

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
JUN 10 2013
USDC WP SDNY

L.O., individually and on behalf of K.T., a child
with a disability,

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

COMPLAINT

Case No.

13 CV 3945

JUDGE SWAIN

L.O., individually and on behalf of K.T., a child with a disability, by and through her attorneys,
CUDDY LAW FIRM, P.C., for her complaint hereby alleges:

1. This is an action brought pursuant to the civil action and fee-shifting provisions of the Indi-
viduals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(3).

2. Plaintiff L.O. resides in the County of Bronx, State of New York.

3. Plaintiff K.T. is a child with a disability as defined by IDEA, 20 U.S.C. § 1401(3)(A).

4. L.O. is the parent of K.T. as defined by IDEA, 20 U.S.C. § 1401(23).

5. Defendant NEW YORK CITY DEPARTMENT OF EDUCATION is a local educational agency
as defined by IDEA, 20 U.S.C. § 1401(19), and, as such, is obligated to provide educational and
related programs and services to its students in compliance with the applicable federal and state
statutes, regulations, and the U.S. Constitution, and is subject to the requirements of 20 U.S.C. §
1400 *et seq.*, and the regulations promulgated thereunder.

CITY OF N.Y. LAW DEPT.
OFFICE OF LEGAL COUNSEL
COMMUNITY SERVICES DIVISION
2013 JUN 14 PM 3:36

JURISDICTION AND VENUE

6. Jurisdiction is predicated upon 28 U.S.C. § 1331, which provides the district courts with
original jurisdiction over all civil actions arising under the laws of the United States, and upon the
civil action provision of IDEA, 20 U.S.C. § 1415(i)(3)(A), which provides that the district courts of

the United States shall have jurisdiction of actions brought under section 1415(i)(3) without regard to the amount in controversy.

7. Venue is predicated upon 28 U.S.C. § 1391(b)(1) based upon the residence of the plaintiffs and defendant, and upon 28 U.S.C. § 1391(b)(2) based upon the location of the subject matter of this action.

FACTUAL BACKGROUND

8. K.T. was born in 1995 and is classified as a student with autism.

9. His autism was first diagnosed in 1999, when he was four years old.

10. Until November 18, 2011, when he began completely refusing to go to school, K.T. had attended Public School 811X ("P.S. 811X") of the New York City Department of Education.

11. He first attended that school during the 2009/10 school year.

12. K.T. is a large boy, standing at least six feet tall and weighing nearly 300 pounds.

13. He functions in a pre-academic range, and communicates in very simple sentences and phrases.

14. He expresses frequent frustration due to his inability to communicate effectively.

15. When in school, K.T. engaged in self-abusive behaviors, as well as hitting and verbal abuse toward others.

16. On March 7, 2011, a committee on special education (CSE) convened to develop K.T.'s individualized education program (IEP) for the 2011/12 school year.

17. This IEP recommended a 6:1+1 class in a special school (namely, 811X) with related services.

18. The IEP's description of K.T.'s present levels of performance states that "[h]e communicates using short sentences and phrases to express his wants and needs[,] and "he requires close supervision to redirect his attention and remain focused."

19. Under "social/emotional performance," the IEP states that K.T. "sometimes displays anger and/or negative behavior an[d] may become verbally abusive and/or self-abusive when he becomes frustrated, irritated, or when he is 'caught' doing something."

20. His self-abuse behavior includes "hitting himself on the head, hitting the table and scratching himself."

21. The IEP notes that often, "K.T. will refuse to do his work[.]"

22. His "[b]ehavior seriously interferes with instruction and requires additional adult support."

23. The IEP also states that "[a] behavior intervention plan has been developed[.]" but no such plan is attached to the IEP.

24. His teacher testified that he did not have an individualized behavior plan.

25. A functional behavioral assessment and a behavior intervention plan was developed in December 2011, over a month after K.T. last attended school. This is the only evidence in the record of any FBA being performed.

26. Despite his behavior problems, K.T. does not receive counseling as a related service.

27. The March 7th IEP includes three annual goals.

28. The first goal is that K.T. "will be able to use the keyboard on a computer to type his name[.]" The second is that K.T. "will be able to set the table in preparation for a snack[.]" and the third is that "K.T. will be able to sort pictures of food and clothing in the proper category[.]"

29. While K.T. receives speech/language therapy, occupational therapy, and physical therapy, each for two half-hour sessions per week, the IEP features no goals explicitly relating to those services (although the typing goal may relate to occupational therapy).

30. A prior IEP, dated December 20, 2010, contained goals relating to shoe-tying and aerobic fitness, but these goals were apparently removed from his IEP at the March 7th meeting.

31. Charlene Torres, speech therapist, provided speech/language services to K.T. nine times during the 2011/12 school year.

32. She testified that K.T.'s language skills are at about a 3.6 age level.

33. She agreed that K.T.'s vocabulary is quite limited, and that he only uses two words relating to food: "pizza" and "cookie."

34. She has never observed K.T. identifying a printed word without a picture providing a prompt.

35. She testified that during the speech classes, she worked with K.T. and his peers exclusively on social interaction; expressive and receptive language skills were never addressed.

36. Myra Quinones was K.T.'s classroom teacher for much of the past three school years.

37. Ms. Quinones provided data collected regarding K.T. from December 2011, a month during which K.T. never attended school. During her testimony, she indicated she could not recall why she made entries for the time when K.T. was not in school.

38. She testified that K.T. does not know any letter sounds, but that she has not worked with K.T. on letter sounds during the past two years.

39. Asked "[i]s that because you don't believe he can learn what sound a letter makes?" Quinones replied that "[o]ur students after a while they reach a plateau and we move on to functional independent skills."

40. Quinones also testified that K.T. had already mastered all three annual goals in the March 7th IEP, presumably prior to leaving school in November.

41. On December 9, 2011, K.T.'s mother requested an impartial due process hearing.

42. This hearing request alleged, inter alia, that the CSE failed to appropriately evaluate K.T. from September 2009 to present; that K.T.'s progress was not monitored using the Brigance assessment tool despite an indication in the IEP that said tool would be employed; that K.T.'s progress was not monitored with a data folio despite an indication in the IEP that, as an alternately assessed student, such a data folio would be maintained; that the present levels of performance in the IEP do not provided a meaningful assessment of K.T.'s abilities; that the annual goals in the IEP are neither meaningful nor measurable; that the Department failed to offer the mandated services for children with autism during the 2009/10, 2010/11 and 2011/12 school year, including daily language instruction and parent counseling and training; that the IEPs for those school years failed to identify appropriate instructional methodologies; that the IEPs provided neither social skills training nor goals relating to such training; that no functional behavioral assessment nor behavior intervention plan has been developed; that the speech/language services provided are not appropriate; that the annual goals do not address K.T.'s needs; that the transition plan is inappropriate; that the Depart-

ment failed to provide the parent with meaningful progress reports as mandated by the regulations; that the IEP contains no goals relating to behavior; that the IEP does not identify any accommodations to be provided to K.T. during assessments; and, that due to the inappropriate program, K.T. has deteriorated to such an extent that he requires a residential placement to ensure his own safety and that of others.

43. The Department appointed Jeffrey Schiro as impartial hearing officer (IHO).

44. On December 13, 2011, the Department made a motion to dismiss, asserting that the hearing request was insufficient as a matter of law.

45. On December 14, 2011, the IHO notified the parties that he had determined that the hearing request was legally sufficient.

46. On December 29, 2011, the Department made a second motion to dismiss, this motion alleging that the hearing request was rendered moot by a settlement offer made at a resolution meeting held on December 22, 2011.

47. By an interim order issued on January 17, 2012, the IHO substantially denied the Department's motion (save for finding he lacked subject matter jurisdiction over a claim for attorneys' fees).

48. In addition, the IHO ordered the Department to initiate evaluations for occupational therapy, physical therapy, speech/language, assistive technology on or before January 27, 2012, as well as a neuropsychological evaluation and a functional behavioral assessment.

49. The IHO further ordered that the CSE shall convene on or before February 24, 2012 to review with the parent these ordered evaluations. IHO Ex. VI (interim order).

50. On February 21, 2012, the IHO issued a second interim order directing the Department to initiate, on or before February 24, 2012, a psychoeducational evaluation of K.T..

51. He further ordered that the CSE shall reconvene on or before March 9, 2012 to review said evaluation report with the parent. IHO Ex. VII (second interim order).

52. IHO Schiro heard testimony on February 1, 7, and 9th, and on March 6th of 2012.

53. Teacher Myra Quinones, assistant principal Eleya Rivas, speech therapist Charlene Torres, occupational therapist Kim McPherson, and physical therapist Charito Labay testified on behalf of the Department, and former related services coordinator Carol Bufano, agency program manager Gracie President, Medicaid services coordinator Peter Doran, and the mother all testified on behalf of the parent.

54. On April 18, 2012, IHO Schiro issued a decision.

55. This decision was untimely, as the final day of hearing was March 6, 2012, and the record close and briefing date was March 23, 2012. According to the Department's case manager, the compliance date was April 13, 2012.

56. IHO Schiro's decision dismissed the parent's claims challenging the appropriateness of the 2009/10, 2010/11 and 2011/12 IEPs, and denied the parent's claim for compensatory additional services.

57. On or around May 16, 2012, plaintiff parent appealed IHO Schiro's decision to the New York State Education Department's Office of State Review.

58. A state review officer (SRO), Justyn P. Bates was assigned to review the case.

59. On March 15, 2013, SRO Bates rendered a decision dismissing the appeal.

FIRST CAUSE OF ACTION

60. Plaintiffs repeat and reallege paragraphs 1 through 59 as if more fully set forth herein.

61. The IHO erred by dismissing the parent's claims regarding the 2009/10, 2010/11 and 2011/12 IEPs, and by denying the parent's claim for compensatory additional services.

62. The SRO erred in dismissing's plaintiff's administrative appeal.

63. The actions by defendant NEW YORK CITY DEPARTMENT OF EDUCATION and the decision of the SRO, as set forth above, interfered with and denied the plaintiff his right to a free appropriate public education (FAPE) under the IDEA, 28 U.S.C. § 1400 *et seq.* and N.Y. Education Law Article 89, and the regulations promulgated under state and federal law.

64. Plaintiff requests that the Court annul the decision of the SRO, and grant the relief requested in the hearing request.

SECOND CAUSE OF ACTION

65. Plaintiffs repeat and reallege paragraphs 1 through 64 as if more fully set forth herein.

66. In an interim order dated January 17, 2012, the IHO ordered the Department to initiate evaluations for occupational therapy, physical therapy, speech/language, assistive technology on or before January 27, 2012, as well as a neuropsychological evaluation and a functional behavioral assessment.

67. By obtaining some of the relief sought in the hearing request, plaintiff is a prevailing party entitled to reasonable attorneys' fees and costs.

68. Plaintiff requests that the Court grant reasonable attorneys' fees and costs.

WHEREFORE, plaintiffs respectfully request that this Court:

- (1) Assume jurisdiction over this action;
- (2) Issue an order annulling the SRO's decision of March 15, 2013;
- (3) Issue an order annulling the IHO's decision of April 18, 2012;
- (4) Make a finding that the defendant denied K.T. a free appropriate public education for the 2009/10, 2010/11 and 2011/12 school years;
- (5) Make a finding that the defendant committed a gross violation of IDEA;
- (6) Issue an order directing provision of compensatory and/or additional services for services denied by the defendant and/or for the violations of IDEA;
- (7) Award to the plaintiffs costs, expenses and attorneys' fees for the administrative proceedings pursuant to 20 U.S.C. § 1415;
- (8) Award to the plaintiffs the costs, expenses and attorneys' fees of this action pursuant to 20 U.S.C. § 1415; and

(9) Grant such other and further relief as the Court deems just and proper.

Dated: Auburn, New York
June 10, 2013

Yours etc.,

s/ Jason H. Sterne

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