs. Schools will not violate the IDEA if a particular component of the IEP falls short, as long as the team has properly balanced the child's overall needs. The team process is highly individualized, holistic, and not subject to pat answers or tests for adequacy.

II. District Court Decisions

We've had only two District Court decisions since last year and both were resounding victories for the schools. The first case involves reading methodology and evidence of student progress and the second involves expensive out of district placements made unilaterally by the family. Both reaffirm thoughtful (and well-documented) decision-making by the schools.

A. *Mr. and Mrs. R., o/b/o A.R. v. York Sch. Dep't, No. 2:18-CV-00047-LEW, 2019 WL 2245014, (D. Me. May 24, 2019).*

Delivery of FAPE Reimbursement for Private Placement

This case involves 12-year-old student with a specific learning disability who attended public school and was served by IEPs developed by the York School Department, until his parents unilaterally placed him at the Landmark School in Massachusetts at the end of his 4th grade year. The family filed for due process arguing that they were entitled to reimbursement for costs associated with the student's attendance at Landmark, because the IEP developed and implemented during the student's 4th grade year and the IEPs proposed for his 5th and 6th grade school years were not reasonably calculated to provide him with a free and appropriate education. The hearing officer and then the District Court rejected the parents' claims and ruled for York on all issues.

Factual Background

This case involved a 12-year-old student with a specific learning disability who was placed at the Landmark School in Massachusetts in June of his 5th grade year (2016-2017). Prior to that time, since kindergarten, the Student had been educated in York.

This case really began in the Student's 3rd grade year, when testing completed by Ms. Victoria Papageorge, an educational consultant, indicated that the Student had a dual processing deficit with weaknesses in phonological skills

NOTES

and orthographic processing. Ms. Papageorge recommended the Seeing Stars and LiPS programs to target the Student's deficits. During his next IEP meeting, at the Parents insistence, the Student's IEP team determined to provide the Student LiPS and Seeing Stars—adding these methodologies to the IEP—and to retain Ms. Papageorge to consult regarding the Student's literacy instruction on three occasions. The Student made great progress in 3rd grade, a fact disputed by neither party.

In 4th grade, the IEP team removed the references in the IEP to Seeing Stars and LiPS, although they continued using these methodologies, among others. Later that year, the school determined to contract with a different literacy consultant out of New Hampshire for additional guidance. Although the Parents protested these changes, believing the District should continue to contract with Ms. Papageorge and arguing that the Student's teachers were not qualified to provide LiPS or Seeing Stars without her consultation, the Student continued to make progress throughout his 4th grade year (2015-2016).

In June 2016, after reviewing the Student's IEP and schedule for 5th grade, the family opted to place the Student at the Landmark School, a Massachusetts-based program specializing in instructing students with dyslexia and language-based learning disabilities. The Student has remained at this program ever since.

The family filed a hearing request in June 2017 challenging the Student's IEP as implemented during his 4th grade year, the proposed IEP for 5th grade, and the proposed IEP for the upcoming 6th grade year. The parents argued that in 4th grade (2015-2016), the school had dismantled the student's formerly-appropriate IEP by first deciding to terminate Ms. Papageorge as a consultant, and then by opting not to deliver daily instruction using Seeing Stars and LiPS.

As for the proposed 5th and 6th grade placements, the family argued that the Student's literacy skills were two years behind his peers, and yet the District was planning to place the student in general education classes, which required grade level reading and writing. The family argued that the Student would not be able to participate in these classes without an educational technician, and yet no educational technician was included in the IEP other than for math. The family further claimed a denial of FAPE because the school no longer consulted with Ms. Papageorge regarding the Student's literacy program. They claimed that these general education classes, combined with the lack of appropriate instruction in LiPS and Seeing Stars, would prevent the student from making progress, which necessitated his removal and placement at Landmark. The Parents requested that the hearing officer award them all of the costs they incurred in sending the Student to Landmark.

NOTES

York argued that the student had in fact made meaningful progress under his IEP. This was demonstrated by the student's curriculum based assessments, grades, standardized tests, and daily data collection. In November of his 4th grade year, the parents had even conceded that the student was making demonstrable progress with decoding and phonemic awareness. The school also argued that decisions regarding methodology and staffing, and particularly the use of Ms. Papageorge as a consultant, were within the purview of the District. Regardless, the consultant hired to replace Ms. Papageorge had extensive experience with the LiPS Program, and the student's literacy instructor had been trained in Seeing Stars and so the District argued that both of these methodologies could continue to be taught to the Student with fidelity.

Hearing officer Ruling

Following a five-day hearing in August 2017 and review of over 4000 pages of records, the hearing officer issued an order ruling for York on every issue. Specifically, the hearing officer found that the IEP offered and implemented by York in 4th grade was reasonably calculated and that the Student had made appropriate progress under that IEP, which was well documented by the District. The Hearing officer also found the IEPs offered by York for the Student's 5th and 6th grade school years—after his parents had made a unilateral private placement at Landmark Academy—were reasonably calculated to enable the Student to make appropriate progress in light of his circumstances. Notably, the Hearing officer found that the Student had actually made more progress at York than he was making at Landmark.

In addition, although the family argued that the school should have specified the student's literacy program in the IEP, the hearing officer noted that the IDEA does not require schools to include specific instructional methodologies in an IEP. Accordingly, after the reference to Seeing Stars and LiPS was removed in the December 2014 IEP, the District was no longer required to provide those instructional methodologies. The hearing officer also acknowledged that decisions regarding which methodology, or combination of methodologies, to use for the student was the school's decision to make. Particularly because this student was making progress, the hearing officer was able to find that the school was providing FAPE without needing to delve into the appropriateness of a specific methodology. Similarly, although the Parents disagreed with the school's decision to discontinue their contract with Ms. Papageorge, the hearing officer noted that staffing decisions such as this are within the sole purview of the District.

Finally, the hearing officer reiterated the importance of the least restrictive environment standard. The hearing officer noted that the student's

NOTES

LRE was York Middle School, and not the Landmark School which was more than an hour's drive from the Student's home and would not allow the student access to non-disabled peers.

District Court Ruling

The family appealed the hearing officer's adverse ruling with regard the IEPs offered for the 5th and 6th grade school years to the federal district court, but did not appeal the adverse ruling with regard to the 4th grade programming. This decision was fatal with regard to decisions made during 4th grade—such as the decision to remove a reference to a specific methodology from the IEP—that continued in 5th and 6th grade as the Court found that the parents' failure to appeal the decision regarding 4th grade barred them from challenging those same determination for future years. The Court agreed with the hearing officer that the proposed IEPs for the student's 5th and 6th grade year were reasonably calculated to allow the student to make appropriate progress in light of his unique circumstances; the FAPE standard established by *Endrew F.*

In reaching its conclusion, the Court rejected the parents' argument that *Endrew F.* substantially changed the FAPE standard in the First Circuit. Instead, citing a recent ruling by the First Circuit Court of Appeals, *Johnson v. Boston Public School*, the Court found that the FAPE standard espoused in *Endrew F.* is consistent with the meaningful benefit FAPE standard that has long been the standard in the First Circuit.³⁰ The Court also rejected the parents' claim that *Endrew F.* had created a second, *per se* FAPE standard—grade level achievement—for students with average to high average cognitive abilities (*i.e.*, students who meet the standards for a specific learning disability, but have average IQs). The Court explained that, contrary to the parents' claim, the *Endrew F.* Court expressly declined to “elaborate on what ‘appropriate progress w[ould] look like from case to case” because “the adequacy of an IEP hinges on the unique circumstances of the child for whom it was created.” The Court went on to explain that, even if *Endrew F.* created such a standard, it would not apply to the student at issue in this case because, given the student's disability, which included below average processing speed, grade level achievement in reading was not was not a reasonable prospect.

In addition to the above findings, the Court, in its decision, went through and rejected a series of discrete challenges to the District's IEP. For example,

³⁰ This First Circuit ruling has just recently been reinforced again by the same court in *C.D. v. Natick Public School District*, 2019 WL 2206265, No. 18-1794 (1st Cir. May 22, 2019).

NOTES

the Court rejected the Parents' claim that the IEP was not appropriate because it did not include 1:1 adult support in mainstream classes. The Court questioned whether there was evidence to support a finding that this was a support the student required to access his educational programming. Regardless, the Court concluded that District was not required to include adult support in the IEP because the middle school classes that the student had been assigned to were staffed with several educational technicians. The Court held that because 1:1 adult support was available to all students and because schools are not required to include services and supports available to all students as accommodations in a student's IEP the District had not violated of the IDEA.

B. *Mr. and Mrs. Doe, o/b/o Jane Doe v. Cape Elizabeth Sch. Dep't*, No. 2:18-CV-00259-LEW, 2019 WL 1904670, (D. Me. Apr. 29, 2019).

Delivery of FAPE
Reimbursement for Private Placement
Child Find and Referral
Evaluation Duty

This case involves a high school student ("Jane Doe") whose parents sought reimbursement after unilaterally placing her at an out-of-state residential program in the middle of an IEP referral process. The student had experienced serious conflict at home throughout high school but had performed well at school until a few months before the unilateral placement. At issue in the case was whether the District had violated its child find, evaluation, and identification duties and failed to provide the parents with procedural safeguards. The hearing officer and then the District Court ruled for Cape Elizabeth on all issues.

Factual Background

Throughout high school, the student and her parents experienced an escalating level of conflict at home, which the parents attributed to oppositional behavior by the student. On multiple occasions, the parents called the police and/or Sweetser Crisis following family conflicts. Despite the turmoil at home, the student performed well at school throughout her ninth and tenth grade years. She earned good grades in honors-level classes and was "sweet and respectful to both classmates and adults."

Starting in the fall of 2016, however, things at school began to change for the student. After the student suffered a concussion from a car accident in

NOTES

September 2016, she started to miss school. The school learned that the student had been diagnosed with General Anxiety Disorder (GAD) and referred the student for a 504 evaluation. A 504 team developed a plan to address the student's attendance issues. Just a few weeks later, because the attendance issues persisted, the school referred the student for special education. The school psychologist began her evaluation of the student in early February, but was unable to interview or observe the student first due of her absences from school, and then because of the parents' removal of the student from school and placement out of state.

In February, 2017, the parents unilaterally sent the student to a wilderness program in North Carolina following an 8-day stay at Spring Harbor Hospital. In May of 2018, the parents unilaterally placed the student at a residential treatment program in Utah. The student performed well at the program and graduated early from that program in January of 2018.

During this time, the District continued its efforts to evaluate the student despite her out of state placement. The parents refused to provide full consent for an evaluation – insisting on being present for clinical interviews – which made it particularly challenging to find an evaluator. Eventually, the District found an evaluator in Utah who was willing to conduct a Functional Behavioral Assessment (FBA), despite the conditional consent.

The IEP team reconvened in October of 2017 and, on the basis of the FBA interview with the student, identified a causal link between the student's anxiety and her school avoidance. The IEP team found the student eligible for special education services under the category of Other Health Impairment.

In November, 2017, the parents filed for due process seeking reimbursement for the two out of district placements. The parents claimed the District had violated its child find obligations by not referring the student to special education earlier in time, and that it had violated special education timelines by not evaluating the student within 45 days of the initial referral. The parents also claimed to have never received procedural safeguards.

Hearing Officer Ruling

This case was first heard by a hearing officer over the course of seven days in January and February of 2018. At the conclusion of the hearing, the hearing officer ruled in favor of the District on all issues. *First*, the hearing officer concluded that the District did *not* violate its child find duties. Prior to her junior year, the student did not meet the criteria for referral to special education since her problems at home were not adversely affecting her school performance at that time. Recall that in Maine the adverse effect issue focuses on performance in school – and perhaps on attendance and homework

NOTES

completion out of school. Further, the hearing officer concluded, it was reasonable for the District to attempt 504 accommodations prior to a special education referral because “a diagnosis of GAD does not automatically mean a student requires special education to succeed in school.” Moreover, the District referred the student for special education within two months of learning of the anxiety diagnosis. Therefore, the District did not violate its child find duties.

Second, the hearing officer found no fault by the District regarding the delay in evaluating the student. Instead, the hearing officer concluded that the parents “interrupted the IEP process while it was ongoing by unilaterally making a decision to remove their child from Maine and place her at a residential program in another state.” In so doing, the parents “rendered [the student] unavailable” for testing. The hearing officer emphasized that the District had no obligation to evaluate the student while she was out of state. Further, the insistence by the parents on being present for clinical interviews was “untenable” and “patently unreasonable.” The hearing officer concluded that the District went above and beyond its responsibilities by contracting with an evaluator in Utah to complete the evaluation.

Third, the hearing officer found that the parents received procedural safeguards at the first IEP meeting in December of 2016, as the mother had signed a consent to evaluate form which included an acknowledgment that she had received her procedural safeguards.

The Parents appealed this ruling to District Court.

District Court Ruling

The District Court also ruled for the Cape Elizabeth School Department on all issues. *First*, with respect to the child find argument, the Court found that the student’s absenteeism in September and October was, by itself, insufficient to trigger a mandatory special education referral. The Court highlighted that the fact that the student’s absenteeism fell short of Maine’s statutory absenteeism standard, which turns on the existence of “unexcused” absences. In this case, the student’s father had continually excused her from school, and so she had few unexcused absences in September and October. Similarly, the Court found that a majority of the student’s absences from September and early October were the result of her concussion.

The Court also rejected the parent’s argument that Jane should have been referred to special education simultaneously with her 504 referral. The Court noted that although “a section 504 plan typically is not an adequate substitute for an IEP” it is nevertheless reasonable in some cases, for schools to “pursue general education interventions prior to referring to special education.” The attempt to use a 504 plan prior to referring to special education in this case

NOTES

was appropriate because the student had successfully used general education interventions to overcome absences prior to the 2016-2017 school year (she had been placed at the Hyde School the prior year for six weeks before returning to Cape Elizabeth), and because there was no evidence that she had a “deficit” in her “educational capabilities.”

Importantly, the Court also rejected the parents’ argument that the hearing officer had been required to find a “trigger date,” or a specific calendar date by which the School was required to refer the Student to special education. Instead, the Court found that child find is a more fluid concept, and that school staff in “considering a student’s need for either an accommodation or special education services are not charting planetary motion with astronomical instruments.”

Second, the Court found that the school’s timeline and attempts to evaluate the student were reasonable and complied with the IDEA. The parents argued that the student’s disability caused her to be unable to attend school, and so the school should have found an alternative way to evaluate her. The Court disagreed, finding that the parents failed to establish any “affirmative duty on the part of [the School] to utilize unconventional means to complete an evaluation.” In holding this way, the Court relied on language in MUSER which requires parents to “produce the child for the evaluation.” Further, the Court held that once the student was removed from the state, which occurred within the 45 school day timeline for evaluation, any remaining obligation Cape Elizabeth had to evaluate her ended.

Finally, the Court found that the parents’ claim that they had not been provided procedural safeguards was not supported by the record. Specifically, the mother signed a consent form which indicated that she had “received the statement of procedural safeguards attached to [the] consent form.” CEHS administrators also testified that it was standard practice for the special education case manager to provide copies of the procedural safeguards whenever a parent signs a consent to evaluate at an initial referral meeting.

Conclusion

This important ruling highlighted the intricacies of a school’s child find obligation, and delved into defenses around parent obstructionism. It appears the District Court will have the last word on this matter, as the parents have not appealed.

III. Hearing Officer Decisions

NOTES

We continue the pattern of a wide range of due process complaints that make it all the way to hearing. The issues below range from relatively “typical” disputes over programming to an IEE hearing litigated (and won!) by the special education director to a hearing examining the intersection of bullying and the provision of FAPE. One of the hearings was the longest in state history (at least that we know of) and may be leading to some procedural changes in the process that will hopefully prevent hearings from lasting 12 days!

A. Parents v. York, No. 18.099H, (SEA Me. 12/14/18)

Release of Claims

FAPE

Reimbursement

This case involved a reimbursement claim for a student with both language and academic needs. In an earlier dispute, the parties had reached an agreement in which the parents released all claims against the District. Despite the release, the parents asserted claims stemming back to days after the settlement agreement. After a 12-day hearing, the hearing officer concluded that: (1) the parents were barred by the settlement agreement from pursuing claims before the student’s circumstances had materially changed (which did not happen until the IEP was revised); (2) the district had offered appropriate IEPs for the entire period at issue in the case; (3) the District committed no procedural violations; and (4) the parents were not entitled to reimbursement for costs associated with their unilateral placement.

Factual Background

In May 2016, the parents released all claims against the District pursuant to a settlement agreement in the earlier dispute. Within a few months, the parents unilaterally placed the student at a private school. Following the unilateral placement, the District continued with the IEP process, including holding IEP team meetings, offering IEPs, and evaluating the student. In May 2018, the parents filed the second hearing request, asserting claims going back to the period of time immediately following the settlement agreement.

Hearing Officer’s Ruling

Prior Release of Claims

As an initial matter, the hearing officer concluded that she had authority to interpret the settlement agreement for the purpose of determining the

NOTES

“parameters of the issues to be decided.” This is important because the parents had argued the hearing officer had no such authority—and that to enforce the agreement, the District should have sued them in court. The hearing officer rejected that argument, explaining that she was not *enforcing* the agreement but *interpreting* the agreement.

In interpreting the scope of the release, the hearing officer emphasized that a settlement agreement can bar a parent from bringing future claims absent a material change to the student’s circumstances. The hearing officer concluded that there was no material change to the student’s circumstances until the IEP team revised the IEP in the middle of the school year, several months after the date of the agreement. Thus, the parents were barred by the settlement agreement from asserting claims prior to that time.

FAPE Analysis

The parents asserted both substantive and procedural violations against the district and, in a 91-page opinion, the hearing officer rejected all of them. The hearing officer concluded that the District had offered the student appropriate IEPs for the entire period at issue and the parents were, therefore, *not* entitled to reimbursement for their unilateral placement.

As to one of the IEPs at issue, the hearing officer concluded that two math goals were inappropriate because they referenced the student’s grade level instead of instructional levels. Nonetheless, the hearing officer concluded that “the IEP, as a whole, while not perfect, was reasonably calculated to enable the Student to make progress appropriate in light of her circumstances.”

The parents argued that, given the student’s unique language deficits, she could only be served by the particular “language-based” program offered at the private school. The hearing officer rejected that argument, concluding that “there is no evidence that the District could not provide a legally sufficient FAPE.”

Conclusion

This 12-day hearing speaks to the potential for special education litigation to be onerous. The hearing officer got it right in the end, but only after an arduous hearing and extensive briefing. Moreover, despite the hard-fought victory, the fight continues. The parents have appealed the ruling to federal court.

B. Parents v. MSAD 31, No. 18.095H, 119 LRP 12193 (SEA Me. 3/15/19)

Child Find

NOTES

Procedural Safeguards

Post-graduation Compensatory Education

This hearing involved a child find dispute pertaining to a student with autism spectrum disorder who had graduated from high school. Two years after the student graduated, the family filed for due process alleging child find violations dating back four years. The hearing officer ordered that: (1) an exception to the statute of limitations applied due to a failure to provide procedural safeguards; (2) the district had violated child find; and (3) the district had to pay for the provision of compensatory education in the form of explicit instruction in social skills through a particular program, including payment of the costs of out-of-state training for instructors.

Factual Background

The student had received special education services through first grade, at which time the IEP team determined he no longer qualified for special education. The student was subsequently referred for special education in third and fourth grades but found ineligible.

Throughout his school years, the student experienced difficulties with peer dynamics and social interactions. After a series of significant bullying incidents, the student was reported to have become increasingly withdrawn. In one particularly severe bullying incident during his sophomore year in high school, another student videotaped him using the toilet and posted the picture on social media. At the hearing, witnesses testified that, after that incident, the student became increasingly quiet and isolated and that he stopped using the bathroom at school.

During the student's junior year, the family obtained a neuropsychological evaluation that concluded that the student's autism spectrum disorder was having a significant impact on his functioning generally. The evaluator recommended that the student receive directed peer interaction and explicit guidance during structured group activities. At a 504 meeting that followed in January 2015, the parents raised concerns regarding the student's refusal to use the bathroom at school and that the student's grades and overall attitude had changed. The 504 team added an accommodation to his 504 plan to address these issues but did not refer him for special education services.

The student received a diploma in June 2016 after having received good grades in 12th grade. He went on to attend Maine Community College but the College later dismissed him due to poor grades. Subsequently, he was diagnosed with major depressive disorder during an admission at Acadia Hospital.

NOTES

On May 18, 2018, the family filed for due process asserting that the district failed to appropriately refer the student for special education.

Hearing Officer's Ruling

As an initial matter, the hearing officer found that an exception to the two-year statute of limitations applied because the district had failed to provide procedural safeguards to the parent. Thus, although the parent had not brought the claim until 2018—two years after the student graduated from school—the parent could pursue claims back to 2014.³¹

As to the substance of the child find claim, the hearing officer ruled that the district had violated child find because, as early as 2014, “the District had reason to suspect that special education services may be needed to address the concerns regarding the Student’s social challenges and ‘warning signs’ of a possible emotional impairment.” The hearing officer emphasized that the threshold for “suspicion” is relatively low, and that the inquiry focuses not on whether the student *qualifies* for services but whether the student should be *referred* for an evaluation.

While acknowledging that the IDEA does not cover problems truly distinct from learning problems, the hearing officer emphasized that educational performance is “more than just academics.” Here, the hearing officer concluded that “[t]he weight of the evidence supports a finding that the Student’s deficient social and communication skills negatively impacted his educational performance.”

The decision by the hearing officer is particularly notable for the nature of the remedy he ordered. Specifically, he ordered the District to pay for compensatory education in the form of explicit instruction in social skills. The hearing officer ordered that a particular methodology recommended by the family’s expert called the Program for the Education and Enrichment of Relational Skills (PEERS) developed at UCLA be provided to the student. Because the expert believed no one in Maine had been trained in this program, the hearing officer ordered the district to pay for two educators to obtain training in the program at UCLA, and to pay for their travel costs.

Conclusion

This decision provides a cautionary tale regarding the importance of diligent documentation of the provision of procedural safeguards. It also serves as an important reminder to view a student’s educational performance broadly to include skills beyond academic skills alone, particularly in instances where a student’s difficult peer interactions may be having a negative impact on the

³¹ The hearing officer capped the period of liability at the time of the student’s graduation.

NOTES

student's ability to fully access his education. In addition, the unique remedy fashioned by the hearing officer, based on the recommendation of the family's expert, reminds school units of the critical role that experts (on both sides) can play in a due process hearing.

C. Parent v. Regional School Unit No. 16, No. 19.068H (SEA Me. 4/9/2019).

Independent Educational Evaluation

This case was precipitated by a parent request for an independent educational evaluation at public expense (IEE), which triggered the school's obligation to file for due process once the school refused to pay for the requested assessment. The hearing officer found for the school, holding that the District's evaluations were appropriate under the IDEA and MUSER.

Factual Background

This case involved a 10 year old student who is eligible for special education services under the category of OHI. In the fall of 2018, in anticipation of the student's triennial evaluations which needed to be completed by February, 2019, the IEP team discussed and agreed to conduct the following evaluations: "academic (reading and writing only), intellectual, learning development, psychological (behavior rating scales), [and] classroom observation." The parent returned the signed consent form requesting that the student also be evaluated in math.

All of the testing was completed by qualified personnel. The student's teacher, who has taken courses on assessments and has five years' experience conducting the WIAT, administered the WIAT-III. She also administered the KTEA-3. The student's scores on these assessments matched what her teacher was seeing during lessons. Psycho-educational testing was completed by the certified school psychologist who has 24 years' experience as a school psychologist and has been trained to administer the WISC-V and CTOPP, which is what she administered in this case. The results of the evaluations were in line with previous evaluations conducted of the student.

When the results of these evaluations were presented to the IEP team, the parent disagreed with the findings and requested an IEE, triggering the school's obligation to file for due process or agree to an IEE.

Hearing Officer's Ruling

NOTES

The hearing officer noted that in determining the appropriateness of educational evaluations, the hearing officer considers the qualifications of the person performing the evaluation, particularly the evaluator's training and education, certification and licensing, and practical work experience. The hearing officer must also consider whether the evaluation itself was administered in compliance with state regulations.

Here, the hearing officer determined that the school psychologist and special education teacher who administered the assessments were both experienced in conducting assessments, held the appropriate certifications to do so, and had received training on the assessments they performed. The parent argued that she had found another, more qualified evaluator to perform the assessments, but the hearing officer rejected this argument finding that there is no "contest to determine who is most qualified. The regulations merely require that the District's evaluators meet certain requirements, which they undoubtedly do."

The hearing officer also determined that the evaluations relied on a variety of assessment tools, rather than any single measure or assessment, that the evaluators had access to and relied upon the reports of the student's previous evaluations, and that there was no evidence that the assessment mechanisms were discriminatory or administered in any way inconsistent with the instructions. Accordingly, the evaluations were administered in compliance with applicable regulations.

Conclusion

The hearing officer in this case reaffirmed that the test in these cases is a simple one: if the school uses qualified evaluators who follow the IDEA's requirements, the school's evaluation will likely be appropriate and the school unit will not have to grant a parent's request for a publicly funded IEE. In other words, "a special education evaluation does not have to be perfect to be appropriate under the IDEA."

D. Parent v. RSU #79/MSAD #1, (#19.004H) (SEA Me. 12/5/18)

Delivery of FAPE

Intersection of FAPE with home school status

Bullying and FAPE

This is the second due process hearing involving the same student. In fact, the issues that form the basis of this hearing arise, in large part, out of the District's attempts to implement the compensatory services ordered by the

NOTES

previous hearing officer. In addition to the issues surrounding programming available to the student, the parent raised allegations that the student was subjected to bullying which prevented the student from accessing his programming and receiving a FAPE. The hearing officer rejected the parent's assertions regarding the denial of FAPE and ruled in favor of the district. He also unequivocally found that once the student became a home schooled student, his eligibility for services ceased.

Factual Background

At the time this hearing was filed, the student was entering 9th grade and resided within MSAD 1. However, the student had not attended school since June 2017. Initially, the parent decided to keep the student out of school and educate him at home during the pendency of her first due process hearing. The District agreed not to pursue truancy and provided educational packets for the student during this initial time period. After the first hearing officer's decision in January 2018, the District reached out to the parent seeking to return the student to school and attempting to initiate the compensatory services ordered by the hearing officer. Citing concerns about the reading instruction that was to be provided to the student under the current IEP (found by the hearing officer to be appropriate), the parent did not return the student to school. In mid-March, the parent formally registered the student as a home school student. He did not return to the District throughout the pendency of this second due process proceeding.

During the period between January and March, the parent brought to the District's attention two incidents of alleged bullying. One of these incidents involved a text message exchange between the student and another individual; the second involved a brief physical tussle between the student and a friend as they were waiting in the car for a ride home. The District attempted to investigate these allegations when it was brought to their attention initially and then again in August/September 2018 when the parent again requested an investigation. The parent refused to participate in either investigation and did not allow the student to participate either.

In addition, during this same January through March period, the parent made repeated assertions that the student suffered from anxiety, which impacted his ability to access his education within the District. Various, she asserted that the anxiety was due to his academic struggles, to the alleged bullying, or to a combination of both. The District offered, on a number of occasions, to evaluate the student for anxiety and/or to review additional documentation of anxiety that the parent might provide, in order to program appropriately for the student. However, the parent never provided any additional information nor did she consent to an evaluation.

NOTES

Hearing Officer's Ruling

As noted above, the hearing officer ruled for the District. He first found that the only time at issue here was the time between the first hearing officer's decision (January 8, 2018) and the time when the parent formally registered him as a homeschool student on March 13, 2018. Because the previous hearing officer had found that the IEP currently in place was appropriate, the issue under consideration for this hearing was primarily whether the District's actions after they became aware of the bullying allegations and before he was enrolled for home schooling denied the student a FAPE. Citing a series of cases that involved serious bullying with clearly documented impacts on the students involved, the hearing officer in this case concluded that the parent failed to meet her burden to prove that the alleged bullying interfered with the student's ability to meaningfully benefit from his education. And he spoke quite clearly about the negative impact of the parent's lack of participation in the investigative processes on the credibility of her claim.

Although the hearing officer cited the District for making a procedural error by not addressing the parent's bullying claim and concerns about anxiety at a January IEP team meeting, he found that error to be *de minimis*. The District had addressed the bullying through its investigation process and likewise had attempted to address the issue of potential anxiety through offers of evaluation and other communications, although not within the context of the IEP team. Again, the hearing officer found this error to be harmless and the Student was not denied FAPE for the period of time at issue in this hearing.

IV. Complaint Investigations

In addition to the usual slew of court cases and due process hearings, we are again including a summary of several complaint investigations. It appears that the number of complaint investigations proceedings is continuing to increase. On the whole, this may be a good thing if this less costly dispute resolution mechanism is being used, rather than accessing the full blown due process hearings.

There are several new complaint investigators at the Department of Education and word has it that the DOE is in the process of revising their complaint investigation process. We've seen a number of complaints regarding

NOTES

the services provided (or not provided) to students who are in (or are awaiting) out of district placements and have seen several systemic complaints. Although some of the complaints are brought by complainants with the aid of legal counsel, a number of them are brought by pro se parents.

In most cases, the complaint investigator is identifying an area of non-compliance with regulations and is ordering a corrective action of some sort. In many cases, the corrective action is some sort of training; however, depending on the nature of the violations, some corrective action plans have required substantial compensatory education services. Below we summarize several of the cases (but by no means all of them) and provide some general observations.

A. Parent v. MSAD 35, No. 18.110C (7/25/18)

Instructional methodology

Student Records

Evaluations

This case involved a 2nd grade student who was identified for special education services in December of her 2nd grade year as a student with a specific learning disability. The IEP team developed an IEP which called for 5x45 minutes a week of specially designed instruction in reading/written language and 5x45 minutes a week of SDI in math. The student received the instruction as outlined in her IEP but, by May, the parent was concerned that she was not making appropriate progress in reading, due in part to the methodology of instruction. At the beginning of June, the parent filed her complaint.

The investigator identified 12 different allegations in this case related to the appropriateness of the IEP, including whether a specific methodology should have been included; the District responded appropriately to parent concerns; the District failed to appropriately respond to the parent's request to review all student records; the District failed to respond appropriately to concerns about the student's emotional status; and whether or not the District responded appropriately to a parent request for an assistive technology evaluation.

The investigator found that the District was in compliance in the vast majority of areas cited. Notably, in finding that the District's IEP was reasonably calculated to provide educational benefit, the investigator made note

NOTES

that the IEP had only been in effect for six months and, given the student's progress through the time of the complaint, the student was making meaningful progress toward the goals, even though she had clearly not mastered yet. Additionally, the investigator rejected the call for a specific instructional methodology to be included in the IEP, given the student's progress to date.

In the areas of non-compliance, the investigator found the District failed to provide access to all of the student's records when it did not provide for the parent's inspection of the student's work, which the District was using to assess progress. As a corrective action, the investigator required the District to review the definition of student records with administrators and to allow the parent to review the records as requested.

In a second area of non-compliance, the investigator concluded that the District failed to evaluate the student in all areas of suspected disability when it failed to order an assistive technology evaluation after the parent requested one. She ordered the District to provide the parent a consent to evaluate form for an AT evaluation. One could disagree with this finding because, arguably, an assistive technology evaluation is not assessing an area of disability, but rather is assessing the need for supplementary aids and services. Additionally, one can reasonably argue that an IEP team is not *required* to order an assessment whenever a parent requests one. However, in this case the corrective action plan was fairly minor and called for providing the parent with the consent for evaluation form and for a memo to go out to administrators and special education staff about the evaluation process.

B. Parent v. Lewiston School Department, No. 18.114C (8/10/18)

Failure to provide services

Dismissal from special education

Discipline

Risk Assessments

This case involved a high school student who had been in and out of special education since his early elementary days. During the time period at issue in this complaint, he had been recently found eligible for special education and was attending an alternative program in a neighboring school district. His IEP had only one goal which related to utilizing skills obtained through counseling to manage his depression and anger. For a number of reasons, the student did not receive any counseling as called for in his IEP. The District convened an IEP team to discuss this fact several months after becoming aware of the lack of services. At the IEP team meeting, the student was dismissed from special education citing a lack of adverse impact of his disability on his education.

NOTES

Several weeks after his dismissal from special education, the student was asked to leave the alternative high school because of several disciplinary incidents, including threatening. The alternative school indicated that he would not be allowed to return until a risk assessment had been completed. Lewiston ordered a risk assessment which was completed and reviewed about six weeks after the student was asked to leave. A team reviewed the evaluation and ordered a re-referral to special education which was pending at the time of the complaint. The student was out of programming from mid-March through the end of the school year.

In this instance, the complaint investigator found a number of areas of non-compliance on the part of the District. Specifically, she found that the District erred in its dismissal of the student, in large part because of a perceived lack of consideration by the team of multiple pieces of data and the failure to provide advance notice to the family that eligibility was to be discussed at the IEP team meeting. Additionally, she found that the student was improperly without services after he was removed from his alternative high school. Her reasoning on this point was unclear, but presumably she had concluded that the child should have been re-referred or continued as eligible – and therefore had gone without required services. Lastly, the investigator found a number of procedural issues with the IEP in its lack of specificity about services and the failure of the District to provide the listed services.

The corrective action plan ordered by the investigator was extensive in this case. In addition to ordering substantial compensatory education services (40 hours of counseling services and 96 hours of specially designed instruction by a special education teacher), she ordered the District to establish a protocol for communicating with alternative schools to which it tuitions students, and that it provide professional development for special education case managers and IEP team coordinators about the use of the adverse effect form. Lastly, she initiated an on-site review by the Department of Education of the District's findings of eligibility for all special education students at the high school level. In this case, the investigator clearly continued her efforts to address what she identified as systemic issues which came to light within a single student's programming.

C. Parent v. Waterville Public Schools No. 19.014C (10/17/18)

Implementation of mediated agreement

Positive behavior support plans

Abbreviated day/non-disciplinary removals

This case involved a middle school student and the implementation of his behavior plan. During the prior school year, the family and the District had

NOTES

entered into a mediation agreement which outlined several steps the District would undertake related to the provision of positive behavioral supports and interventions, particularly as they related to de-escalation strategies to be used with the student. The present complaint alleged that the District had failed to comply with several aspects of the mediation agreement and, additionally, had improperly sent the student home (without suspending him) which resulted in a lack of educational services.

In the investigator's report, the determination as to whether or not the District complied with the mediation agreement rested in large part on the fact that the agreement did not have specific timelines by which certain activities were to be undertaken. Because there was no specific timeline, the investigator found no instance of non-compliance because the District was actively acting to implement the agreement, even though particular components were not implemented immediately upon the execution of the agreement.

The remaining issue in the complaint was related to two instances when the student became behaviorally escalated in school. In one instance, the student's parents were called to bring him home at the end of the school day because of concerns about his capacity to ride the bus safely given his agitated state. Additionally, he was suspended as the result of his behavior. The second incident involved a similar situation when the student became dysregulated and he went home before the end of the school day. He was not issued a suspension in this instance.

The complaint investigator found the student was properly suspended (and removed from school) in the first instance. In regard to the other incident, the investigator found that the student was sent home from school for non-disciplinary reasons when the school called the student's parents and asked that he be picked up (although there is some factual dispute about the circumstances surrounding the call and what was communicated to the parent). Although she found that this early dismissal did not impact the student's ability to access his education or denied him FAPE, she ordered a related corrective action for the District.

The corrective action required the District to review with administrators "the proper policies and procedures for removing students from their educational placement for any reason, including the removal from school through non-disciplinary action." It appears that the intent of the investigator is to remind schools that a pattern of removals, even non-disciplinary or for a partial day, can constitute a pattern of removals that may necessitate the convening of the IEP team to consider the appropriateness of the student's programming.

NOTES

D. Parent v. RSU 54/MSAD 54 No. 19.019C (10/25/18)

Provision of FAPE

LRE

Abbreviated day/tutoring

This case involved a significantly involved middle school student with autism. By the middle of the 2017-2018 school year, the student was being educated in a substantially 1:1 setting without access to peers due to the severity of his behaviors which included self-injurious behaviors, aggression toward others, and significant vocalizations. He received all of his specially designed instruction and related services in a room and was supported by a cadre of special education technicians who rotated on a 40 minute schedule due to his intense behaviors. In the fall of 2017, the IEP team began to explore day treatment programs but none had openings for the Student. In June 2018, the IEP team determined that the student's placement would be a day treatment program. At the beginning of the school year in August, a placement was still not available and there was a question as to whether or not the parent was supportive of any day treatment program, or was just opposed to the one that the District pursued. Regardless, in August, the IEP team ordered the student's placement to be a two hour a day alternative educational setting in another school building as a temporary measure until day treatment was available. The parent filed the complaint seeking the student's return to his previous setting while a day treatment placement was secured.

The complaint investigator issued findings around whether or not the District provided the student FAPE during the present 2018-2019 school year. As the student was not attending any programming at all (the parent had refused the two hours a day of tutoring), the investigator found that the student had not received FAPE. Further, she found the District's present interim programming was insufficient and improper pending the availability of a day treatment program. Similar to her findings in other complaints, the investigator concluded that the tutoring placement ordered by the team was an inappropriate use of tutoring and the abbreviated day under the regulations because it was not put in place for medical or educational reasons or in conjunction with student discipline.

As one would expect, given the investigator's findings, she ordered significant corrective action for the District. In addition to ordering a suite of compensatory education services to be developed to compensate the student for the services missed throughout this school year, she ordered the student be returned to his previous placement (the 1:1 full day setting), pending a placement in an out of district program. Although she concluded that this

NOTES

previous placement was not the most appropriate placement (the day treatment was), this was far more appropriate programming than the “interim” tutoring programming proposed by the District. She was quite clear that District continued to be responsible for providing programming of some reasonable sort pending the availability of a day treatment programming. Additionally, the investigator ordered professional development for special education staff about stay put during the pendency of a dispute, tutorial instruction, and the least restrictive environment.

E. Parent v. Veazie Public Schools No. 19.028 (11/20/18)

Abbreviated day/tutoring

Disciplinary removal

Stay put

LRE

This case involved a 5th grade student with a history of significant interfering behaviors. Based on detailed evaluations completed over the summer, the student began the school year with a detailed positive behavior support plan while she received the vast majority of her programming within the general education setting. Within the first two weeks of school, the student had several significant behavioral episodes which resulted in her classroom being cleared and the student engaging in behaviors resulting in harm to herself and others which necessitated several restraints. The school imposed discipline by suspending the student and convened the IEP team to discuss placement options. The parent did not attend this IEP team meeting and the team determined that the student would receive tutoring while permanent placement was secured with the parent’s involvement.

The parent filed for a complaint investigation asserting stay-put to continue the student’s placement within the general education setting; the District filed an expedited hearing request seeking an interim placement, and the District and the parent agreed to the tutoring placement until the matter could be resolved. In the meantime, the District also offered a full day temporary placement at Bangor Regional’s day treatment program, which the parent rejected. Since the advent of the tutoring, the student has been unavailable to access the program due to hospitalizations and subsequent placement at a residential treatment facility by DHHS.

In this case, the complaint investigator found non-compliance on the part of the District in every area. In relation to the allegations regarding whether or not the student was denied FAPE due to her IEP not being implemented in the least restrictive environment, although the investigator found that District out of

NOTES

compliance, she found no denial of FAPE for the Student because, generally speaking, either the period of time in question was so short or, alternatively the student was not available to access the programming.

Interestingly in this case, the investigator found that the District violated the stay-put requirement when it did not return the student to her classroom and instead filed for a due process hearing. The investigator opined that the agreement between the parent and the District to institute tutoring until the IEP team could meet and agree on placement was not the last agreed upon placement because the parent felt pressured into the placement when faced with the expedited due process hearing.

Additionally, the complaint investigator found the District out of compliance for failing to conduct a manifestation determination (although there is some dispute about the length of the student's suspension). She also faulted the District for ordering tutoring because they had not properly complied with MUSER's regulations regarding the circumstances under which tutoring can be ordered. Instead, the investigator cited the move to a tutoring placement to be an "abbreviated day" which can only be used for educational or medical needs, or in conjunction with discipline which the District did not address in its IEP team meeting at which the tutoring was ordered.

F. Parent v. RSU 16 No. 19.036C (12/4/18)
Parent v. RSU 16 No. 19.035CS (12/12/18)

Abbreviated day

Unavailability of programming

Placement determinations

These two complaints center on the same set of facts. The District unexpectedly had to close a self-contained elementary program for students with social-emotional and/or behavioral needs. In having to close the program on very short notice, the students in the program were left without access to programming while the District attempted to secure alternative placements. One of the complaints involved an individual student while the other was a systemic complaint assessing the impact of the closure on all of the students in the program.

Several weeks into the school year, the District was forced to close this program which served eight students at the elementary school level. With the closure of the program, the students were all left without a classroom program to attend. The District quickly convened IEP team meetings for each of the eight students and ordered tutoring for most of them, while seeking full time programming for the students. Two of the students received programming

NOTES

within RSU 16 schools while the others received some tutoring services while they awaited placement at various out of district placements.

The hearing officer found non-compliance on a number of fronts and ordered substantial compensatory services for the students who were without programming after the in-district program closed.

There are a few important take-aways from these complaints. First is the supremacy of the IEP team process. The complaint investigator ruled against the District for unilaterally changing the students' placements outside of the IEP team process when it closed the program, regardless of the validity of the reasons for the closure. Second, districts are reminded that when they are faced with programming challenges (due to staff shortages, facilities, or any other unforeseen circumstance), each student's placement and programming must be reviewed in terms of the individual student's needs and a blanket temporary intervention (such as putting the students out on tutoring) will be problematic.

Finally, the complaint investigator again reiterated (as she has in several other cases summarized here), that abbreviated school days can only be used when the student's educational and/or medical circumstances warrant their use, or within the context of a disciplinary removal. She found that the use of abbreviated school days in these cases was not in line with either of the permissible circumstances. As a side note, the complaint investigator also reminded us that when considering an abbreviated school day with tutoring, school units should be conducting an individual analysis of what comprises appropriate services for each student and that this analysis should include a review of related services (e.g. social work) in addition to the traditional provision of academic specially designed instruction.

G. Parent v. RSU #15/MSAD #15, No. 19.044C (1/7/2019)

Responsibility for delivery of FAPE

Stay put and special purpose private schools

LRE

This complaint involves allegations of a denial of FAPE for a significantly involved student who had been dismissed from two special purpose private schools due to the severity of his behaviors. The complaint also raised interesting questions of whether or not stay put applied to a placement at a private school when the private school has dismissed the student.

The student, who is approaching the end of his IDEA eligibility, is a state agency client who was placed in a residential home within MSAD 15 for non-educational reasons. When he was placed in the district, MSAD 15 became

NOTES

responsible for his educational programming. The district initially placed the student at a private day treatment program, but at the 30-day review, the program informed the district that they were dismissing the student, in significant part because of the intensity of the safety issues the student presented.

The district immediately began a search for another, more intensive placement and secured one; however the student was out of programming from the end of February to the beginning of June while applications were made, intake was completed and transportation (with supports) was secured. The student began programming in June and, with intensive interventions, data collection and up to 3:1 support, began to make some progress. The team completed a thorough functional behavioral assessment and amended the student's IEP and behavior and crisis plan to reflect the information gathered through the assessment process and through several months of working with the student.

Unfortunately, despite the intensive programming and analysis, and the safety measures taken by the staff (including wearing protective clothing and helmets), by October, at the student's annual review, the private school informed the district and the parent that they were dismissing the student from the school, effective immediately. The team discussed the intense level of the student's needs at the IEP team meeting and the district offered a residential placement to address the student's educational needs. The parent refused the residential placement because she wanted the student to remain in his present housing situation because it was close to her and would be available to him as an adult. She also refused tutoring in the group home because she and the group home staff felt that it would be too disruptive for him.

The complaint investigator found that the district failed to provide the student access to a FAPE during the period from February to June when the student was between day treatment placements. Notably, she found that the district had offered the student FAPE by offering a residential placement when he was dismissed from his second day treatment program in October and the parent had refused a placement which would have provided a FAPE. The complaint investigator ordered the district to provide compensatory education in the form of six weeks of additional community-based transition services to compensate for the period of time he was without programming in the spring.

Of note, the complaint investigator, found that the "stay-put" provision does not apply to placements at private schools because they are a "private entity" not subject to the IDEA. The obligation of the district, upon learning of the lost placement, was to secure another appropriate placement to serve the student.

NOTES

Complaint Ruling Summary

While there are likely a number of complaint investigation decisions that are not included in our summary, we can draw several conclusions regarding what have seen. First, the DOE is expressing significant concerns about the use of tutoring placements for students, particularly when they are used as an interim measure while the team is attempting to secure an alternative placement. Given the scarcity of more intensive placements in Maine, some of these tutoring placements are stretching on for significant periods of time. We can read the investigator's findings as a call for school units to be very thoughtful and creative about programming offerings and while waiting for what may very well be more appropriate placements to become available.

Secondly, it is reasonably safe to conclude that the investigator is likely to order some sort of professional development regarding some aspect of special education regulations, policies or procedures, regardless of the findings.

