

ATTORNEY'S CORNER

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A Synopsis of Salient Updates and Cases in Special Education

In this installment of the Attorney's Corner, we review a decision from the Southern District of New York analyzing whether school districts are required to reimburse parents for the religious instruction portion of their children's tuition at a private school, when the district denies them a free appropriate public education ("FAPE"). We also review a decision from the State Education Department's ("SED") Office of State Review ("SRO") discussing a parent's disagreement with a CSE's initial eligibility determination. Next, we analyze the State Education Department's (SED) proposed regulations on diapering and toileting in schools. Finally, we review an announcement from SED on joining the nationwide WIDA Consortium, and New York's switch to the WIDA Alternate ACCESS assessment for English Language Learners who meet the criteria for alternate assessment.

For purposes of clarity:

- In New York State, the Supreme Court is the lowest level trial court of general jurisdiction. An appeal from the Supreme Court may be taken to the Appellate Division, and then to the Court of Appeals. The Appellate Division, Second Department has jurisdiction over cases in Brooklyn, Queens, and Long Island.

- Federal claims are filed with federal district courts. An appeal may be taken to the Circuit Court of Appeals, and then to the U.S. Supreme Court. The Second Circuit Court of Appeal has jurisdiction over cases that arise in New York State.
- Claims brought under the Individuals with Disabilities Education Act (“IDEA”) are heard by an impartial hearing officer, from which an appeal may be taken to the SRO, and then to the New York State Supreme Court or Federal District Court. Parents may also join 504 claims using IDEA due process, however, appeals of the 504 portion of any resulting decision go directly to court rather than the SRO.
- Parents may also file complaints for alleged violations of Section 504 of the Rehabilitation Act of 1973 (“Section 504”) with the U.S. Department of Education’s Office for Civil Rights (“OCR”), and may file complaints with SED for alleged violations of IDEA or Part 200 of the Commissioner’s Regulations.

***BOARD OF EDUCATION OF THE CITY OF NEW YORK v. A.L.
SOUTHERN DISTRICT OF NEW YORK
125 LRP 29275 (2025)***

BACKGROUND:

In our Spring, 2024 column, we discussed the SRO’s decision in Appeal No. 23-133, related to reimbursement for religious instruction at a parents’ unilateral placement. In that case, an impartial hearing officer (“IHO”) found that the New York City Department of Education (“DOE”) denied a 5-year-old child FAPE for 2022-2023, and found that the parents’ unilateral placement at the Sinai School was appropriate to meet the child’s needs. However, as a matter of equity, the IHO reduced the parents’ award of tuition reimbursement based on the percentage of the child’s school day that related to religious instruction for Judaica studies

The parents appealed the reduction in tuition, and the SRO reversed, finding that the parents were entitled to full tuition reimbursement, including for the portion of religious instruction. The SRO stated that reimbursement for religious instruction did not violate the Establishment Clause, nor did it have the imprimatur of the state funding the religious studies. It simply made the parents whole, financially, for the district's deprivation of FAPE. The SRO further noted that the Judaica class worked on reading comprehension, and expressive and receptive language skills, which were transferable skills to the secular portion of the school day. In February, 2024, the DOE appealed to federal court.

PROCEDURAL HISTORY:

The DOE argued to the Southern District of New York that reimbursement of the religious portion of the school day violated the Establishment Clause and State Constitution. The court rejected the DOE's argument, giving deference to the SRO's decision on the basis that such questions are best left to the expertise of administrative review officers. In addition, the court noted that the Judaica studies classes were a core part of the child's receipt of an appropriate education from the Sinai School. The court credited the Sinai School's testimony that their Judaica instruction worked on the child's reading comprehension, and expressive and receptive language skills, which were critical periods of learning and development for a 5-year-old child. The court held that it would be inequitable to exclude the religious instruction periods from tuition reimbursement as they were key development periods during the school day for the child's learning. As such, the court found the award of tuition reimbursement for the religious instruction did not violate the Establishment Clause, State Constitution, or IDEA, and affirmed the SRO's decision

WHY YOU SHOULD CARE:

This court decision confirms the legal perils that districts face when they deny children FAPE, and the low bar that parents are required to meet to be awarded tuition reimbursement at their chosen private school. Parents who can demonstrate at a hearing that the religious studies portion of their private school education teaches transferable skills to meet a child's needs will be successful in receiving full tuition reimbursement at a hearing. Even if the DOE had prevailed, the relatively minor cost savings in tuition reimbursement for religious instruction would pale in comparison to the total cost for tuition reimbursement, This includes the IHO, court reporter, the district's own legal fees, and the parents' prevailing party legal fees, which continue to accrue throughout the appeals process.

**NEW YORK STATE EDUCATION DEPARTMENT
OFFICE OF STATE REVIEW
APPEAL NO. 25-049**

BACKGROUND:

In March, 2022, the parents of a child with a 504 accommodations plan in the Valhalla Union Free School District referred their child to the CSE to determine eligibility for special education. The parents told the district that their child's ADHD and anxiety were negatively affecting the child's ability to learn, and that the 504 plan was insufficient to meet his needs. In April, the CSE conducted an initial evaluation consisting of a social history, classroom observation, and psychiatric evaluation of the student. The CSE relied on a private neuropsychological evaluation submitted by the parents instead of conducting its own academic and psychological testing. The district's 504 Committee also reconvened in April, 2022 to update the student's 504 plan for 2022-2023. The 504 Committee recommended: a counseling consultation, indirect, twice a month for 20 minutes; a speech language consultation, indirect, once a month for 15 minutes; and psychological counseling services twice a month for 30 minutes in a group. The Committee also recommended: a writing checklist and templates for writing assignments; check for understanding; preferential seating; copy of class notes; support for organizational skills; additional time for processing; and assignments broken down into small tasks. Previously, in 2019, the 504 Committee found the student eligible for a 504 plan based on a learning impairment.

On June 8th, the district held an initial CSE meeting, but found it had insufficient information to make an eligibility determination. Instead, the CSE recommended an additional psychiatric and neuropsychological evaluation. The student subsequently attended a partial hospitalization program for two weeks over the summer. On August 16th, the parents sent the district a 10-day notice letter stating they were unilaterally placing their child at the Westfield School at the district's expense.

Another CSE meeting was held in September, 2022, to review a second psychiatric evaluation, and the parents discussed their child's recent hospitalization. The psychiatrist diagnosed the student with ADHD, and an adjustment disorder. However, the CSE again did not make an eligibility determination at the conclusion of the meeting, which rendered the student without special education services.

PROCEDURAL HISTORY:

The parents proceeded to enroll their child at Westfield for 2022-2023, and in January, 2023, they filed for due process seeking tuition reimbursement. Their due process complaint alleged that the CSE failed to determine that the child should be classified with a disability as a result of the child's severe emotional distress, and that the student had made appropriate progress at Westfield during 2022-2023. After six days of the impartial hearing, the IHO determined that the child did not have a specific learning disability because the student achieved age-appropriate academic scores and was meeting grade level standards. As such, the demand for tuition reimbursement was denied. The parents appealed.

DECISION OF THE SRO:

The SRO first noted that the district failed to comply with the procedural timelines under IDEA and state regulations for making an initial determination regarding eligibility. However, the procedural violation is only a substantive deprivation of FAPE if the child would have met the criteria for eligibility to receive special education services. The SRO determined that the student did not meet the criteria for an emotional disability, as the student did not display an inability to learn or pervasive mood disorders over an extended period of time and to a marked degree. However, the SRO did find that the student could meet the criteria for an OHI classification based on his ADHD, if it adversely affected his academic performance.

Upon reviewing the student's report cards, attendance records, classroom observation, and teacher comments, as well as testimony from the student's teachers, the SRO found that the student's ADHD did not adversely affect the student's academic performance in a meaningful way. The SRO reviewed the student's 504 plan. The SRO found that the accommodations and interventions in the 504 plan did not demonstrate that the student required special education services as of the June, 2022 CSE meeting. The SRO discussed the September CSE meeting and the student's hospitalization. The SRO noted that there was no new information presented at the meeting that shed light on whether the student's academic performance was adversely impacted. As such, the SRO found that the CSE correctly determined not to classify the student under IDEA and not to provide special education services.

The SRO did remind the district of its obligation to make a determination regarding classification, within the 60-school day timeline required by the Commissioner's Regulations. The SRO also reminded the district that it had an obligation to make an initial eligibility determination regardless of the parents' unilateral placement at a private school and their seeking reimbursement from the district.

WHY YOU SHOULD CARE:

This case illustrates the pitfalls of a CSE deferring a determination on initial eligibility. Although CSEs can defer making an initial eligibility determination at the meeting, they should do so only when exercising extreme caution. As the SRO points out, if the CSE defers the determination, it must still reconvene within the 60-school day timeline in order to make an eligibility decision. If the CSE defers, it must quickly proceed with the additional evaluations in order to reconvene and make a decision within the timeline. If the CSE reconvenes beyond the 60-school day deadline and determines the student should be classified, it does so at its peril. The district may be found to have denied FAPE for not providing special education services in a timely fashion.

If the CSE believes additional evaluations are warranted and they cannot be completed within the timeline, the CSE and parents can agree to extend the timeline. In such event, the prior written notice letter and IEP comments should note the parents' consent to extend the timeline.

Here, the CSE also relied upon a private neuropsychological evaluation, instead of conducting its own educational and psychological testing for the initial evaluation, which led to the CSE determining it did not have sufficient information to make an eligibility determination. Had the district conducted its own testing, it likely would have had sufficient information to make a determination, including the results of a BASC or Connors, and reading data. The district would have also been in a stronger position at the hearing had it written a comprehensive prior written notice letter explaining the classification categories it considered, and why the student did not meet eligibility for each of the classifications under consideration. The SRO noted that no such prior written notice letter was introduced by the district at the hearing.

NEW YORK STATE EDUCATION DEPARTMENT JOINING THE WIDA CONSORTIUM AND NEW ENGLISH LANGUAGE PROFICIENCY ASSESSMENTS OCTOBER 2025

BACKGROUND:

At the October, 2025 Board of Regents meeting, SED announced that New York became the 42nd state to join the WIDA Consortium (WIDA), formally known as the World-Class Instructional and Assessment. WIDA is a group of states

dedicated to the research, design, and implementation of high-quality, culturally and linguistically appropriate systems to support English Language Learners (“ELLs”). Its mission is to provide a trusted, comprehensive approach to supporting, teaching, and assessing multilingual learners. WIDA has developed a computer-based assessment for ELLs called “WIDA ACCESS” for students in grades 1-12, and an assessment on paper format for kindergarten students.

For students with the most significant cognitive disabilities, WIDA has developed the “WIDA Alternate ACCESS”, for alternately assessed students in New York who are ELLs. The WIDA Alternate ACCESS is a paper-based assessment, not taken on the computer. SED’s first administration of the WIDA Alternate ACCESS and WIDA ACCESS will be in Spring, 2027. The final administration of the New York State English as a Second Language Achievement Test (“NYSESLAT”) will be in Spring, 2026. According to the *WIDA Alternate ACCESS Participation Decision Tree*, a student with a disability is eligible to take the Alternate ACCESS assessment if: (1) the student is identified as an ELL; (2) the student has the most significant cognitive disability as defined by the state (i.e. alternately assessed students in New York); (3) the student requires extensive direct individualized and substantial support to achieve measurable gains in grade and age-appropriate curriculum; and (4) the student will participate in state alternate content assessment based on alternate achievement standards.

SED noted in its October 8th memorandum that instruction for ELLs is not changing; the only change is the assessment used to measure progress. SED will be providing additional information to educators in the coming months about implementation of WIDA assessments.

WHY YOU SHOULD CARE:

The WIDA Alternate ACCESS should provide an updated assessment for teachers and administrators to use to measure the progress of ELL students with significant cognitive and academic abilities. Given the challenges with both language barriers and having significant deficits in cognitive and academic ability, these students may have difficulty on the alternate assessment currently administered in New York. ELL teachers and special class teachers with alternately assessed students should review the information on the WIDA website to begin familiarizing themselves with the new assessment and its administration.

NEW YORK STATE EDUCATION DEPARTMENT PROPOSED REGULATIONS ON DIAPERING & TOILETING

BACKGROUND:

In September, 2024, Governor Hochul signed into law Chapter 361 of 2024, which requires the Commissioner of the State Education Department (“SED”) to create statewide protocols for diapering and toileting of children in schools. The teachers’ union had advocated for its passage to ensure that districts provide appropriate supplies and locations for staff who are required to meet the needs for diapering and toileting. On August 28, 2025, SED published proposed regulations to implement the law, which are expected to take effect on March 27, 2026.

The proposed regulations require districts to define basic procedures to promote a safe and healthy environment to support diapering and toileting. It requires districts to establish a plan with protocols, which outline clear, age-appropriate routines to support student privacy, hygiene, and supervision. Each district’s plan should identify staff roles and responsibilities regarding diapering and toileting. The plan should include direct or indirect supervision based on student needs while balancing the need for student privacy. A copy of the plan should be made available to parents upon their request.

The regulations require districts to provide annual training to staff on health and safety procedures related to diapering and toileting. The training should address: maintenance of diapering and toileting areas, including bathrooms, to ensure they are safe, sanitary, and hygienic; and standard precautions when dealing with blood or bodily fluids. The changing areas should be as close as possible to a sink with soap, paper towels or hand dryer, running water, with a bin for used diapers that is out of reach of students or located outdoors. The changing area should provide students with privacy in a developmentally appropriate and accessible area for all students, including students with disabilities. The district should provide and have available the following items based on student needs: toilet paper; hand soap; paper towels or hand dryer; disposable gloves; wipes; plastic bags for soiled clothing; extra diapers and pull-ups; and step stools or potty seats.

Districts cannot exclude a child from enrolling or participating in school programming based on their toileting status, or discipline them for toileting accidents. A child cannot be sent home when a toileting accident occurs.

Districts must establish developmentally appropriate toileting policies to support preschool students, and support school-age students who require diapering and toileting based on a disability. Districts should collaborate with families to

support their students' individualized toileting needs, and make arrangements with parents to provide an adequate supply of diapers and pull-ups, and suitable changes of clothing. Upon request, districts should also provide translated information about toileting to non-English speaking parents.

WHY YOU SHOULD CARE:

SED's proposed regulations on diapering and toileting provide the minimum standards that districts must comply with to meet the needs of students who are not toilet trained. For school-age students with disabilities who are not yet toilet trained, the Committee on Special Education ("CSE") should determine whether the student is having toileting accidents in school, and if so, how to address the student's needs. For those children, the CSE may need to identify toileting as a need, develop a goal to address the child's toileting needs in school, and determine which staff member will work on that goal. These children may also need a visual aid, gesture, or cue recommended on their IEP as a supplementary aid and accommodation, such as a toileting plan or daily visual schedule, to remind them to use the bathroom. CSEs and CPSEs should consider including a timed schedule in the student's IEP where students are taken to the bathroom every 30, 45, or 60 minutes. This is a procedure for children unable to determine or to independently respond to the need to use the bathroom. The timed schedule may help a child develop a routine and avoid accidents. attorney.

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This publication is intended to provide general information and is not meant to be relied upon as legal advice. If you have questions about anything discussed, we urge you to contact your school

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