

# Special Education Law Update 2013



Recent Developments  
in New York State



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# I. Changes



- ◆ Statutory
- ◆ Regulatory

“I have wondered at times what the Ten Commandments would have looked like if Moses had run them through the US Congress.”



~ Ronald Reagan

# A. Federal IDEA Funding



- “Maintenance of Effort” (MOE)
- States must maintain the level of special education funding from the previous year, unless they obtain a US DOE waiver.
- Penalty was permanent decrease in federal funds.

# MOE violations



South Carolina



Kansas



# MOE



- Reduced penalty so decreased federal funds only until the State resumes previous spending.
- US DOE may distribute the penalty funds to those States that do comply with the MOE as a bonus.

“As I hurtled through space,  
one thought kept crossing  
my mind:

- every part of this rocket  
was supplied by the lowest  
bidder.”

~ John Glenn





# B. Autism Insurance Coverage



- New York's autism insurance reform law
- Requires insurance companies to cover screening, diagnosis, and treatment for ASD.
- Up to \$45,000. for medically necessary ABA.
- On policies issued or renewed after November 1, 2012.

# State Department of Financial Services (DFS)



- Issued regulations requiring ABA practitioners to have a state license to qualify for insurance reimbursement under the new law.
- New York State had no such ABA licensure.

# Advocacy Groups



- In June 2013, NY Legislation established an ABA license about to go to Gov. Cuomo,
- DFS issued a new regulation accepting BACB certification as the license on July 31, 2013.
- APPENDIX A

# APPENDIX A



- Defines Applied Behavior Analysis (ABA)
- Defines behavior analyst, assistant behavior analyst, and ABA aide
- Qualifications, duties, and supervision

# Does Medicaid Cover ABA?



*Iliana Garrido, K.G. by and through his next friend, et al., v. Interim Secretary, Florida Agency For Health Care Administration, Elizabeth Dudek, (11<sup>th</sup> Cir, September 20, 2013)*

# 11<sup>th</sup> Circuit Case



Facts: The parents of children with autism filed against the Florida Healthcare Administration (AHCA) for its rejection of ABA.

Issue: Whether Florida's blanket ban on Medicaid funding for ABA violates the federal Medicaid Act.

# District Court S.D. Florida



- Judge Joan Lenard
- Ordered the State of Florida to provide Medicaid coverage for ABA when prescribed by a medical professional as medically necessary.

# Judge Joan Lenard



“There exists in the scientific and medical peer-reviewed literature a plethora of meta-analyses, studies and articles that clearly establish ABA as an effective and significant treatment to prevent disability and to restore children to their best possible functional level and restore their developmental skills.”



# 11<sup>th</sup> Circuit



- On September 20, 2013, the U.S. Court of Appeals for the Eleventh Circuit upheld Judge Lenard's order directing Florida to cover ABA under its Medicaid program.
- The Court remanded to clarify that AHCA retains the authority to determine the medical necessity for ABA on a case-by-case basis.



# Will Parents Fight School Districts For ABA

If their insurance policy or Medicaid cover it?

Are Schools Able  
to Bill Medicaid  
for ABA Services  
with Parental Consent?

What if the ABA services are equitable services a District provide to parentally placed children in private school?

C. What are the  
New York State  
High School Diplomas  
And Credentials ?

What is the sound of one  
hand clapping?



# Diploma/Credential



- Regents (with and without Honors)
- Local Diploma
- Career Development and Occupational Students Commencement Credential
- Skills and Achievement Credential
- No IEP diploma since July 1, 2013

# CDOSCC



## Career Development and Occupational Studies Commencement Credential

(APPENDIX B)



# Career Dev. and Occupational Studies



- The student has knowledge, preparation, and skills for entry level employment.
- Credential can supplement a regular diploma or stand alone if the student has 12 years of school, and meets the qualifications.

# Option 1: Student must have



- A Career Plan with goals, career coursework, and work-based learning experiences;
- Achieve learning standards in CDOS.;
- Completed at least 216 hours of coursework (at least 54 hrs. of work-based experience);
- Completed at least one employability profile.

# Option 2



The student has a nationally recognized work readiness credentials, including, but not limited to:

- National Work Readiness Credential;
- SkillsUSA Work Force Ready Employability Assessment;
- National Career Readiness Certificate WorkKeys - (ACT);

# Nat.'l Work Readiness Credential – Four Modules



1. Situational Judgment,
2. Active Listening,
3. Reading with Understanding, and
4. Using Math to Solve Problems.

# Situational Judgment



- The ability to cooperate with others
- Conflict resolution and negotiation
- The ability to observe critically
- Problem solving and decision making
- Taking responsibility for learning

# Nat.'l Work Readiness Credential



Many Special Education Students  
Will Not Be Able  
To Achieve this Credential

# School District Responsibility: districts must



- 1) Issue prior written notice that the student continues to be eligible for FAPE until 21, if the CDOS Credential is the student's only exiting credential.
- 2) \*Provide Option 1.\*
- 3) Ensure opportunities for a regular diploma.

# District Responsibility: must



- 4) Provide instruction toward the CDOS learning standards, access to coursework and school supervised work-based experiences
- 5) Review curriculum and practices to ensure that **ALL** students with disabilities have these opportunities.



# CDOS Credential



- What is FAPE for ALL students with disabilities?
- Impact on Transition Planning
- Course Options – wider range
- Real World Work Opportunities (cannot just refer to ACCES-VR)

## 2. Skills and Achievement Commencement Credential



- Beginning this 2013 – 2014 school year,
- For students with severe disabilities who take the State alternate assessment

## 2. Skills and Achievement Commencement Credential



- School districts shall award this credential,
- Nonpublic schools may award this credential.
- APPENDIX C

# Skills and Achievement Commencement Credential



- Student has a “severe disability,”
- CSE recommended the alternate assessment,
- Student had appropriate opportunities to participate in community and other experiences,
- Prepare for post-secondary living, learning, and employment. (Who in the district?)

# Skills and Achievement



(b) May be issued at any time after a student has attended school for at least 12 years, excluding kindergarten,

(c) Shall be similar in form to a diploma but it must have a clear annotation that it is based on achievement of alternate academic standards.

# (d) Issued with a Summary



- (1) Achievement of the career development and occupational studies learning standards,
- (2) Academic skills, as measured by the State assessment for students with severe disabilities; and
- (3) Strengths and interests and, as appropriate, other student achievements and accomplishments.

# (e) If student is less than 21



Prior written notice must indicate that the student continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a regular high school diploma.

# 3. GED - Reminder



- The GED is not a “regular high school diploma”
- A GED does not terminate the right to FAPE
- 28 C.F.R. **Section 300.102(a)(3)(iv)**
- Earning a high school equivalency diploma, . . . or a skills and achievement commencement credential . . . shall not terminate a student's entitlement to a FAPE.



# Scenario #1



Parent: John (19) just attended his high school graduation and prom with his friends. He will leave high school and work on his GED.

Options?


Can a parent waive a child's right to FAPE?

# Scenario #2



Parent: “John just earned his GED and I understand that he can continue his high school education. But he does not want to go back to the high school.”

# D. Proposed NYS Regulations on Hearings



- (1) Continued IHO certification requires actual acceptance of a case every two years;
- (2) While a due process complaint is before an IHO, subsequent complaints concerning the same student will be assigned to the same IHO who may consolidate. The proposed regulation provides factors to consider.

# Proposed NYS regulations



(3) An IHO may only “so order” the aspects of a settlement that he has authority to decide;

(4) The IHO timeline to transmit a redacted copy of a decision to SED is extended 15 days;

# Proposed NYS regulations



(5) An IHO may grant extensions of compliance for settlement discussions, and no extension of compliance may be granted after the record close date;

~ but still no extension of compliance beyond 30 days

# Proposed NYS regulations



(6) The impartial hearing record shall include briefs, written orders, subpoenas issued by the IHO, and other relevant documents.

# (7) Withdrawals of due process complaint



- Prior to the first hearing date, without prejudice.
- Presumed without prejudice, but IHO may, at the request of the other party, issue a written decision that the withdrawal is with prejudice.
- If a subsequent impartial hearing complaint within one year and it is based on substantially similar claims, the district appoints the same IHO.

# Proposed NYS Regulations



Written Comments on the proposed amendment must be submitted on or before **December 23, 2013.**

Public Comment Submission Sheet online.



# II. New Federal Directives



# A. OCR - Extracurricular Sports



- January 25, 2013 “Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics”
- Ensuring that students with disabilities are given the opportunity to play alongside their peers—both with and without disabilities.
- No new legal requirements.

# OCR - Extracurricular



- Section 504 regulations have always applied to extracurricular activities.
- Although the Guidance addresses K-12 activities, the main principles apply to postsecondary schools and **interscholastic athletic associations.**

# B. OSERS Bullying



- August 20, 2013
- The school district's responsibilities under the IDEA to address bullying of students with disabilities.”
- Although the focus of this letter is peer-to-peer bullying, it acknowledges that it is also intolerable for teachers and school staff to be party to school bullying.

# Bullying



“Bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied.”

# Bullying



- “However, even when situations do not rise to a level that constitutes a denial of FAPE, bullying can undermine a student’s ability to achieve his or her full academic potential.”
- Attached to the letter are specific strategies.

# Bullying



- As part of their response to bullying, schools should convene an IEP team to determine if the effects of the bullying have resulted in the student's needs changing so that the IEP is no longer appropriate.

# Bullying



- If the IEP team considers a different placement, it should be mindful that a "more protective" placement may violate the "least restrictive environment" obligation.
- If the perpetrator also has a disability, that student's IEP should also be evaluated.



# C. OSERS Dispute Resolution



Revised July 23, 2013 Q&A consists of five sections:

- Mediation;
- State Complaint Procedures;
- Due Process Complaints, and Due Process Hearing Procedures;
- Resolution Process; and
- Expedited Due Process Hearings.

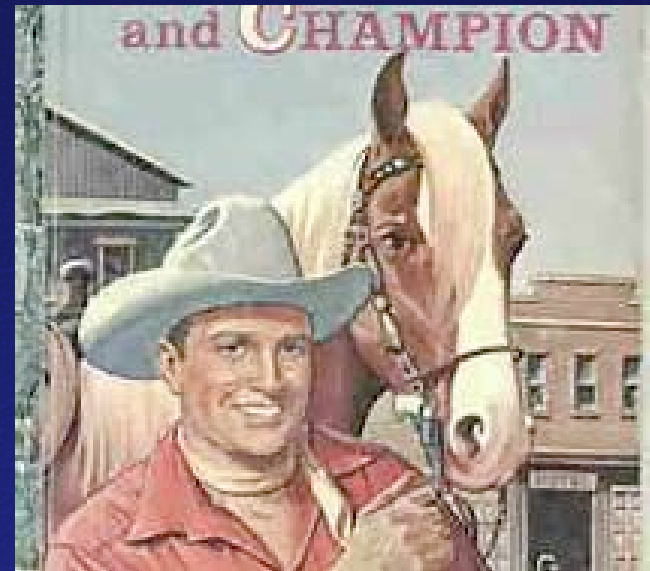
# Alternative Dispute Resolution



- New York State is beginning a Pilot Study of Facilitated CSE meetings
- New York City and Long Island

# III. Legal Ethics

## The Cowboy Code



Gene Autry

1. The Cowboy must never shoot first, hit a smaller man, or take unfair advantage.
2. He must never go back on his word, or a trust confided in him.
3. He must always tell the truth.
4. He must be gentle with children, the elderly, and animals.
5. He must not advocate or possess racially or religiously intolerant ideas.

6. He must help people in distress.

7. He must be a good worker.

8. He must keep himself clean in thought, speech, action, and personal habits.

9. He must respect women, parents, and his nation's laws.

10. The Cowboy is a patriot.

# A. All NYS Attorneys



- Revised Statements of Client Rights and Responsibilities went into effect April 15, 2013.
- Every attorney with an office in NYS must post them in that office in a manner visible to clients.
- Attorneys that provide legal services without fees may delete provisions dealing with fees.

# 1. Client Rights - revisions



- Clients have a right to be respected by non-attorneys in an attorney's office.
- Clients are entitled to reasonable fees and expenses and to be informed about them before, or within, a reasonable time after, representation begins.

# Client Rights



- Communications include faxes and email.
- The right of clients to be reasonably informed and entitled to prompt responses from an attorney on relevant materials.



# Clients Rights



- The client has the right to decide whether to settle.
- Replace the phrase "secrets and confidences" with the phrase "confidential information" regarding the right to private communications with an attorney.

# 2. Client Responsibility



- Clients "should" have a candid relationship with their attorneys, rather than "must."
- Clients compensate their attorneys for services and expenses, even after the attorney-client relationship ends.
- A client does not have to pay an attorney when fees are excessive.

# Client Responsibility



- Changes in language to reflect modern communications, such as email.
- A client's right to have an attorney respond to communications within a reasonable time, but with the understanding that the attorney might have obligations to other clients.

# Client Responsibility: revisions



- Clarification that an attorney may decline to accept a matter if personal or professional commitments would prevent complete, competent, and diligent representation.

(This point is extremely important for attorneys in the field of special education law.)

# 3. Pro Bono Reporting



- The hours of pro bono work and the financial contributions to groups that provide legal services to the poor that attorneys report on their registration forms will now be available to anyone who requests them.
- Is the confidentiality of client identity an issue?

# 4. Interns and Volunteers



# Eric Glatt v. Fox Searchlight Pictures (S.D.N.Y., 2013)



Facts: Interns on the production of “Black Swan” and other movies.

Issue: Are they employees under the Fair Labor Standards Act (FLSA) and the New York State Labor Law (NYLL).

# Eric Glatt v. Fox Searchlight Pictures (S.D.N.Y., 2013)



Analysis: Employer control is the key

- 1) Power to hire and fire
- 2) Supervised and controlled work schedules or conditions
- 3) Determined rate and method of payment, and
- 4) Maintained employment records.



# Glatt v. Fox Searchlight Pictures



Holding: They are employees.

In this economy, are you using unpaid interns and volunteers to perform work that is usually performed by employees?

# Henderson-Jones v. Industrial Comm of AZ (Aug. 22, 2013)



Volunteers are not employees subject to  
employment laws and workmen's  
compensation.

But what is a volunteer?

# Henderson-Jones



Facts: She was in the International Educators for Africa program of the International Foundation for Education and Self-Help ("IFESH"), a 501(c)(3) non-profit with headquarters in Arizona.

# Henderson-Jones



IFESH provided her with

- per diem cash payments during orientation to cover travel, hotel, and meal expenses;
- an apartment and utilities during orientation;
- A \$350 country settling-in allowance and an \$850 monthly stipend for living expenses.

# Henderson-Jones



## Participation Agreement:

“Participation in the TFA program is strictly on a volunteer basis. Although IFESH provides a nominal living stipend and other allowances to each volunteer, participants are not paid for their services nor are they employees of IFESH. All volunteers agree to participate in the TFA program strictly at their own risk.”

# Henderson-Jones



Holding: She is a volunteer under federal law and Arizona Law.

# But



The Sixth Circuit Court of Appeals recently held that volunteer firefighters in Gibraltar, Mich., who receive a substantial hourly wage for responding to calls when they choose to do so are "employees" under the Family and Medical Leave Act. (*Mendel v. City of Gibraltar*, 6th Cir, No. 12-1231, 8/15/13).

# 5. Social Media Ethical Issues – Blogs



- In New York State, attorney websites are advertisements subject to ethical rules.
- What about blogs?
- The Virginia Bar initiated disciplinary action against a lawyer who blogged about current criminal cases he handled. The Bar found the blog to de-facto misleading advertising.



# Blogs



- If you are including your contact info and/or describing the services you perform
- Then it's advisable to comply with NYS ethics rules related to advertising.

# 6. Cases Against Law Schools



- Most lawsuits alleging fraudulent enticement against law schools have been dismissed.
- Even when cases are dismissed, the plaintiffs want to pressure law schools to be more forthcoming about their employment statistics.

# *Gomez-Jimenez et al v. New York Law School (2012)*



- Nine former law students alleged that New York Law School engaged in unfair and fraudulent practices, fraudulent and negligent misrepresentation.
- The Court dismissed the case without comment.

# Survived Motions to Dismiss



Widener University School  
of Law in NJ

Thomas Jefferson School  
of Law in CA



# Are Graduate Schools of Education

next ?

# B. School District Special Education Ethical Issues



Whistleblowers

Fraudulent Billing

**Retaliation**

# 1. Whistleblower



## **Monroe-Woodbury SD**

NY Supreme Court, Orange County, 2013

Alethea Schepperly, Director of Pupil Personnel Services, filed against the President of the District's BOE, Director of Special Education, and a school psychologist for alleged violations of the IDEA.

# Allegations that



- Violations of Confidentiality
- The President of the BOE established an unwritten policy to deny special education services without CSE or parental input.
- The Director was to determine the parents financial ability to pursue an impartial hearing to challenge the denial of services.



# Whistleblower



- There is a five-page affidavit from a parent who had moved out of the school district.
- The case was dismissed without a determination on the merits because Schepperly had no standing.

# 2. Retaliation



## **Monroe-Woodbury SD**

Same parties, same court, same judge

Court reject disciplinary charges against Alethea Schepperly and a \$75,000. fine an arbitrator imposed on her.

# Retaliation



- The nature of the charges and “overall extremely poor quality of the evidence” suggests that the allegations were “not only trumped up, but were based, in the main, on speculation, hearsay and double hearsay.”
- The Judge referred to the \$75,000. fine as “shocking to one’s sense of fairness.”

# 3. Other Whistleblowers



## **Harris Lirtzman - Bronx**

Former deputy New York State comptroller, became a public school teacher at age 53.

He told the Principal that special education students were not receiving their IEP services.

# Harris Lirtzman



The principal denied him tenure and asked him to leave immediately.

When NYSED investigated his charges, it sustained Mr. Lirtzman's allegations and he was given whistleblower status

# Darien, CT



A Connecticut Dept. of Education investigation found sixteen systematic violations of federal law, including that the district changed IEP's without the knowledge or consent of parents. It is alleged that some special education students were deprived services.

A teacher "blew the whistle."

# 4. Fraudulent Billing



## Stacy Lore in Connecticut

- Lore owned Spectrum Kids that provided services to autistic children in Connecticut.
- She claimed to have a Bachelor's Degree from Mercy College, and a Master's Degree from St. John's University.

# Stacy Lore



- Weston School District paid her \$300,350,
- Norwalk School District paid her \$155,000.



# Fraudulent Billing



- Lore had not even finished high school,
- She had a G.E.D. in NY State.
- A Florida certification board had issued a cease and desist order against her.
- Lore will serves three years in prison.

# Fraudulent Services



## **Nelson Ruiz, William Cruz in New York City**

Nelson Ruiz pleaded guilty to billing the New York City DOE \$2.7 million from 2008 to June 2012 for sign language interpretation services to eleven special needs children when they did not need them and no such service was provided.

# Fraudulent Services



Ruiz forged signatures of parents, a retired DOE employee, and a dead one. He paid a monthly fee to another DOE employee who expedited payments and now faces charges.

William Cruz, his alleged partner in this endeavor, also worked as a special education advocate in NYC.

# Alleged Fraud



## Island Child Development Center – New York City

Island Center was supposed to serve preschool children, but it is accused of diverting millions of dollars to:

- a girls' religious school,
- summer camps,
- and a kosher supermarket.

# Island Child



Auditors reviewing over fifteen hundred of thirteen thousand subpoenaed checks found \$5.8 million in alleged misappropriation over a six-year period.

# Island Child



Auditors claim that Island Child paid nearly

- \$2 million to a private school for Orthodox Jewish Girls,
- \$877,000 to summer camps,
- \$12,000. to two jewelers,
- nearly \$200,000. to fictitious workers,

# Island Child



- and more than \$330,000 in non-payrole payments to one individual.
- Queens District Attorney has Island Child under investigation.

# 5. Answer Sheet Change



## **Allison Risoli - Peekskill City SD**

A high school social studies teacher was arraigned and charged with felony counts of offering a false instrument for filing for allegedly altering scores on two Regents exams.

Risoli, the social studies dept, chair, delivered completed Regents exams to the data analyst.



# Peekskill City School District



- The Risoli case is the second criminal investigation in Peekskill.
- The district attorney's office is investigating unrelated allegations that guidance counselors gave course credits to students for courses that they did not take.

# C. Ethical Issues Raised by DSM-5



- Eligibility for Students with high-functioning autism
- DSM-5 eliminated Asperger Syndrome and PDD-NOS and changed ASD
- Some school districts are using these changes to deny special education eligibility.

# DSM-5 eligibility options



- Autism – NYS definition does not indicate IQ level and does not require a medical diagnosis of ASD.
- OHI – use OHI for the ADHD component of the child's disability.
- Same placement?

# DSM-5 Manifestation



- Discipline incident, Section 3214 Hearing finding of guilt
- Manifestation meeting – was the behavior a manifestation of the student's disability?
- But what is the child's disability now?

# DSM-5 Transition



- Transition is strengthened by the new CDOS Commencement Credential
- But what happens to students who lose their ASD medical diagnosis?

# Transition



- The Supplemental Security Income (SSI)
- OPWDD – individuals with higher IQ scores use ASD for eligibility
- NY Surrogate's Court 17A guardianships

# IV. Case Law



What Did You Miss This Year?

New York State Courts: Wrongful Death

# Begley v. New York City



Facts: After an impartial hearing, the CSE placed Jonathan Begley, a nine-year-old with autism, asthma, and severe allergies, in the Forum School in New Jersey with a nurse.

Jonathan's mother hired nurses, and the New York City DOE paid them.



# Begley v. New York City



On July 21, 2004, Jonathan experienced difficulty breathing in school. Eventually, his nurse realized that he was having a severe allergic reaction, and she injected him with an "epi-pen" three times.

Jonathan died two days later. The allergen that triggered his reaction is not known.

# Begley v. New York City



- Analysis: A school's duty to supervise arises from physical custody but also when “a specific statutory duty has been imposed.”
- The parents contend that the DOE's statutory obligation to formulate an IEP for Jonathan imposes a duty of care to provide him with adequate supervision.

# Appellate Div. Second Dept.: affirmed



- Holding: The Court found that the DOE fulfilled its obligation under the IDEA by formulating an appropriate IEP for Jonathan. To impose a duty of supervision on the DOE where the child is in the custody of a private school in another state, would make the DOE an insurer against negligence by the private school despite its lack of control over its staff.

# King v. Cornell University



Facts: The parents of a 19 year old sophomore sought damages for his death after he fell from a cliff over two hundred feet into a gorge on the Cornell campus.

Their son was intoxicated and smoked marijuana during a night at fraternity houses when at approximately 3:30 a.m., he ran off a marked trail through a split-rail fence, and fell to his death.

# King v. Cornell University



Analysis: Cornell asserted an affirmative defense of immunity because landowners who permit members of the public to use their property for recreational activities without charge have immunity. The Plaintiffs argued that their son was a student who paid.

Holding: The Court denied the University's motion for summary judgment.

# B. NYS Court: Scheduling



## **Edwards v. City of Middletown**

Facts: A police officer is terminated after a multi-day hearing with one date on a Sunday. Article 78 proceeding sought to vacate her termination.

Analysis: Judiciary Law §5 provides that a court shall not be opened, or transact any business on Sunday, nor on a Saturday in any case where such day is kept as holy by a party to the case, . . .

# Edwards v. Middletown



- "The fact that petitioner here had expressly consented to the hearing being held on a Sunday is of no consequence. . . ."
- The Court annulled the determination, and remanded for a new hearing *de novo*.

# C. Cases of Interest Outside New York State





# Lousiana – wrongful death



## **Ward v. Jefferson Parish, et al.**

A jury awarded the parents of a five-year old \$4.5 million in the wrongful death of their daughter. A substitute teacher strapped Elizabeth Ward in a Rifton Chair not knowing that the child had seizures and not having training in the use of the chair.

# New Jersey - Medicaid



## **Lakewood Board of Education v. Department of Human Services**

Facts: Lakewood Board of Education appeals from a final agency decision of the New Jersey Division of Medical Assistance and Health Services, adopting the decision of an ALJ, denying a claim for Medicaid reimbursement for services to special education students placed in non-public schools by their parents.

# New Jersey - Medicaid



- A plain language reading of the Medicaid statute establishes services to Medicaid-eligible special needs in public schools or private schools provided by an IEP team.
- The lack of mention of any provision for students placed in private schools by their parents demonstrates that Congress did not intend to provide benefits to those children.

# New Jersey - Medicaid



If a New York School District  
Provides Section 3602-c services  
To a parentally placed child,  
Can the District bill Medicaid?

# US Supreme Court watch



## Hall v. State of Florida

Facts: Freddie Hall was sentenced to death for the kidnap and murder of a woman he abducted from a grocery store in 1978. The Florida Courts declared Hall to be "mentally retarded" in 1992 and 1999. After Hall obtained a full scale IQ score of 71 on a single Weschler Adult Intelligence Test, Florida declared him "un-retarded" 2009.

# Hall v. State of Florida



Issue: What is the IQ cutoff for “MR” and may states rely on the results of one test?

In 2002, the US Supreme Court struck down the death penalty for the “mentally retarded” but it did not set a clear standard for what is now referred to as intellectual disability and left states leeway.

# D. Federal Cases in NY



# SRO Delay



- UA v. DOE, SED and SRO, 13 CIV 3077, Southern District of New York; Susan Luger and Lawrence Weinberg, Esq.
- State Complaint filed by Gary Mayerson and Associates in January 2013



# SRO Delay



SRO 13-170: Parent prevailed at an impartial hearing. The NYC DOE appealed to the SRO. The SRO dismissed the appeal sua sponte finding that the DOE's nine-day delay in filing the administrative record "impeded his ability to issue a timely and thorough decision."

## 2. Reimbursement: Prong 1



### **K.L. ex rel. M.L. v. New York City DOE (2013)**

Facts: Parents sought reimbursement for a student with severe autism with shredding.

IHO: Ordered reimbursement.

SRO: Reversed. The offered 6:1:1 class with a para offered FAPE, but the SRO considered retrospective evidence.

# Reminder – RE v. NYCDOE



Restricted the use of retrospective evidence so that a school district cannot rehabilitate an insufficient IEP with testimony of additional services the student would have received in the public placement even though they are not on the IEP.

Parents must be able to make decisions based upon the IEP.

# Prong 1: FAPE



## K.L. v. NYC DOE

District Court: Affirmed.

Second Circuit: Affirmed. Although the SRO used retrospective evidence before the Second Circuit issued its decision in RE, the SRO relied on sufficient permissible evidence. SRO decision deserves deference.

# 3. Reimbursement: Prong 2



## C.L. v. Scarsdale UFSC

Facts: Parents sought reimbursement for Eagle Hill. The District denied IDEA eligibility and provided only a Section 504 plan.

IHO: For Parents - Ordered reimbursement.

# Prong 2: LRE



SRO: Reversed. The SRO aff'd the IHO's finding that the District denied the student FAPE, but reversed the IHO's finding that Eagle Hill was appropriate due, in part, to LRE.

District Court: Affirmed

Second Circuit: waiting

# U.S. amicus



- The LRE analysis is only one factor among others in determining appropriateness on prong two.
- The district court erroneously compared the restrictiveness of CL's private placement with his placement in the public school that denied him FAPE. Instead, the court should have inquired whether there were other less restrictive private school options available to CL's parents.

# 4. Reimbursement: Prong 3



**A.R. v. New York City Department of Education,**

Facts: The Parent sought prospective reimbursement for a previous year at the Cooke Center.



# Prong 3: Equity



IHO: DOE conceded prong one. The IHO found that Cooke was not appropriate because the Student was substantially younger than the rest of her class and not ready for the advanced curriculum. On the third prong, the private school contract was a “sham” and the Parent did not admit any financial documents to establish need for prospective payment.

# Prong 3: Equity



SRO: Reversed on prong two finding that Cooke was appropriate. But upheld prong three that the contract with the private school was a “sham” and that the Parent did not provide financial evidence.

District Court: Reversed on prong 3.

“[t]he fact that [the parent] ultimately expected to prevail in her claims against the DOE does not indicate that she believed that she had no obligation to pay under the contract.”

# 5. Deference



## **F.O. and E.O., on behalf of Brendan O., v. The New York City DOE**

Facts: Brendan is a ten year old with “Myasthenia Gravis”, Autism, and a G-tube. The CSE convened in 2009, and it deferred to the CBST for a non-public school. When the CBST did not locate one, the parents placed Brendan in the Rebecca School.

IHO found for the parents.

# Deference



SRO: Because the SRO found the proposed public placement appropriate, he found that it was “not necessary to reach the issue of whether the Rebecca School was appropriate,” or “whether equitable considerations support the parents’ claim”.

District Court.: The Court reversed, giving the IHO deference and finding that the SRO relied on the DOE’s evidence without consideration of the Parents’ expert’s testimony. There is an in-depth discussion of deference, especially footnote 9.

# D. NYC Issues



- Nickerson P-1 Letters
- CBST
- Pattern – IHO finds for the parents but is reversed
- Is the NYC IHO pay scale a matter of due process?

# E. Harassment/Bullying



**DASA**

**Hostile**

**Environment**

**Discrimination**

**BULLY**

# Pine Bush CSD: Religious



T.E. v. Pine Bush Central School District

Facts: Five current and former students claim that school administrators acted with deliberate indifference to pervasive anti-Semitic name-calling and graffiti, including engraved swastikas that remained there for weeks and months.

# Pine Bush CSD



Procedural History: Gov. Andrew M. Cuomo directed the New York State Police and the State Division of Human Rights to investigate. He also released a letter to the state education commissioner, John B. King Jr., asking what, if anything, the agency knew about the situation in the Pine Bush Central School District, and what it might have done to address it.

The United States Department of Justice just joined in the investigation.



# Pine Bush CSD



The Second Circuit upheld a \$1 million jury verdict against the Pine Bush School District last year for its deliberate indifference to persistent racial harassment Anthony Zeno, who is half-white and half-Latino.

# Mohawk Central School District (Sexual Orientation)



Facts: J.L., a 14-year-old student faced escalating harassment during the seventh and eighth grades including verbal assault, his personal property was defaced and broken, and he was regularly pushed. During 2009, a student knocked J.L. down the stairs and sprained his ankle and another student brought a knife to school and threatened to kill him. J.L. stopped attending school out of fear.

# Mohawk CSD



Procedural History: The United States Department of Justice filed a motion to intervene, and the matter settled. Under the settlement, the District

- Reviews its policies and procedures governing harassment based on sex, and sexual orientation;
- Reports to the New York Civil Liberties Union and the Department of Justice on its efforts
- Pays \$50,000. to J.L.

# Conclusions



- Medical insurance and Medicaid for ABA treatment for ASD, but DSM-5 just changed the definition of ASD.
- US DOE just issued the Dear Colleague Letter on Bullying and the US intervened in bullying cases in Mohawk School District and Pine Bush Central School District.

# One Final Thought

