

# Special Education 101: A to Z of a Special Education Case

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# Cuddy Law Firm, PLLC

- Multi-state private law firm that provides legal services to families of loved ones with special needs
  - 2 New York Locations- Westchester and Auburn
  - Ohio, Pennsylvania, North Carolina
- Practice Areas: Special Education Litigation

# Role of a Special Education Attorney

- Facilitate obtaining comprehensive independent evaluations
  - Crafting an appropriate program
- Assist in locating an appropriate placement and obtaining funding
- Obtain District funded compensatory services and locate providers
- Ensure individualized education program (IEP) includes the necessary services, accommodations, and modifications

# Special Education Law 101

- Federal and State law mandate that students with special education needs must receive a free and appropriate public education (**FAPE**) under the Individuals with Disabilities Education Act (**IDEA**).
- 20 U.S.C. § 1400; New York Part 200 Regulations
- If a child is eligible for special education and services under the IDEA, the student is entitled to an individualized education program (**IEP**)
  - The child is eligible when “because of mental, physical or emotional reasons, the student has been identified as having a disability and requires special services and programs approved by the department.” (Part 200.1(zz)). The child must have one of thirteen disability classifications and the child’s disability needs to impact the child’s “educational performance.” (Id.)
  - The IEP has several sections including: classification; present levels of performance; goals; related services; accommodations; class size; transition plan [once the student turns 15 in New York]; and placement (200.4(d)(2)).
  - Evaluations must be conducted at least every three years (Part 200.4(b)(4)) unless the Parent waives the evaluations.
  - The IEP must be reviewed and updated at least annually (200.4(f)).

# Important Cases

- *Andrew F. v. Douglas County School District RE-1* (No. 15-827) (2017), U.S. Supreme Court unanimously rejects the “de minimis” standard for one that “is markedly more demanding than the 'merely more than de minimis' test applied by the 10th Circuit." In his opinion, Chief Justice Roberts says “a student offered an educational program providing ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all.”
- *Burlington Sch. Committee v. Mass. Bd. of Ed.*, 471 U. S. 359 (1985). Decision clarifies procedural safeguards, parent role in educational decision-making; tuition reimbursement for private placement; child's placement during dispute about FAPE.
- *Florence Co. Sch Dist Four v. Shannon Carter*, 510 U.S. 7, (1993). In a unanimous 9-0 decision, the Supreme Court found that if the public school fails to provide an appropriate education and the child receives an appropriate education in a private placement, the parents are entitled to be reimbursed for the child's education, even if the private school does not comply with state standards.
- *Nancy E. Connors, v. Richard Mills, Commissioner of Education; New York State Board of Regents*, 300 U.S. 26 (1998). School districts could be required to pay the tuition directly to the private school if the Burlington factors are met.
- *Jarron Draper v. Atlanta Independent School System* (11th Cir. 2008) - Affirmed District Court and ordered Atlanta Independent School System to pay tuition and expenses at a private special education school for four years or until child graduates from high school as prospective compensatory education for their failure to provide him with a free appropriate education over a period of many years.
- *R.E., M.E., et al v. NYC Dept of Education* (2nd Cir. 2012) - 2nd Circuit adopts the “snap-shot” rule to judge the adequacy of an IEP written in Burlington/Carter reimbursement cases; held that retrospective testimony about additional services that the also district "would have provided," but which were not offered in the IEP, cannot be used to rehabilitate an IEP or prove its adequacy.
- *Board of Education of the Yorktown Central Sch. Dist. V. C.S.* (2<sup>nd</sup> Cir. 2021)- The Individuals with Disabilities Education Act (IDEA) does not permit a school district to amend an individualized education program (IEP) unilaterally during the thirty-day resolution period. The Act envisions the resolution period as a time for mediation and agreement, not one-sided action

# Special Education Law 101

- The legal standard is the IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,” which is “markedly more demanding than the ‘merely more than *de minimis*.’” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999-1000 (2017).
- Parents have the right to be meaningful participants in IEP meetings (Part 200.5(d)); *See, e.g. J.E. and C.E. ex rel. D.E. v. Chappaqua Cent. Sch. Dist.*, 116 LRP 27979 (S.D.N.Y. 06/28/16) (“Predetermination of a child's IEP amounts to a procedural violation of the [IDEA] if it deprives the student's parents of meaningful participation in the IEP process. ... The core of the statute is that the development of the IEP be a cooperative process between the parents and the district, and predetermination by a district of a child's IEP undermines the IDEA's fundamental goal to give parents a voice in the educational upbringing of their children.”)(internal citations omitted).
- The child has the right to remain in school through age 21 (20 U.S.C. § 1412 (a)(1)(A)).
- 2 year SOL, with some exceptions (20 U.S.C. § 1415(f)(3)(c)) to bring claims against a school district.

# What Should An IEP Include?

- Classification and school placement.
- Present levels of performance considerations: Academic, Social/ Emotional/Behavioral, Physical, and Management Needs (Part 200.1(w)(3); Part 200.4(2)(i)).
- Goals:
  - Academic and functional goals (20 U.S.C. § 1414 (d)(1)(a)(i)(II)).
  - Measurable (Part 200.4(2)(iii)).
  - Based on and tailored to the student's needs (Part 200.4(2)(iii)).
- Related Services – speech-language therapy, occupational therapy, physical therapy, feeding therapy, applied behavior analysis (ABA), counseling, social skills services, equine therapy, art therapy.
- Accommodations – a one-to-one aide; assistive technology; a scribe; breaks; sensory diet.
- Class Size –general education; integrated co-teaching; resource room; 15:1; 12:1:1, 6:1:1, a mix.
- A transition plan the year the student will turn 15: looking at post-secondary goals and needs relating to education, employment, and independent living (200.4(d)(2)(ix)).
- Placement – in district; out of district; approved private school, and consideration of a right to sue for private school tuition.

THESE ARE ALL BASED ON WHAT THE STUDENT NEEDS! MUST BE TAILORED.....

# Important Considerations in Assessing a Special Education Matter

- Compliant IEP team- who should be at your child's IEP meeting?
- If the Parent is not an English speaker- what should the IEP team provide for them?
- What evaluations and reports are being used? Does the Parent have access?
- Was an IEP provided after the meeting?
- Was the IEP followed? Related service encounter attendance records
- Identifying special education “red flags”.



# Litigation Process in NYC and Suburbs- Two-Tiered System

- New York City
  - Pre-Covid- Impartial Hearing Office- Brooklyn, NY
  - Post-Covid- Remote- As of now, fully through Office of Administrative Trials and Hearings (OATH)
- Outside of New York City
  - At the school district's administrative buildings
- State Review Office- Albany, NY
- Federal District Courts
- 2<sup>nd</sup> Circuit
- Supreme Court of the United States

# What Have We Seen?

- Child Find- failure to identify a Student with a disability and develop an IEP
- High School Student with Kindergarten reading levels- being passed along without the proper supports
- Failure to implement the IEP- no special education teacher in an ICT class, failure to provide occupational therapy as the provider was on leave,
- No evaluations or evaluations from when the Student was 5 and is now 14
- Students sitting at home without a placement
- Students in public school who require a residential placement
- Failure to translate documents or interpret at IEP

# Typical Case Structure

- Intake/Records Request
- Department Evaluations v. Independent Evaluations
- Compensatory Services
- Appropriate Placement
  - Approved Non-Public School v. Non-Approved Private School
  - Day Treatment Center, Residential Placement
- Implementation
- Fee Claim

# Fee Shifting Provision

- The Individual with Disabilities Education Act (IDEA) contains a fee shifting provision which “award(s) reasonable attorneys’ fees...to a prevailing party who is a parent of a child with a disability.” (20 U.S.C. § 1415(i)(3)(B)(i)(II)).
- In any action or proceeding brought under the IDEA, a federal district court may award reasonable attorneys’ fees as part of the costs to a “prevailing party” who is the parent of a child with a disability (20 U.S.C. § 1415(i)(3)(B)(i) and 34 C.F.R. § 300.517(a)(1)(i)).\*
- “Proceedings” brought under the IDEA include administrative proceedings, such as a hearing before an Impartial Hearing Officer (IHO) or State Review Officer (SRO). (see *A.R. v. New York City Dept. of Educ.*, 407 F.3d 65 (2d Cir. 2005); *Strek v. Bd. of Educ. Of East Greenbush Cent. Sch. Dist.*, 408 Fed Appx. 411, 2010 WL 4847481 (2d Cir. 2010).
- \*Under the IDEA and its implementing regulations a parent is defined to include a guardian. 34 C.F.R. § 300.30

# Fee Claim

- Submit fee demand to school district
- Negotiate  Settlement
- If no settlement  Federal Court
- Issue becomes the rate and the standard is what is reasonable in the community/complexity of matter/experience of the attorney (*Lodestar Method*- multiply the number of hours reasonably spent by trial counsel by a reasonable hourly rate)
- Importance of contemporaneous time keeping in fee shifting cases

# Johnson Factors

## *(Johnson, 714 F.2d at 717-19)*

1. Time and Labor required
2. Novelty and difficulty of the issues in the case
3. Skill requisite to perform legal services properly
4. Preclusion of other employment by the attorney due to acceptance of the case
5. Customary fee charged for those services in the relevant community
6. Whether the fee is fixed or contingent
7. Time limitations imposed by the client or the circumstances
8. Amount involved and the results obtained
9. Experience, reputation, and ability of the attorneys
10. Undesirability of the case
11. Nature and Length of the professional relationship with the client
12. Awards in similar cases

# Types of Cases

- Single issue case: failure to provide assistive technology, private transportation, outside tutoring
- Multiple year denial of FAPE
  - Relief can include: independent evaluations, new appropriate placement, compensatory services (tutoring, speech and language, music therapy, vision services, feeding therapy, and more), transportation to compensatory services, transportation to a new placement, translated documents, appointment of a transition coordinator, parent training, and more
- Tuition For Private School
  - Carters (Tuition Reimbursement) v. Connors (Direct Funding)

# Types of Evaluations

- Psychoeducational, Psychological, Neuropsychological
- Speech and Language, Feeding, Assistive Technology
- Functional Behavior Assessment, Behavior Intervention Plan, Applied Behavior Analysis (ABA) skills assessment
- Vocational Assessment
- Occupational Therapy, Physical Therapy, Art Therapy, Music Therapy
- Tutoring Assessments



# Burlington-Carter Test in Tuition Reimbursement/Connors Cases

- Did the District provide the Student with a FAPE?
- Is the private placement appropriate?
- Do the equities favor the Parent?

\*The default is tuition reimbursement, if you want direct funding- that is an extra component you need to prove

Direct payment cases- rationale of a Connors case.

# Pendency

- “during the pendency of any proceedings...unless the local board of education and the parent otherwise agree, the student shall remain in the then current placement of such student.”  
Regulations of the Commissioner of Education Part 200.5(m)(1).
- Last Agreed Upon IEP
- Last Unappealed Decision
- Substantially Similar

# Compensatory Service Claims

- The IDEA empowers the courts to grant the relief that they determine to be appropriate. *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, U.S. 1925. (citing 20 U.S.C. §1415(i)(2)(C)(iii).
- An award of additional services should aim to place the Student in the position he or she would have been in had the district complied with its obligation under the IDEA. *P. ex el. Mr. and Mrs. P. v. Newington Bd. of Ed.*, 546 F.3d 111, 123.

## Types of Services:

- Tutoring
- Applied Behavior Analysis (ABA)
- Speech services
- Occupational therapy services
- Parent Counseling and Training (PCAT)
- And more..

# Resources

- Regulations of the Commissioner of Education: <https://www.nysed.gov/special-education/new-york-state-laws-and-regulations-related-special-education-and-students>
- SEAL HOUSE: Special Education Advocacy Learning House: <https://www.sealhouse.us>
- Wrightslaw: <https://www.wrightslaw.com/>
- Council of Parent Attorneys and Advocates: <https://www.copaa.org>
- Special Education Committee of the Elder Law Section and Special Needs Law Section of NYSBA: <https://nysba.org/committees/elder-law-special-needs-section/>



The Cuddy Law Firm is dedicated to serving individuals with disabilities and their families in special education matters in NY, PA, NC, and OH



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Thank you!