



PRACTICE GROUP MESSAGE *By Frederick M. Misilo, Jr.*

“Spring, summer, and fall fill us with hope; winter alone reminds us of the human condition.” - Mignon McLaughlin

As we enter into another winter, I’m mindful of the challenges that lie ahead in the coming months. As I write this, my thoughts are with the people of Newtown, Connecticut, who are facing the upcoming winter with what must seem an intolerable burden of loss. May our heartfelt prayers and messages of condolence bring some measure of comfort to those directly affected by this tragedy.

The lead article in this edition is from Attorney Hillary Dunn, who most recently joined the FT Special Needs Practice Group. The experience of many students with special needs in the middle school years can be incredibly challenging. It is during the middle school years when some degree of transitional planning begins to take place. This transition I am referring to relates to transition to a secondary and, perhaps, a postsecondary educational environment. Attorney Dunn joined the FT Special Needs Practice Group after several years working at the Disability Law Center, in representing individuals with disabilities and their families in special education and adult service settings. Her article captures the many issues students and their families should be considering during the middle school years.

As I write this, the ABLE Act is still pending before Congress. As readers of this newsletter know, the ABLE (Achieving a Better Life Experience) Act would amend the federal law relating to financial eligibility for Supplemental Security Income and Medicaid by enabling individuals with disabilities and their families to create ABLE accounts to hold funds, up to \$100,000, which would not be considered countable resources for purposes of financial eligibility. These funds can be used only for qualified expenses for the benefit of the individual with a disability. Any amounts left in the ABLE account at the death of the individual with a disability would be subject to a right of

reimbursement to the state plan Medicaid agency for any and all Medicaid benefits provided to the account owner during his or her lifetime. I will keep readers of this newsletter apprised of the progress of this bill in Congress.

Over 120 people attended the FT Special Needs Practice Group’s annual Administration of Special Needs Trust Seminar in November 2012. The topics covered in this seminar included a review of government benefits planning, fiduciary duties and liabilities; a comprehensive tax lecture; a nuts-and-bolts description of trust accounting; and a comparison of individual, professional and corporate trustees. There was also a presentation by Evelyn Husslein from The Arc of Massachusetts, Inc., on the Support Brokers service and how that service can be valuable to trustees and beneficiaries. Attendees were also provided an interview with two family members who serve as co-trustees of a special needs trust. This seminar is offered every year in the fall.

As readers of this newsletter are well aware, the transition from the world of special education entitlement to the world of adult services based on priority of need is a challenging and complex process. This is particularly true for individuals with very significant needs. I recently learned that the Town of Auburn, working closely with a family, recently created an innovative set of supports to bridge the transition to adult services for a very challenging student approaching the end of public schooling. This process involved collaboration between the Auburn public schools and two adult service provider agencies. The end result is a set of supports to the individual student and the family that will be put in place prior to the student’s turning 22 years old and will continue after the student ages out of his special education entitlement. A more thorough description of this one-of-a-kind model will appear in a future edition of this newsletter. **FT**

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EARLY INTERVENTION

Special Needs Planning

Medical Malpractice

SCHOOL AGE

Special Education Advocacy

Transition to Adult Services

Special Needs Planning

Guardianship and Alternatives

ADULT

Special Needs Planning

Adult Service Advocacy

Special Needs Trust Admin.

Guardianship and Alternatives

EXTENDED FAMILY

Special Needs Planning

Elder Law

MassHealth Planning

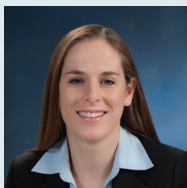
PROBATE AND FAMILY COURT PRACTICE

Estate Planning Petitions

Adult Support Petitions

Guardianship/Conservatorship

SPECIAL ED & MIDDLE SCHOOL: TIPS FOR PARENTS



By Hillary J. Dunn, Esq.

The middle school years can be challenging for any child and any family. Students are expected to be more independent, adjust to different teachers for each different subject area and, of course, navigate the maze of social cliques. However, these years can present even more challenges for children with disabilities and their families. We often hear from our clients about the difficulties of moving from the more supportive and nurturing world of elementary school to the more academically competitive and socially challenging world of middle school.

As children with disabilities approach these middle school and early teenage years, an unfortunate reality is that disputes between parents and school districts about special education programming and placement are very common. These disputes usually take shape in one of three ways. One scenario involves parents wanting their child to remain either fully or partially included in classes with peers without disabilities, while the school district wants the child placed in a substantially separate classroom in the local school or in an out-of-district placement. The second situation essentially just flips the positions of the parties; the parents feel an out-of-district placement is necessary for their child, but the school refuses. The third scenario involves parents encountering resistance when seeking a residential placement for their child.

Regardless of the situation in which a family finds itself, in order to increase their chances of success, parents should have an understanding of the basic laws and principles that apply to special education services. The Individuals with Disabilities Education Act (IDEA) is the federal law that protects the educational rights of children with disabilities. Under IDEA and Massachusetts law, every child receiving special education services is entitled to receive a “free and appropriate education” (FAPE) and to be educated in the “least restrictive environment” (LRE). The law does not require the school to provide the best possible program for the student, nor does it require the school to provide services that will maximize the student’s educational potential. Instead, the school must provide “meaningful access” to public education that allows a student to make meaningful and effective progress commensurate with his or her educational potential.

The principle of LRE is that, to the maximum extent appropriate, a child with a disability must be educated with other students who do not have a disability. LRE is a continuum, and the more separated the child with a disability is from students without disabilities, the more restrictive the setting is considered. In most situations, a residential placement is considered one of the most restrictive options. When either a school district or parents seek a more restrictive placement, the party must show that the student

cannot make effective progress and receive FAPE in a less restrictive setting.

The standard for determining the need for a residential placement, as reflected in First Circuit case law and King Philip, BSEA #12-0783, 18 MSER 20 (2012), is whether the educational benefits to which a child is entitled can be provided only “through around-the-clock special education and related services, thus necessitating a placement in an educational residential facility.” Furthermore, particularly in situations in which a child has behavioral or emotional issues that are difficult to manage at home, parents should be prepared to show that their child cannot receive FAPE in a day program even if home-based services and supports or other “wraparound” services are provided. Practically speaking, this often means that parents have to try in-home services for a reasonable period of time before seeking a residential placement.

With this legal framework as a backdrop, if parents are not in agreement with the school about programming and placement, it is important to remember that parents have valuable input as members of the IEP team, but it is crucial to have professional support for their position. We cannot emphasize this point enough. Parents need to be prepared to prove their case at a team meeting, at mediation or at a hearing at the Bureau of Special Education Appeals (BSEA), if it gets that far. Parents have the right to obtain an independent evaluation if they are not satisfied with the school’s evaluations and, in some circumstances, to have the school district pay for that independent evaluation. However, parents are almost always best served by retaining their own independent expert. A well-credentialed independent expert usually is essential to prevail in a dispute with the school over programming and placement. Parents always can have their child evaluated by whomever they wish at their own expense. Health insurance may cover the cost of some evaluations.

When choosing an evaluator to serve as an expert if the dispute is not resolved, parents should make sure the evaluator has experience with their child’s particular disability and age group. In addition, we always recommend that parents have their expert observe any current or proposed program or placement. The school must allow the parents’ expert to have a reasonable opportunity for such observations. Finally, parents should ensure that the evaluator is willing to testify at the BSEA, if needed.

A final thought for parents as they wade through the difficulties of middle school – begin thinking about the future. By this, we mean begin thinking about transition planning and the transition services that may be appropriate for the child. Massachusetts law requires transition planning to begin at age 14. Transition services must be coordinated, results-oriented, and focused on improving academic and functional achievement to facilitate the move from school to post-school activities. All IEPs from age 14 on, in accordance with IDEA, must include a post-school vision and incorporate “appropriate measurable postsecondary goals based upon age-appropriate transition assessments” related to training, education, employment and, if appropriate, independent living skills. **FT**

UPCOMING SEMINARS

LEGAL AND FUTURE CARE PLANNING FOR YOUR RELATIVE WITH A DEVELOPMENTAL DISABILITY

January 17, 2013

Speaker: Theresa M. Varnet, J.D., M.S.W.

Location: Park Lawn Association
10833 S. LaPorte Avenue, Oak Lawn, IL

MASSACHUSETTS DOWN SYNDROME CONGRESS (MDSC) 29TH ANNUAL CONFERENCE

March 23, 2013

Special Needs Practice Group

Location: DCU Center / Worcester, MA

SPECIAL NEEDS PLANNING FOR A FAMILY MEMBER WITH A DEVELOPMENTAL DISABILITY

March 7, 2013

Speaker: Frederick M. Misilo, Jr.

Location: Nantucket High School
Nantucket, MA

34TH ANNUAL CONFERENCE - MASSACHUSETTS EARLY INTERVENTION CONSORTIUM

May 9-10, 2013

Special Needs Practice Group

Location: Best Western Royal Plaza Hotel / Marlborough, MA

*To arrange a seminar by a representative of the
Special Needs Practice Group, contact Fred Misilo at
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(left-right) Kamil Kocia, Maria Kocia, Aleksandra Kocia, Wilma Valejos, Andy Kocia, Geoffrey Misilo and Lainie Petrou

Good friends of the firm the Kocia family were recently inducted into the Special Olympics Hall of Fame for their years of service and dedication. By all accounts it was a wonderful, touching event, and some of us here at Fletcher Tilton were lucky enough to join in the celebration. Congratulations, Kocia family!

For more information about Special Olympics, visit www.specialolympicsma.org. **FT**

IS YOUR CHILD ON AN IEP OR 504 PLAN?

Time flies! It’s hard to believe that it is already winter. We are well into the school year, and any issues with your child’s programming at the start of the school year should have been ironed out a while ago. Unfortunately, though, that is often not the case. We encourage you to take a few minutes and check your child’s IEP or 504 Plan.

Is your child’s IEP being implemented appropriately? Is your child getting all the services in his or her IEP? For example, is your child missing out on occupational therapy because the school still has not hired an occupational therapist?

Is your child making progress on the goals in the IEP? Check your child’s progress report(s). Each progress report must describe the student’s progress toward meeting each annual goal.

If your child has a 504 plan, are the agreed-upon supplementary materials, equipment or other accommodations being provided? Is the plan working?

If you have concerns, ask for the team to reconvene. Be proactive, and don’t let the entire year or IEP cycle go by. Ask now to reconvene, because before you know it, it will be February vacation. You do not want to let the school push the meeting off until the spring. At that point, it may be almost time for the annual team meeting. **FT**

GUARDIANSHIP?



By Elise Kopley, Esq.

When people discuss guardianship, they are really talking about surrogate decision making -- that is, assisting another person with important decisions that they are faced with on a daily basis. And there are so many important decisions – selection of medical providers, best living arrangements, and employment and service options, along with a host of financial decisions. Guardianship and conservatorship are public proceedings in the Probate and Family Court where a judge finds that a person has a diagnosed condition impacting the person’s ability to make informed decisions, which necessitates the appointment of another person to make choices for the affected person. However, before guardianship or conservatorship is pursued, alternative arrangements should first be explored.

There are many private options available to assist with decision making. For instance, if there is a medical-related issue or a person has limited capacity, the person may be able to execute a health care proxy and medical releases to assist with those decisions. If assistance with financial management is sought, a private trust arrangement or durable power of attorney may suffice. Likewise, if the only income an individual receives is from the Social Security Administration, an application for management by a Representative Payee may be made.

First, it is important to determine the specific areas in which an individual requires assistance. With this list, one or more alternative arrangements may be entered into to support the individual. There are some situations where guardianship is unavoidable, but before pursuing guardianship, one should discuss all available options with an attorney. **FT**

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