

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

R.A-G. by her parent, R.B., individually and
on behalf of all others (parents and
students) similarly situated

Plaintiffs

v.

BUFFALO CITY SCHOOL DISTRICT
BOARD OF EDUCATION and PAMELA C. Defendants
BROWN, Superintendent

12 CV 0960 - 5

COMPLAINT
CLASS ACTION

PRELIMINARY STATEMENT

1. This is a class action to remedy the Defendant's practices, customs, policies and/or procedures which deny the provision of a free appropriate public education ("FAPE") to, and which violate other federal statutory rights of, educationally disabled children who attend public school in the Buffalo City School District (hereinafter "District") and/or who are entitled to services from the District, and which deny parents of such children their legal rights under the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400, et. seq.
2. Plaintiff R.A-G., hereinafter "Student," attends school in the Buffalo City School District and brings this action by her parent and Plaintiff herein, R.B. (hereinafter "Parent"), who is a resident of the District. Said student and numerous similarly situated students (present and future) are educationally disabled and classified as such by the District's Committee(s) on Special Education ("CSE")(s).
3. Defendants have failed to meet their statutory and regulatory obligations to Student and numerous similarly situated children attending the District, or who are entitled to

services from the District, and to Parent and similarly situated parents of such children.

4. Defendants' practices, customs, policies and/or procedures fail to comply with the applicable statutes and regulations requiring that children with disabilities timely and promptly receive related services (e.g. – speech and language therapy, occupational therapy, physical therapy) to be provided pursuant to their respective Individual Educational Programs (IEPs) as determined on an individual basis (rather than based on policy, practice, custom and/or procedure), and requiring that parents of such children be afforded meaningful participation in the educational decision-making process.
5. Defendants maintain and implement a policy by which the District does not provide the related services to be provided via students' IEPs during the first two weeks of the school year (or longer), irrespective of any individual student's need for such related services at the inception of the school year.
6. Defendants, consistent with their policy, did not implement the related services (i.e. – speech and language therapy) to be provided via the Student's IEP until September 23, 2011, more than two weeks after the inception of the 2011-12 school year. Defendants delayed providing such services despite the absence of the Parent's approval, consent, or input into such decision.
7. Plaintiffs challenged Defendants' unlawful policy and exhausted their administrative remedies by filing a due process complaint, participating in an impartial hearing, and appealing to the New York State Review Officer (SRO). This action is, *in part*, an appeal of the SRO's erroneous decision that Defendants' application of their unlawful

policy to R.A-G. did not deny the Student a FAPE.

8. The specific relief Plaintiffs request is as follows:

- a. a judgment declaring that Defendants' practices, customs, policies and/or procedures, deprive Plaintiff (Parent and Student) and similarly situated parents and students their statutory rights, are illegal and/or invalid, and are in contravention of Defendants' statutory duty to assure that Student and similarly situated students (1) promptly receive services at the start of the school year; and (2) receive services based on an individual assessment of the child, rather than based on general policy or practice; and that Parent and similarly situated parents are afforded their right to meaningfully participate in the decision-making process;
- b. a preliminary and permanent injunction requiring Defendants to cease their unlawful practices and activities, to rescind their unlawful policy, and to provide students with disabilities the related services determined appropriate by the CSE, at the start of the school year based on individual assessment;
- c. an order directing the provision of additional related services for the Student to compensate for Defendants' implementation of its unlawful policy and practice, which resulted in Defendants' failure to provide the Student with related services at the start of the school year;
- d. an order directing Defendants to pay the costs and disbursements incurred by Plaintiffs in commencing and maintaining this action, and reasonable attorneys' fees pursuant to 20 U.S.C. § 1415(e)(4) and/or this Court's general equity powers;

e. such other and further relief as to this Court may deem just and proper.

JURISDICTION

9. Jurisdiction is conferred on this Court by 20 U.S.C. § 1415(e) and 29 U.S.C. § 794 which provide this Court with jurisdiction over any action brought pursuant to said section without regard to the amount in controversy. The declaratory relief is sought pursuant to 28 U.S.C. § 2201 and § 2202.
10. This complaint also sets forth causes of action arising under the laws of the State of New York, which are incorporated into the standards applicable under 20 U.S.C. § 1401, et. seq.
11. This complaint also sets forth a cause of action arising under Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794.
12. Plaintiffs herein, and the class they seek to represent, have no adequate remedy at law and have suffered and will continue to suffer irreparable harm unless the District, including its agents, representatives and/or employees, are restrained from continuing their unlawful practices.

PLAINTIFFS

13. R.A-G. ("Student") was born in 1999, resides in the Buffalo City School District and most recently attended Math, Science and Technology School #197 as a seventh grade student.
14. R.B. ("Parent"), resides in the Buffalo City School District and brings this action individually and on behalf of her daughter, the Student, and on behalf of all other similarly situated parents and students.

DEFENDANTS

15. The Buffalo City School District is a "local educational agency" within the meaning of 20 U.S.C. § 1401(8).
16. The District receives substantial state and federal funds earmarked for the provision of special education programs and services for educationally disabled children.
17. The District is obligated to comply with all federal and state laws and regulations relating to the education of students with disabilities.
18. The District's Board of Education is responsible for the overall operation of the District's schools in compliance with state and federal law.
19. Defendant, Pamela C. Brown, Ed.D. is the Superintendent and Chief Administrator of the Buffalo City School District and is responsible for the overall operation of the District's schools in compliance with state and federal law.

FACTUAL ALLEGATIONS

20. Student is classified by the defendant District's CSE as learning disabled.
21. An Individualized Education Program (IEP) was developed by a District CSE for the Student on or about May 19, 2011.
22. Such IEP, dated May 19, 2011, recommended that the Student receive related services, including speech and language therapy.
23. The Student's IEP, dated May 19, 2011, recommended the Student receive speech and language therapy three times per six day cycle.
24. The Student's IEP, dated May 19, 2011, identified September 7, 2011, as the projected date for the beginning of the Student's related services.
25. There is no indication within the IEP that any alternative projected date for the beginning of services was in effect for any special education, related service, and/or

supplementary aid and service identified on the IEP (pursuant to District policy, CSE determination, or otherwise).

26. There is no indication that the Student's CSE made a determination that the Student's individual needs called for a projected start date different than September 7, 2011.
27. The District issued a policy memorandum mandating that related services for all students in the District were not to start until the third week of the school year. Such policy memorandum was issued at some point prior to the 2011-12 school year.
28. A prior written notice document entitled "Proposed Amendment to IEP without a Committee Meeting" was sent to the Parent prior to the 2011-12 school year.
29. Such "Proposed Amendment to IEP without a Committee Meeting" proposed to amend the Student's IEP so that "Speech/Language therapy...start date to follow district policy – start date 9/21/2011."
30. Such "Proposed Amendment to IEP without a Committee Meeting" was sent to the Parent again after the school year began but prior to the implementation of the related services identified on the Student's IEP.
31. The proposed amendment to the Student's IEP, namely the change of the start date of related services, was based on the District's policy exclusively, and not as a result of any meeting and discussion by the CSE, including the parent, nor individual assessment of the needs of the Student, nor any recommendation by the CSE of the appropriateness of delaying the implementation of related services of the Student.
32. The District did not convene, nor request the convening of, a CSE meeting to discuss the appropriateness of an amendment to the Student's IEP.
33. The Parent did not sign any "Proposed Amendment to IEP without a Committee

Meeting,” and did not approve nor consent to any modification of the Student’s May 19, 2011 IEP (including the proposed starting date of related services).

34. Notwithstanding the absence of the Parent’s approval or consent to amend the Student’s IEP, the District, consistent with its policy, did not implement the related services recommended in the Student’s IEP until September 23, 2011.
35. As a result of the District’s across the board policy, the Parent was denied her right to meaningfully participate in the development and implementation of the Student’s IEP, and the child was denied provision of services based on an individual assessment of appropriateness.
36. In addition, as a result of Defendants’ practices, customs, policies and/or procedures, the Student was denied her right to a FAPE.
37. On or about October 3, 2011, the Parent, through her attorneys, requested an administrative hearing to address the District’s violations of the Student’s right to a FAPE.
38. In his decision, the impartial hearing officer (IHO) determined that the District failed to commence speech and language therapy on September 7, 2011.
39. Notwithstanding such determination, the IHO determined that such failure to commence speech and language therapy did not rise to the level of a denial of a FAPE.
40. The Parent appealed such determination to the State Review Officer (SRO) and the SRO rendered his decision (fifty-six (56) days late).
41. The SRO erroneously determined that the delay in commencement of speech and language therapy did not constitute a material failure to implement the Student’s IEP,

and erroneously concluded that the Student was not denied a FAPE.

42. Plaintiffs have exhausted their administrative remedies.

CLASS ACTION ALLEGATIONS

43. The class consists of children, and parents of children, between the ages of 5 and 21 residing in the Buffalo City School District, present and future, who are classified as disabled per the definition in the Individuals with Disabilities Education Improvement Act ("IDEIA") (20 U.S.C. § 1400, et. seq.), and receive related services.

44. The members of this class are so numerous as to make joinder impracticable.

45. There are questions of law and fact common to the members of this class, namely whether the District is violating the substantive and procedural rights of the class members, which rights are guaranteed to students with disabilities by the laws of the United States, including their statutory and regulatory right to a FAPE and their parents' procedural rights conferred under the Individuals with Disabilities Education Improvement Act (20 U.S.C. §1400 et. seq.), the New York State Education Law and regulations and other statutes. In particular, the failure of the District to implement and provide related services (e.g. – speech and language therapy, occupational therapy, and physical therapy) provided for on students' IEPs during the first two weeks of the school year and whether this violates 20 U.S.C. § 1400 et. seq.

46. The claims of the named plaintiffs are typical of the claims of the class. The named plaintiffs will fairly and adequately protect the interests of this class, as their interests do not, in any way, conflict with the interests of the class sought to be represented. The individual claims are not such that they can easily be compromised to the detriment of the claims of the class as a whole. Moreover, counsel for the named

plaintiffs will vigorously pursue this action on behalf of the named plaintiffs and presently unnamed class plaintiffs.

47. The District has acted, and failed to act on grounds generally applicable to all of the class members. The District's practices, customs, policies and/or procedures, of which plaintiffs complain, have had, and are having, a similar impact upon the plaintiffs and the class they seek to represent. Correction of these violations will benefit all of the class members. The relief sought herein applies to the class as a whole and not merely to any particular individual or group of individuals.

STATUTORY AND REGULATORY FRAMEWORK

48. The IDEIA requires school districts to provide FAPE, including special education and related services, to students who are educationally disabled. See, 20 U.S.C. § 1400 et seq., 34 C.F.R. Part 300, N.Y.S. Education Law § 4401 et seq., and 8 N.Y.C.R.R. Parts 200 and 201.

49. The IDEIA establishes a system of procedural and substantive requirements to which school districts must adhere to ensure that each child with a disability receives a FAPE. 20 U.S.C. § 1401 et seq.

50. The IDEIA and its implementing regulations require that a FAPE be determined by an appropriately constituted IEP Team (in New York, such Team is denominated as a "CSE"). 20 U.S.C. § 1414(A)-(B); 34 C.F.R. § 300.321; N.Y. Education Law § 4402(b)(1); 8 N.Y.C.R.R. § 200.1(k).

51. The IDEIA and its implementing regulations require that an IEP Team's (in New York, a "CSE") determination of an IEP be based on an assessment and determination of the student's individual needs. 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320-300.324.

52. The IDEIA and its implementing regulations require that the student's parent be included as a member of any such CSE, and be afforded the opportunity to meaningfully participate in the decision-making process. 20 U.S.C. §§ 1414(d)(1)(B)(i), 1414(e); 34 C.F.R. §§ 300.321(a)(1), 300.322; N.Y. Education Law § 4402(b)(1)(a); 8 N.Y.C.R.R. § 200.3.
53. Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794 and with implementing regulations at 34 C.F.R. §§ 104.31-104.39, prohibits any entity that receives federal financial assistance from discriminating against individuals with disabilities.

ADDITIONAL FACTUAL ALLEGATIONS

54. As alleged hereinbefore, Defendants have failed to fulfill their legal obligations to assure that the Student, and similarly situated students, are promptly and properly provided the related services to which they are entitled.
55. Defendants, due to their policy, procedure, custom and/or practice, as a general rule do not provide related services at the beginning of the school year, but rather delay services until not sooner than the third week of school.
56. The District receives federal financial assistance.
57. Defendants, due to the policy, procedure, custom and/or practice, discriminate against the Student, and similarly situated students, by failing to provide related services at the beginning of the school year.
58. Services provided to non-disabled students are not subject to the Defendants' unlawful policy, procedure, custom and/or practice, and are routinely provided from the outset of the school year.

59. Upon information and belief, Defendants have failed to adopt and/or implement practices, customs, policies and/or procedures to assure that educationally disabled children's IEPs are adequately and/or properly formulated and implemented.

60. Upon information and belief, Defendants' practices, customs, policies and/or procedures deny parents their right to meaningfully participate in the educational decision-making process.

FIRST LEGAL CLAIM

61. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 60 above.

62. As set forth above, the District has substantively failed to provide the Student and similarly situated students with a FAPE, as mandated under the IDEIA (20 U.S.C. § 1400, et seq., 34 C.F.R. Part 300).

SECOND LEGAL CLAIM

63. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 62 above.

64. As set forth above, the District has procedurally failed to provide the Student and similarly situated students with a FAPE, as mandated under the IDEIA (20 U.S.C. § 1400, et seq., 34 C.F.R. Part 300).

THIRD LEGAL CLAIM

65. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 64 above.

66. As set forth above, the District has failed to make individual assessments of the needs of the Student, and similarly situated students, as mandated under the IDEIA (20

U.S.C. § 1400, et seq., 34 C.F.R. Part 300).

FOURTH LEGAL CLAIM

67. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 66 above.

68. As set forth above, the District has denied the Parent, and similarly situated parents, meaningful participation in the decision-making regarding their children, as mandated under the IDEIA (20 U.S.C. § 1400, et seq., 34 C.F.R. Part 300).

FIFTH LEGAL CLAIM

69. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 68 above.

70. As set forth above, the District has failed to implement the related services provided for on the IEP of the Student, and similarly situated students, at the beginning of the school year, as mandated under the IDEIA (20 U.S.C. § 1400, et seq., 34 C.F.R. Part 300).

SIXTH LEGAL CLAIM

71. Plaintiffs repeat, reallege and incorporate hereunder by reference the allegations contained in paragraphs 1 through 70 above.

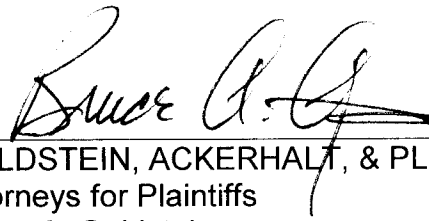
72. As set forth above, the District has violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and discriminated against the Student, and similarly situated students, by failing to provide services to such disabled students where services for non-disabled students are not so delayed.

WHEREFORE, Plaintiffs respectfully request that this Court assume and retain

jurisdiction over this action and issue the following relief:

- a. a judgment declaring that Defendants' practices, customs, policies and/or procedures, deprive Plaintiff (Parent and Student) and similarly situated parents and students their statutory rights, are illegal and/or invalid, and are in contravention of Defendants' statutory duty to assure that Student and similarly situated students (1) promptly receive services at the start of the school year; and (2) receive services based on an individual assessment of the child, rather than based on general policy or practice, and that Parent and similarly situated parents are afforded their right to meaningfully participate in the decision-making process;
- b. a preliminary and permanent injunction requiring Defendants to cease their unlawful practices and activities, to rescind their unlawful policy, and to provide students with disabilities the related services determined appropriate by the CSE, at the start of the school year based on individual assessment;
- c. an order directing the provision of additional related services for the Student to compensate for Defendants' implementation of its unlawful policy and practice, which resulted in Defendants' failure to provide the Student with related services at the start of the school year;
- d. an order directing Defendants to pay the costs and disbursements incurred by Plaintiffs in commencing and maintaining this action, and reasonable attorneys' fees pursuant to 20 U.S.C. § 1415(e)(4) and/or this Court's general equity powers;
- e. such other and further relief as to this Court may deem just and proper.

DATED: October 13, 2012
Buffalo, New York

A handwritten signature in black ink, appearing to read "Bruce A. Goldstein", is written over a horizontal line.

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