

CASE SCENARIO: TUITION REIMBURSEMENT¹

Born on September 24, 2003, Student X was diagnosed with autism at age 2. Identified under Part C of the IDEA, X received home-based applied behavior analysis (ABA) along with speech/language therapy (SLT) and occupational therapy (OT) through New York City's early intervention program.

In July 2007, in preparation for transition to Part B of the IDEA, X attended a full-day preschool center-based program in a 8 (students):1 (teacher):3 (aides) classroom. Per her IEP, she also received 1:1 OT and SLT, each for three 30-minute sessions per week at the center, and five two-hour 1:1 ABA sessions weekly from a special education itinerant teacher (SEIT) at home.

In mid-April 2008, the CSE met to develop X's IEP for kindergarten during the following school year. They considered various sources of data, including (a) a report from X's pediatric neurologist that concluded X was high-functioning autistic and should continue with an ABA-based program; (b) a center report that also recommended continuation of ABA in a small structured environment; (c) her preschool teacher's mid-year progress report that described X's high excitability and nonfunctional behaviors that interfered with learning and required "maximum support" in a highly structured small group learning environment; (d) the school psychologist's psycho-educational evaluation that reported X to be too unstable to be evaluated² but opined in favor of a highly structured environment; (e) the SEIT's reports that emphasized X's need for 1:1 ABA services and continued OT and SLT; (f) OT and SLT reports proposing continuation of the same level of related services and a small structured environment; and (g) an IEE³ that recommended 40 hours of 1:1 ABA sessions per week and "manding" sessions (in which a child is shown reinforcing items she can access upon request), five 60-minute SLT sessions per week, five 60-minute OT sessions per week in a sensory gym, and two hours of ABA training per week for the parents. The resulting IEP proposed a 6:1:1 class in a special public school, with OT and SLT each for three 30-minute sessions weekly. Although acknowledging X's self-stimulatory behaviors that interfered with task attention and social interaction, the IEP concluded X's behavior "does not seriously interfere with instruction and can be addressed by the ... special education classroom teacher." The parents dissented to the proposed IEP, with their primary objection being the lack of specified, sufficient ABA services. They called

¹ The basic factual framework is based on *R.K. v. New York City Department of Education*, 56 IDELR ¶ 168 (E.D.N.Y. 2011), *adopted*, 56 IDELR ¶ 212 (E.D.N.Y. 2011), which was subject to review in *R.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012).

² More specifically, she reported that X's attention span "was basically non-existent" and that X "could not/would not focus, follow directions, or relate in a meaningful way."

³ The private evaluators were a clinical pediatric professor and a school psychologist.

the CSE chair the next day to reinforce their objections and warning that they would seek a private placement in the absence of immediate revisions.

On May 7, 2008, the parents unilaterally enrolled X in a small private school that specializes in students with autism.⁴ The school's ABA-trained instructors work 1:1 with the students, rotating every 30 minutes "to promote generalization across teachers." They record discrete trial data on each targeted skill (e.g., self-care, socialization, play skills, and pragmatic language) and graph data daily to track progress and make program adjustments." The school provides parents with regular individual training to transfer skills from the school environment to the home and community. X's class had four students and five staff members, including a lead teacher, assuring each student of 1:1 attention for the entire school day. The parents arranged for OT and SLT, each for three 30-minute sessions weekly, at home.

Meanwhile, on June 12, 2008, they filed for an impartial hearing, seeking reimbursement for the tuition at the private school. The subsequent hearing on January 7-8, 2009 included the following witnesses:

- the private school's director testified that X needed 1:1 ABA instruction to progress and that with this method and the school's specialized structure the child did not evidence a need for a formal FBA-BIP
- the teacher at the proposed classroom testified that she used an eclectic method called Treatment and Education of Autistic and Communication-Related Handicapped Children ("TEACCH"), which includes ABA but places more emphasis on visual skills, independent work, and group instruction, and that she would have provided X with at least 25 minutes daily of 1:1 ABA and manding sessions, which she regularly does for her other students, and a BIP; she also pointed out that a regular public school shared the same building, thus providing potential opportunities for interaction with nondisabled students
- the parent coordinator at the proposed school placement testified that she would have arranged training and counseling opportunities for X's parents upon request
- the district's representative at the CSE, who was a school psychologist, testified that a 1:1 setting would be too restrictive for X in comparison to a small-group setting and that no formal FBA or BIP was necessary; he also testified that the parents only went through the motions of participating in the IEP process and clearly only wanted the private placement at public expense

⁴ At the time, the school was limited to two classes, each with four students.

- another district psychologist, who conducted testing in late December 2008, concluded the results revealed “minimal progress” in academic achievement, although on cross-examination she acknowledged that these results were “expected” in light of X’s low baseline data
- the private school representative showed staff data of notable gains in social, communication, and behavioral skills for X
- the parents testified that the district only did not meaningfully consider their input at the CSE and stonewalled their subsequent efforts to (a) ascertain specific information about the proposed placement, including its location, and (b) revise this proposal so as to assure its appropriateness to the individual needs of X

A. Prehearing and Hearing Considerations:

1. *What would be your ruling with regard to these contentions advanced prior to the hearing:*
 - a. *Parents: you should recuse yourself because you are not available within the 45-day timeline or within a reasonable time thereafter*
 - b. *Parents: you should not allow the testimony of the parent coordinator from the proposed school placement, who is expected to testify that she would have arranged training and counseling opportunities for X's parents upon request*
 - c. *District: the complaint must be dismissed because the parents refused to participate in the resolution meeting; they refused to discuss the facts and the issues and would not discuss any other alternative to tuition reimbursement*
 - d. *District: you are required to review the adequacy of the IEP as amended during the resolution meeting*
2. *If the response did not mention the lack of proper notice, must the district affirmatively plead it? If it need not be affirmatively pled, do you ask the parties whether it is an issue to be determined? Instead, if it need be affirmatively pled, do you ask whether the parent is going to raise an exception?*
3. *If the complaint only mentions compensatory education very briefly, would you address it during the prehearing conference? If so, how would you do it?*
4. *Would you discuss with the parties at the prehearing conference whether they will be prepared to submit evidence on what the IEP, moving forward, should look like if you find the IEP in question inappropriate?*
 - a. *Would you address the inappropriate IEP even if you award reimbursement for the private school?*
5. *Would you direct the parents to submit as proposed exhibits evidence of payment for any costs for which they seek reimbursement?*
6. *What position would you take if the district requests that, in the event you award reimbursement, you condition reimbursement on the parents regularly providing the district copies of all private school records and consenting to the district being able to observe the child at the private school in advance of any annual review?*

7. *What would be your ruling with regard to these contentions during the hearing:*
 - a. *at the outset of the hearing, the district contended that under the residual rationale of the Supreme Court's decision in Schaffer v. Weast the burden of production was on the parent*
 - b. *during the second day of the hearing, the parents contended the two-day hearing and the hearing officer's disallowance of witnesses and testimony deemed repetitive deprived them of due process under the IDEA and the Fourteenth Amendment*
 - c. *either party's claim at the conclusion of the hearing that the hearing officer's questioning of the witnesses for clarification after the direct and cross examination amounted to a violation of the IDEA's impartiality requirement*

B. Preliminary Equities Step:

1. *What is your decision as to district's initial argument that the parent failed to provide the required timely notice in terms of your:*
 - a. *factual finding(s)*
 - b. *legal conclusions*
 - c. *remedial order (more specifically, if you conclude that the parent violated this requirement, does the violation in this case preclude an order of tuition reimbursement, reduce the potential amount of reimbursement [and, if so, by what approximate percentage], or have no quantitative effect on the amount of reimbursement?)*

C. Appropriateness Steps:

1. *What is your decision with regard to these parental claims of denial of FAPE:*
 - a. *procedural:*
 - *the district failed to provide an FBA and BIP despite X's serious behavioral problems, which violates state law*
 - *the IEP lacked parent counseling and training, despite the state regulations' requirements that districts provide parents of students with autism with parent counseling and training (for the purpose of enabling them to perform follow-up at home) and that*

such services be specified in the IEP

- *the CSE's failure to provide the parents with a draft copy of the IEP at the meeting, the IEP's lack of definitive specification of the proposed school site, the other members' rejection of the IEE constituted denial of a meaningful opportunity for parental participation*

b. *substantive:*

- *the IEP lacked the specification, much less sufficiency, of ABA therapy*
- *the proposed placement also offered insufficient 1:1 specially designed instruction*

c. *Would your answers differ if, instead, the following factual substitutions applied in the original case?*

- *the District's proposed IEP included 20–25 (but not 40) hours per week of ABA*
- *the district's evaluation included the functional equivalent of an FBA, and the 6:1:1 proposed classroom teacher credibly testified that she has a classroom-wide BIP that addresses many of X's serious behavioral problems*
- *the IEP provided for 30-minute sessions of SLT per day in a group not to exceed two, but the proposed public school can only provide three of the five sessions per week and, as a result, the district provided the parents with a related service authorization ("RSA") for the other two sessions⁵*

2. *Assuming that you reach the issue of the appropriateness of the unilateral placement,⁶ what would be your ruling . . .*

a. *as to the following district challenges:*

- *the school is not state-approved*

⁵ An RSA allows a family to secure an independent provider paid for by the NYC Department of Education ("NYCDOE") when the NYCDOE does not have a provider available or an agency that has contracted with the NYCDOE is not available to provide the service. An RSA is only available to families in the New York City school district.

⁶ Alternative reasons for reaching this step are because 1) you concluded that the threshold issue of timely notice did not preclude further analysis and the district denied the child FAPE, or 2) you opted to complete the analysis in case of reversal, upon appeal, of contrary rulings at the earlier steps.

- *the school is too small to provide the requisite quality in terms of a full range of services and accountability*
 - *the school violated various FAPE procedural requirements of the IDEA specific to this individual child, such as lack of an FBA-BIP*
 - *the parents did not meet their burden to show academic progress at the private placement*
 - *the testimony of the private school director and representative were inadmissible as retrospective because they had not shared the information with the IEP team at the time the IEP was being developed*
 - *the private school did not actually provide any of the related services that the child needed*
 - *the school's ABA method does not meet the IDEA requirement for "peer-reviewed research"*⁷
 - *the school's program for student X was a violation of the IDEA's LRE provision in terms of not only its absence of nondisabled students but also its 1:1 approach for student X*
- b. *if, instead, the following factual substitutions applied in the original case:*
- *the District's proposed IEP contained an uncontested goal(s) that required some inclusion*
 - *the private school provided its students reverse inclusion activities/opportunities, i.e., bringing in some students without disabilities*
 - *to combat the assertion that X made "minimal progress" in academic achievement while enrolled in the private school, the parents assert that they need not demonstrate actual progress, as the district argues, but rather the potential for progress*
 - *the private school provided the SLT and OT by contract with separate private entities*

⁷ 20 U.S.C. § 1404(d)(1)(A)(i)(IV)); 34 C.F.R. § 300.320(a)(4):
[The IEP] must include . . . [a] statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable

- *Would your analysis be any different if the private school offered to provide the SLT and OT at an additional cost but the parents declined because it was cost prohibitive?*
- *Would your analysis be any different if the complaint had requested prospective payment for the SLT and OT and compensatory education for the missed services?*

D. Final Equities Step:

1. *Assuming that you had ruled that the district's IEP was not appropriate and that the parent's unilateral placement was proper, what would be your ruling in terms of reimbursement . . .*
 - a. *as to the following district contentions:*
 - *the parents failed to provide written notice*
 - *the parents' oral notice failed to advise that they were seeking reimbursement*
 - *the parents failed to cooperate in good faith in the IEP development as confirmed by their having made the placement shortly after the IEP team meeting and prior to the end of the school year notwithstanding the lack of any mention of needing ESY*
 - b. *if, returning back to the original case, the following factual substitutions applied:*
 - *the parents passively participated in the IEP meeting and did not make their objections known to the IEP team, but a week after the meeting they call the CSE chair to express their objections and to inform her that they would seek a private placement*
 - *the parents asked for an immediate, second IEP team meeting but the CSE chair responded that the meeting could be scheduled only after the start of the school year*
 - *the CSE chair invited the parents to an immediate, second IEP team meeting to discuss their concerns, but the parents replied that they are only available after the start of the school year*
 - *the cost of the Parent's unilateral placement was \$250,000 per year and a suitable but less expensive alternative was available for one third of that amount*

- *to substantiate their reimbursement claim the parents submitted only a cash receipt for the full amount of tuition*
- *the district offered 20–25 hours per week of in-school ABA at the resolution meeting*
 - *What if the district offered 40 hours per week after school?*
- *the teacher testified that she would actually provide the student with 20–25 hours per week of in-school ABA (even though the IEP only says that the student would be provided with ABA, without any number)*
- *the parents had left the IEP team meeting in frustration/protest prior to the completion of the meeting*
- *the mother of one of the parents was a therapist at the private school who will provide services to the student*
- *the parents filed the complaint the day after receiving the FNR but before visiting the recommended public school program*
- *the parents had visited the private school a few weeks before the IEP team meeting?*
 - *Would your analysis change if the parents entered into a contract with the private school several days before the IEP team meeting?*
 - *What if, instead, the parents signed the contract right after the IEP team meeting?*
- *the private school's contract provided that payment to the school was due only if the parents prevailed at the hearing*
- *the father, who lives in a rental apartment with his wife and X, testifies that the household annual income does not exceed \$50,000 and that there are no other substantial assets, and they are contractually obligated for the annual tuition amount of \$48,500 but have only paid a negligible down payment thus far.*
- *one of the parents testified at the hearing that the school provided them with a scholarship but they seek the full amount reflected in the contract*
- *the private school program was housed in a parochial school or*

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- *the evidence in this case supported a finding that the parents' motivation for the private school placement was unrelated to X's disability*