SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

This month's update concerns two issues that were subject to recent court decisions of general significance: (a) the school district of residence's IDEA obligations to students in private schools, and (b) liability for defamation arising from the special education context. For further examination of such issues, see Publications section at **perryzirkel.com**

As summarized in the May 2018 Legal Alert based on my earlier article, the school district of the family's residence has an obligation to students voluntarily placed in private schools independent of the concurrent obligation of the district where the private school is located. In general this obligation is to provide an evaluation, if necessary, and to offer FAPE to the eligible child. However, neither OSEP guidance nor the growing line of case law had made particularly clear the extent of the parent's role in triggering this obligation. In *A.B. v. Abington School District* (2020), a federal district court addressed this specific issue. In this case, the parents of child with autism placed him in a private school at the start of fifth grade. During sixth grade at the private school, the parent emailed the school district, stating: "I'm interested in what programs the district can offer [the child]." The overall question is whether the obligation applies on an ongoing basis unless the parents make clear their intent to keep the child at the private school. If, instead, it requires an affirmative parental request, the specific question is whether this parental statement suffices to trigger the school district of residence's obligation?

First, as a threshold and distinctive matter, note that the school district did not require the parents to enroll the child in the district as a prerequisite to evaluation and a proposed IEP.	An earlier court decision in the same jurisdiction, *Shane v. Carbondale Area School Distric*t (2017), rejected the prerequisite of enrollment.
Second, for the overall question, the court concluded that the obligation required a parental request, not the expression of the opposite, which is the intent to keep the child at the private school.	The court interpreted the opposite language in the OSEP guidance as solely addressing which district—that of location or that of residence—has a FAPE obligation.
Finally, for the specific question, the court ruled that the obligation requires a parental request objectively manifesting the desire for the action of an evaluation and/or an offer of FAPE.	Applying this standard, the court concluded that the parent's communication was reasonably understood only as a request for information, not for an evaluation or proposed IEP.

The bottom line is not to confuse the school district of residence's IDEA obligations to private school students with those of the school district of location; these obligations overlap but are independent of each other. Although this court decision is not necessarily generalizable to other jurisdictions, both parents and school districts need to pay careful attention to their respectively applicable roles when the child is enrolled in a private school and either is eligible under the IDEA or—as a matter of child find—is reasonably suspected of being IDEA eligible.

In August 2017, an Internet periodical published an article entitled "Alabama School Board Member Considers Institutionalization for Special Education Students." The gist of the article was the following quoted statement by Ella Bell, a long-time member of the state board of education (SBOE), during a meeting discussing the academic performance scores of the state's public school students: "'Is it against the law for us to establish perhaps an academy on special education … so that our scores that already are not that good would not be further cut down by special-ed's test scores?'" Illustrative of its criticism of Bell, the article commented, "The idea that a SBOE member would even seriously ask the question about returning to a practice of institutionalization demonstrates a tragic lack of knowledge and thoughtfulness." Bell sued the publisher and the author for defamation,* asserting, for example, that she had not used the word "institutionalization." The trial court dismissed the suit, thus resolving the matter without even proceeding to the next step prior to trial. Bell appealed, seeking reversal of the dismissal.	
In *Bell v. Smith* (2019), the state supreme court upheld the dismissal of Bell's suit, concluding that "a fair reading of . . . [the] article reveals it to be an expression of opinion that does not mislead the readers about the contents of Bell's actual statements."	Examining not only the headline, but also the various statements in the article, the court concluded that a reasonable reader would readily understand it to be "a piece of advocacy expressing Smith's opinion that the people of Alabama should pay more attention to whom they elect to the [SBOE]."
The court warned that some cases would require moving to the next pretrial stage, summary judgment, when more contextual information is needed to determine whether the publication was an expression of opinion or a statement of fact.	In this case, the court concluded that Bell did not point to any additional context that would be necessary to determine whether the communication was reasonably capable of a constituting defamation, not merely opinion.
Although not addressed in this decision, Bell faced two alternative hurdles—(1) as a public official, the First Amendment requires the plaintiff in a defamation case to prove the defendant engaged in actual malice, and (2) even if she were not a public official or public figure, various state law immunities may apply to defamation in the context of public education.	The Supreme Court established the defamation defense against public officials in its famous decision in *New York Times v. Sullivan* (1964) and subsequently expanded its application to public figures. The less well-known state law defenses, which vary by common law and state statute, include governmental immunity and qualified or absolute privileges in the public school context.
The bottom line is that, defamation suits in the specific context of special education or public education more generally are often—contrary to the plaintiffs' sensitivities and knee-jerk notions of fairness—exercises in futility.	

* "Defamation" is generally defined as dissemination of untruthful statements of fact that result in injury to one's reputation. It has two subsets—libel, when in writing, and (b) slander, when in oral expression. Being a common law tort, its nuances and defenses vary from state to state.