War II, the Chairman of the Senate Labor and Public Welfare Committee, Harrison Williams, introduced a bill in 1972 that was intended to address problems with the current laws regulating pension assets. ERISA was to accomplish this by establishing uniform national standards for funding and payment and would do so by pre-empting all state laws on these matters. The House Committee later widened ERISA's scope to cover all employee benefit plans, including health plans. As a result, the pre-emption clauses in ERISA affect health care torts, including malpractice and civil litigation for damages. (Ciccone JR: ERISA, health care and the courts, in Principles and Practice of Forensic Psychiatry (ed 2). Edited by Rosner R. London, Arnold, 2003, pp 756–60).

Over the years, ERISA has withstood many attempts to curtail its power over health care benefits. Several lawsuits against ERISA plans have failed when they asserted that the plans' decisions to either deny benefits or limit care have directly harmed plaintiffs (*Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321 (5th Cir. 1992), *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3rd Cir. 1995), and *Pegram v. Herdrich*, 530 U.S. 211 (2000)). Later suits have focused on whether ERISA plans may obtain recovery of medical costs from beneficiaries who have been reimbursed by a third party. *Sereboff v. Mid Atlantic Medical Services, Inc.,* 547 U.S. 356 (2006), determined that, given the presence of certain plan terms, ERISA plans could seek at least some reimbursement from employees who obtain compensation from third parties. In *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), the Court determined that the actual terms of an ERISA Plan Document govern, not the Summary Plan Description (SPD).

The Third Circuit's decision to side against ERISA in this case was seen as a potential game changer. With its decision in *U.S. Airways, Inc. v. McCutchen*, the U.S. Supreme Court reaffirmed that the terms of ERISA plans still rule the day. The Court did communicate some displeasure at U.S. Airways' attempt to make Mr. McCutchen pay the costs associated with the reimbursement. This case highlights the importance of drafting plan documents with clear provisions regarding how third-party settlements and costs associated in obtaining them will be shared between the plan and its participants. If courts perceive ambiguity in the terms of an ERISA plan, decisions could result in a finding that favors the employee participant.

Mr. McCutchen's case remains in litigation. Upon being remanded to the district court, he filed a counterclaim in which he alleged that while the U.S. Airways SPD includes a provision for reimbursement, the Plan Document itself does not. He argued that U.S. Airways had breached its fiduciary duty to him, as it failed to provide a copy of the Plan earlier during litigation. He asserted that the Plan itself does not require repayment from his settlement. The district court granted his motion for leave to amend his counterclaim stating:

> Under normal circumstances, this Court would be loath to allow amendment of the pleadings and a reopening of discovery nearly six (6) years after the commencement of the case . . . however, the Court is troubled by U.S. Airways' untimely production of the Plan documents and its disingenuous contention that Defendants failed to request the Plan document . . . .The Court finds U.S. Airways' reasons for its failure to produce the Plan to be woefully inadequate" [Memorandum order, *U.S. Airways, Inc. v. McCutchen*, No. 2:08-cv-01593 (W.D. Pa. (March 17, 2014))].

It will be interesting to follow the further development of this case.

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The Impact of Individualized Education Programs on Free Appropriate Public Education

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Reliance on "Retrospective Testimony" in Defending the Appropriateness of an Individualized Education Program Constitutes Denial of a Free and Appropriate Public Education, as Defined by the Individuals with Disabilities Education Act

In *Reyes v. New York City Department of Education*, 760 F.3d 211 (2nd Cir. 2014), the United States Court of Appeals for the Second Circuit reviewed the case of the plaintiff, Dominga Reyes, who enrolled

her son with autistic disorder at a private school after deciding that the Individualized Education Program (IEP) proposed by the New York City Department of Education (DOE) did not provide her son with a "free and appropriate public education" (FAPE) under the Individuals with Disabilities Education Act (IDEA). The Court of Appeals for the Second Circuit found that the reliance on retrospective testimony regarding the IEP was improper.

Facts of the Case

During the 2010–2011 academic year, R.P., Ms. Reyes's son, was a 16-year-old student with autistic disorder and deficits in cognitive functioning, receptive, expressive, and pragmatic language abilities. In addition, he had diagnoses of sensory integration dysfunction, moderate intellectual disability, and attention-deficit hyperactivity disorder. R.P. had attended the Rebecca School in Manhattan (a therapeutic private school for students with neurodevelopmental delays in relating and communicating) since May 2007. While there, he was provided a "sensory diet" and a personalized regimen of activities to help him maintain control and focus throughout the day. The DOE paid R.P.'s expenses for the 2009–2010 school year, pursuant to a 2010 decision of an Independent Hearing Officer (IHO).

In May 2010, a Committee on Special Education that included R.P's mother, a DOE special education teacher, a DOE psychologist, and a parent member, met to develop R.P.'s new IEP. The IEP for the 2010–2011 academic year recommended that R.P. be placed in a 6:1:1 class, in a public school (six students, a special education teacher, and a classroom paraprofessional) with various related services. The IEP also included a three-month assignment for R.P. to a one-on-one paraprofessional to "ease the transition" from private to public school. On June 15, 2010, the DOE sent Ms. Reyes a final notice of recommendation offering her son a seat at New York Public School 79.

Ms. Reyes and an occupational therapy supervisor from Rebecca School visited Public School 79 and discovered the complete absence of a teacher familiar with the term "sensory diet" and the lack of a personalized regimen of activities providing the sensory input that R.P. required. Instead, both classes that Ms. Reyes and the therapy supervisor observed employed the TEACCH (Treatment and Education of Autistic and Related Communication-Handicapped Children) methodology. TEACCH is an educational program that provides highly structured learning environments for students with autism. This program includes a daily individual schedule, clinical services, parent training and parent support groups, and social play and recreation groups, along with individual counseling for higher-functioning clients and supported employment.

Ms. Reyes ultimately rejected this proposed placement, believing that the TEACCH methodology was inappropriate for her son. Moreover, she was concerned that the school was not familiar with the "sensory diet," nor could it provide the adequate level of individual attention that R.P. was due. She consequently enrolled R.P. in a 10-month program at Rebecca School for the 2010–2011 year.

According to the 20 U.S.C. § 1412(a)(10)(C)(ii) (2005), "Any parent who thinks that the school district is failing to provide his or her child a FAPE may unilaterally enroll the child in a private school and seek tuition reimbursement from the school district." However, the reimbursement is granted only if the following conditions are met: the IEP failed to provide the student with a FAPE; the parent's private school placement provides the student with education that was appropriate; and the parent's claim is supported by equitable considerations.

Ms. Reyes filed a due process complaint, initiating the action on March 4, 2011, entitling her to a due process hearing before an IHO. After testimony, the IHO concluded in a decision dated September 20, 2011, that the DOE had denied R.P. a FAPE and that placement at Rebecca School was appropriate. The IHO determined that a 6:1:1 class with 1:1 paraprofessional support for three months was insufficient to meet R.P.'s needs and subsequently ordered the DOE to pay R.P.'s Rebecca School tuition.

On September 27, 2011, the DOE appealed the IHO's decision to the New York State Review Officer (SRO). The SRO overturned the ruling of the IHO, apparently relying on testimony from a psychologist that the plan would have been reviewed after three months and revised or extended if necessary. As the Second Circuit notes, "testimony about additional services that *would have* been provided had the parent accepted the school district's proposed placement" (*Reyes,* fn 6, italics in original) has been referred to as "retrospective testimony" in the circuit since 2012.

Ms. Reyes appealed to the United States District Court for the Southern District of New York. On December 11, 2012, the district court upheld the conclusions of the SRO, concluding that, although the SRO's reliance on the DOE psychologist's testimony that the IEP could be modified was impermissible, the remainder of the evidence supported that the IEP was substantively adequate.

Ms. Reyes appealed to the United States Court of Appeals for the Second Circuit.

Ruling and Reasoning

Finding that the district court did not consider the appropriateness of R.P.'s private school placement or the balance of the equities, the Court of Appeals for the Second Circuit reversed and remanded. Under *R.E. v. New York City Department of Education*, 694 F.3d 167 (2nd Cir. 2012), the SRO's reliance on retrospective testimony asserting that the student's IEP could have been amended to include additional services was found to be improper. In addition, the court found that the IEP's specification of a class ratio of six students to one professional and one paraprofessional for a period of only three months was inadequate for R.P.'s needs and thus constituted a denial of a FAPE.

In New York State, "the local school bears the initial burden of establishing" the IEP's validity (N.Y. Educ. Law § 4404(1)(c) (2007)). However, the IDEA is silent on the burden of proof. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the U.S. Supreme Court held that the party bringing the suit bears the burden of proof, whether that party is a parent or the school system. Without reaching the question of whether New York's assignment of the burden of proof is proper under *Schaffer*, the Court of Appeals for the Second Circuit stated that Ms. Reyes met her burden on appeal and indicated in a footnote the failure of the SRO to adhere to state law.

The court of appeals reversed and remanded the case to the district court to consider the appropriateness of R.P.'s placement at Rebecca School and the tuition reimbursement.

Discussion

The *Reyes* case highlights the importance of developing a proper IEP with "measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum" (Individuals with Disabilities Education Act, § 300.320(2)(i)).

The IDEA was a federal law enacted in 1990 and reauthorized in 1997 and 2004. It was designed to protect the rights of students with disabilities by ensuring that everyone receives a FAPE, regardless of ability. Furthermore, the IDEA strives not only to grant equal access to students with disabilities, but also to provide additional special education services and procedural safeguards to those individuals. Special education services are designed to be individualized to meet the unique needs of students with disabilities and are to be offered in the least restrictive environment. Such services are provided in accordance with an IEP specifically tailored to the unique needs of each student. IDEA requires that the IEP goals be reviewed on a periodic basis, "to ensure an orderly annual review of a child's needs and to provide for them in a comprehensive plan" (*Reyes*, p. 220).

The IEP at the time of signing by the parent must specify all the relevant services that the child receives. The deficiencies on the IEP cannot be rectified by retrospective testimony. If the IEP requires an amendment in the middle of the academic year, the IDEA allows for the amendment with the parent's consent and according with the statutorily prescribed process.

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