

## ATTORNEY'S CORNER

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***A Monthly Synopsis of Salient Cases in Special Education***

In this installment of the Attorney's Corner, we review a Second Circuit decision that found a District provided FAPE by adding a 1:1 aide to a student's IEP in response to Parental concerns regarding a high student-to-staff ratio. We review several District Court decisions that examined whether a Parent was entitled to tuition reimbursement for a unilateral private school placement due to a FAPE denial. In one decision, the Parent did not prevail when she relied on retrospective testimony and speculation to argue that the District would use an inappropriate teaching methodology for the student. The Southern District also examined whether a District's failure to conduct a three-year reevaluation for six years constituted a FAPE denial. We conclude with an SRO decision that stated that the impartial hearing process is not the appropriate forum for requesting a change to a student's attendance records due to medical absences.

### ***Second Circuit Court of Appeals***

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#### **1. Parent Will Not Prevail On Argument That Class Is Too Restrictive When It Provides A Similar Ratio To Previous Parental Placement.**

**R.B. ex rel. D.B. v. New York City Dept. of Educ., 2015 WL 1244298 (2d. Cir. 2015)**

### **SALIENT FACTS:**

The CSE prepared an IEP for a student with autism who was transitioning from a private school to an in-District program. The CSE determined that the student required a 6:1:1 special class and provided for a 1:1 aide to assist the student with the transition. The Parent was not in agreement with the recommendation for a 1:1 aide and argued that the student required a small class due to academic difficulties. The IEP also provided a number of related services, including counseling, occupational therapy, speech/language therapy and adapted physical education. The IEP did not provide parent counseling and training or goals for adapted physical education. After the CSE meeting, the Parent provided the district with a letter indicating her intent to place the student at the Rebecca School (“Rebecca”), a private school for children with autism that is not New York State Education Department (“SED”) approved. The Parent stated that the District’s recommended program was not appropriate for the student.

At the impartial hearing, the impartial hearing officer (“IHO”) found that the recommended program “provided the support and structure necessary to address [the student’s] needs” and would provide him with a “meaningful educational benefit.” The SRO and District Court agreed that the District offered FAPE. The District Court found that the IEP goals included limited detail due to a lack of adequate space on the actual document. However, this did not result in a FAPE denial because the short-term objectives expanded on the annual goals by providing sufficient detail. Similarly, the lack of baseline data on the goals did not result in a violation because the goals were “stated in absolute terms that the district could measure without a baseline.” The Court ruled that the other procedural violations, including failure to include parent counseling and training or goals for the adapted physical education, did not result in a denial of FAPE. The court considered the cumulative effect of the procedural violations, and found that they were “formal rather than substantive, and did not result in a denial of FAPE, whether considered individual or cumulative, and that the IEP was procedurally adequate.”

### **COURT’S DECISION:**

The Second Circuit agreed that the IEP was “procedurally adequate, and that any procedural violation did not impede the child’s right to [FAPE], significantly impede the parent’s opportunity to participate in the decision-making process, or cause a deprivation of educational benefits.” The Court indicated that the District could have provided parent counseling and training as a programmatic service if the student actually attended the recommended program. As such, failing to include the service on the student’s IEP did not deny FAPE. The IEP was also substantively adequate. The CSE agreed to add the 1:1 aide to the student’s IEP after the Parent stated that the recommended 6:1:1 special class would not provide adequate support. As such, the Court dismissed the Parent’s contention that the class with the 1:1 aide would be too restrictive for the student because the District effectively recreated the ratio of the student’s previous 8:1:3 placement.

The Court also rejected the Parent's speculative claim that the District would not be able to provide the recommended program.

### **WHY YOU SHOULD CARE:**

A CSE must take a parent's concerns and input into consideration when developing an IEP for a student. However, the CSE is not required to revise an IEP based on the parent's concerns. Parents frequently argue that a recommended placement will not offer enough support for their child. In such situations, school districts may consider supplying an aide to the classroom, which would change the student-to-adult ratio and create a more restrictive setting. A parent likely will not prevail on an argument that the district will not be able to provide the recommended special education program when the child is parentally placed before he or she ever actually attends the in-District program. Further, a District may still prevail in a FAPE case even if it committed a number of procedural violations when creating the student's IEP. In such situations, the Court will examine the District's recommended program in its entirety to determine whether it offered FAPE.

### ***Federal District Courts***

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#### **1. Retrospective Testimony Is Not Permitted When Parent Makes An Argument For FAPE Denial Due To Teaching Methodology.**

**J.W. v. New York City Dept. of Educ., 2015 WL 1399842 (SDNY 2015).**

### **SALIENT FACTS:**

A student with autism began to attend the Rebecca School in 2010 when he was six years old. In May 2011, the District convened a CSE and developed an IEP for the 2011-12 school year. The CSE recommended a 12-month program in a specialized school and a 6:1:1 special class. The District provided the parent with a final notice of recommendation at a public school. The mother informed the District that she did not believe the placement was appropriate. She stated that she toured the school with a "parent coordinator," who informed the mother that the school utilized Applied Behavior Analysis ("ABA") methodology. The mother did not voice any concerns to the parent coordinator or anybody involved with the District's CSE about the use of ABA. The mother indicated that Rebecca uses a Developmental Individual-difference Relationship-based Model ("DIR"), and that this was more appropriate for her son, as he had not responded to ABA in the past. The mother unilaterally enrolled the child at Rebecca and requested a due process hearing, alleging that the district did not provide FAPE and seeking tuition reimbursement.

At the impartial hearing, the Parent brought the student's former occupational therapist, who testified that she used both ABA and DIR with the student. She testified that the student did not respond to ABA and exhibited regression, and he made better progress with DIR. The District's classroom teacher assigned to the 6:1:1 class testified that although she used ABA methodology, she individualized her teaching to meet the needs of each student. The IHO found for the Parent and stated that the District's placement was not appropriate because it "included ABA teaching methodology which was not appropriate because it would not enable [the student] to make educational progress." The IHO further found that Rebecca was an appropriate placement and the equities favored the Parent. As such, the IHO granted the Parent's request for reimbursement, but reduced the tuition by ten percent because the Rebecca School is only in session until 12:30 on Fridays.

Both parties appealed to the SRO. The District alleged that it offered the student FAPE and the Parent argued that the tuition was improperly reduced. The SRO reversed the IHO's decision and held that the IEP allowed the student to receive FAPE at the District's proposed placement. The SRO also held that the IHO should not have addressed the teaching methodology issue, as the Parent did not raise it in her due process complaint, thereby waiving this claim. However, the SRO addressed the question of the methodology on the merits and found that the Parent's concerns regarding the District's methodology were speculative and that there was no evidence that ABA would be "the sole methodology used in the classroom".

#### **COURT'S DECISION:**

The Parent brought the current appeal. The District Court found that the Parent did not waive the issue of teaching methodology as the due process complaint stated that the student had "not made progress in a similar program." The Court concluded that the reference was sufficient to provide the school District with adequate notice that the methodology of the program was at issue. The Court found that the Parent did not identify "a specific requirement in the IEP that the placement will not satisfy." Further, the IEP did not specify the teaching methodology to be used with the student. The Parent did not demonstrate "sufficient non-retrospective, non-speculative evidence" that the student would have been taught using ABA principles at the District's recommended placement. The testimony from the District's teacher was retrospective because there was no indication that she would have been the student's actual teacher. Therefore, the Parent could not use that testimony as evidence that ABA would be used in the student's classroom. Further, the only evidence that ABA would have been used with the student was the conversation the mother had with a tour guide at the school.

The Court held that 'this evidence is insufficient, however, to support the Parent's conclusion that the public school would have used ABA, and ABA

exclusively” with the student. The mother testified that she was unsure of the tour guide’s position at the school and could not remember her name. Further, the mother did not ask the tour guide if there was a possibility of using methodologies other than ABA in the program. As such, the Court agreed with the SRO that the Parent’s objection to the District’s placement was speculative. The Court awarded summary judgment to the School District.

### **WHY YOU SHOULD CARE:**

There is no requirement for a CSE to indicate the teaching methodology to be used in a placement recommendation on a student’s IEP. Rather, this determination is made as an instructional decision by the classroom teacher. A Parent cannot speculate that a District will use an inappropriate methodology with the student when the information comes from an unqualified source. Districts will prevail in proving that they offered FAPE through testimony regarding the teaching methodologies that would be utilized in the recommended placement.

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## **2. IEP Not Appropriate When It Does Not Address Student’s Sensory, Social and Management Needs.**

**K.R. ex rel. Matthew R. v. New York City Dept. of Educ., 2015 WL 1808911 (SDNY 2015)**

### **SALIENT FACTS:**

A 13-year-old child with Autism attended the Rebecca School during the 2010-11 school year. In May 2011, the CSE developed an IEP for 2011-12 that included placement in a 6:1:1 special class and related services. The Parents visited the recommended school in June 2011 and sent a letter rejecting the proposed placement. The Parents unilaterally placed the student at Rebecca for the 2011-12 school year and sought tuition reimbursement at an impartial hearing. They argued that that District committed both procedural and substantive violations, including the recommendation of a placement with inappropriate peers that would not meet the student’s academic, social, and emotional needs.

The IHO found that the District failed to offer FAPE and that Rebecca was an appropriate placement, and ordered tuition reimbursement. The IHO dismissed the District’s psychologist’s testimony because she did not have a recollection of the meeting, and instead, relied on the documents produced at the meeting for her testimony. The IHO also found that the proposed placement would not have been appropriate for the student because it would not provide the “sensory input that [the student] needs throughout the school day in order to stay regulated and engaged in classroom activities.” The program also would not allow



the student to have appropriate peer interactions, because all of the students in the proposed classroom were nonverbal, whereas the student had high functioning verbal skills. The student's academic skills were also higher than the other students in the class.

The SRO disagreed with the IHO's findings. The SRO found that there were no procedural violations that resulted in a FAPE denial because the Parents had adequate opportunity to participate in the CSE process and brought an advocate with them to the meeting. The SRO also found that the IHO should not have agreed with the Parents' speculation that the District would not have implemented the IEP as written if the student attended the recommended in-District program. The IEP was substantively adequate, so any challenge regarding its implementation would have been speculative. As such, the SRO found that the District offered FAPE.

### **COURT'S DECISION:**

The District Court disagreed with the SRO and upheld the IHO's decision. The Court gave credit to the IHO's determination that the District's school psychologist lacked credibility while testifying. As such, the Court agreed that the CSE did not adequately discuss the student's present levels of performance and needs, thus denying the Parents the opportunity to meaningfully participate in the meeting. The Court noted that the IEP did not adequately provide for the student's sensory needs, including his need to access sensory equipment. This was not speculative on the Parents part because the District did not have such equipment at the student's recommended school. The proposed class was not appropriate because it did not include students who had similar social and management needs as the student. The Court found that Rebecca was an appropriate placement and that the equities favored the Parents, and awarded tuition reimbursement.

### **WHY YOU SHOULD CARE:**

A CSE must ensure that it conducts an adequate conversation of the student's present levels of performance to allow the Parents to meaningfully participate in the meeting. Further, the IEP must address the student's identified needs. This includes sensory equipment for a student who has clear sensory needs that relate to his or her education. Students also must be placed in programs with other students who have similar needs and abilities. Autism is a spectrum diagnosis, and as such, it is not appropriate to place all students with the diagnosis in one setting. A student with higher functioning autism, who has well-developed verbal skills, should not be placed in a classroom with students who are nonverbal. Regardless of the focus of a class placement, a class profile will help the CSE, as well as the Parents, determine whether a particular class is composed of students with similar needs and abilities. In this case, had the District compiled a class profile, the CSE would have realized that the child in question had needs and abilities that were not consistent with those of the other children in the class.

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### **3. District Must Conduct Reevaluation Every Three Years To Support IEP Recommendations.**

**Brock ex rel S.B. v. New York City Dept. of Educ., 2015 WL 1516602 (SDNY 2015)**

#### **SALIENT FACTS:**

The District paid for a student's attendance at the Cooke Center for Learning and Development ("Cooke") for five years, from the 2006-07 through the 2010-11 school years. The CSE convened in June 2011 to develop an IEP for the 2011-12 school year and recommended a 12:1:1 in-District program. The Parents continued the student at Cooke for that school year and requested an impartial hearing. The Parents alleged that the District did not reevaluate the student at least once every three years as per state law. The District conceded this procedural violation. The Parents also stated that the recommended program was not appropriate for the student as it would not adequately meet her academic needs.

The IHO found that the District did not offer FAPE "based on the lack of adequate evaluations." As such, the District was not able to adequately determine the student's needs and abilities or make an appropriate recommendation. The Parents were awarded tuition reimbursement. The SRO disagreed and found that the CSE had adequate information to develop an IEP, that the failure to conduct a three-year reevaluation was not a total defect and that the proposed placement was appropriate to address the student's needs.

#### **COURT'S DECISION:**

The District Court found the SRO's decision to be deficient for two reasons. First, the SRO acknowledged that there was limited and conflicting information regarding the student's progress. Second, the SRO did not consider any additional documentation used by the CSE to develop the student's IEP other than what was provided by the District. The District conceded that it committed a procedural violation by failing to conduct the three-year reevaluations. The Court found that because the District did not conduct updated evaluations for six years, this denied FAPE and "deprived [the student] of educational benefits because there was insufficient information which the CSE team could use to accurately assess her development and develop her IEP." The Court found that the IHO's decision warranted deference and awarded tuition reimbursement to the Parents.

#### **WHY YOU SHOULD CARE:**

New York State Regulations provide that students with IEPs must be reevaluated at least once every three years. This obligation remains even when a

student is placed in an out-of-District program. Evaluations are an essential component to determining the student's present levels of performance and needs. This is especially important when a student does not attend an in-District program and District staff are not as familiar with the student's abilities and needs, compared with students who are educated in-District. Failing to conduct this three-year reevaluation is a procedural violation that could prove fatal, leaving a District vulnerable to a ruling that FAPE was denied.

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#### **4. Parent Cannot Prove District Denied FAPE By Speculating About District's Ability To Implement IEP.**

**H.C. V. New York City Dept. of Educ., 2015 WL 1782742 (SDNY 2015)**

##### **SALIENT FACTS:**

A 14-year-old student with Attention-Deficit/Hyperactivity Disorder ("ADHD") and a learning disability was classified with a speech and language impairment. The Parents were dissatisfied with the student's progress and unilaterally enrolled him at the Cooke Center for Learning and Development ("Cooke") for fifth grade during 2011-12. The District developed an IEP for the 2012-13 school year that included a 12:1:1 special class with related services in an in-District program. The Parents continued the student at Cooke and filed for due process, seeking tuition reimbursement.

The Parent alleged that the District denied FAPE because the student was grouped with other students who had more advanced academics, different classifications and emotional problems. The Parent also alleged that it was inappropriate that some of the student's related services would be provided by independent contractors, rather than District employees, and that the teacher in the proposed placement would not have adequately implemented the student's IEP. The IHO found that the District provided FAPE. The SRO affirmed the IHO's decision.

##### **COURT'S DECISION:**

The District Court explained that a Parent had a different burden when alleging a denial of FAPE for a District program that the student never attended. Specifically, the Parent must demonstrate that the IEP is inadequate on its face, rather than arguing that it would not be appropriately implemented by the school. The Parent here complained about the student's "potential classmates, [the school's] provision of therapy services, and the teacher instruction [the mother] observed during her sight visit." These allegations all pertained to the District's ability to implement the IEP, rather than the adequacy of the IEP. Further, a



District may group students with different needs and classifications together in the same class or service provided that this does not impede progress on IEP goals. It was also permissible for the District to provide related services off-site through independent contractors. As such, there was no indication that the District denied FAPE and the Parent's request for tuition reimbursement was denied.

#### **WHY YOU SHOULD CARE:**

A CSE must develop an IEP with programs, services and goals that address the student's needs and abilities. The Parent has the burden of proving that the IEP itself is not adequate in situations where a student never attends the recommended District program. A District is not obligated to provide academic programs and services that group students together with the same classifications, abilities and needs. Rather, having students with different needs within a group is permissible provided that it allows each student to make meaningful progress on his or her IEP goals. However, if students are placed in a program with diverse needs and abilities, it makes the District's burden to prove that the program was appropriate that much more difficult.

### ***Office of State Review***

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#### **1. Impartial Hearing Process Is Not Appropriate Forum For Challenging Student's Grades And Attendance Records.**

#### ***Application of a Student with a Disability, Appeal No. 14-138 (2014)***

#### **SALIENT FACTS:**

A Parent requested an impartial hearing and argued that her child's grades and attendance records violated the student's IEP. The Parent wanted the student's grades to be changed to the grades he earned in "home instruction school." She wanted the all of the student's absences to be "medically excused," because she was concerned that they would affect the student's ability to be accepted into a private school. The Parent also wanted the opportunity to review all of the student's school records so she could correct any incorrect information that could "negatively affect his placement opportunities."

The District moved for dismissal because the Parent's requests did not pertain to the "identification, evaluation, or educational placement of the student or the provision of FAPE." Rather, these allegations fell under the Federal Educational Rights and Privacy Act ("FERPA"). As such, the claims were "beyond the scope of authority of an IHO." The IHO agreed and dismissed the Parent's complaint with prejudice.

### **SRO'S DECISION:**

The SRO agreed with the IHO and found that the due process complaint notice did not involve the provision of FAPE or pertain to the identification, evaluation or educational placement of the student. As such, neither the IHO nor the SRO had jurisdiction over the allegations contained in the complaint.

### **WHY YOU SHOULD CARE:**

Claims under the Individuals with Disabilities Education Act ("IDEA") must relate to the identification, evaluation, or educational placement of students with disabilities or suspected of having disabilities. Any claims beyond this purpose are not within the purview of the CSE or an impartial hearing officer. Districts should be aware of the topics that are appropriate for a CSE and direct the Parents to the CSE's responsibilities accordingly. CSE chairs should be aware of those issues which involve FERPA or other state or federal laws and which are outside the jurisdiction of the CSE. Under FERPA, a Parent has the right to review his or her child's educational records and request that the records are amended by the District. A Parent may file a complaint with the Department of Education if he or she is dissatisfied with the District's response to granting or refusing to grant any requested changes to the student's educational records.

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