NYSE Directors
Centris Group


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## MONTHS IN REVIEW: April – May, 2012

## Read All About It!

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

## INTRODUCTION

This month, the recurring complaint of parents of students with disabilities relating to the appropriateness of CSE recommendations is that the CSE failed to rely on sufficient evaluative data in making its recommendations. In several of these cases, the District did not conduct its own evaluations to determine the student's special education needs. Rather, the CSE relied upon reports and evaluations provided by the parents and private schools. Where these reports accurately reflected the students' needs, the CSE's reliance upon them was sufficient.

## *Federal District Court*

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## 1. Similar IEP Recommendations Continues to Offer FAPE.

**Dzugas-Smith v. Southold Union Free School District, 2012 WL 1655540 (E.D.N.Y., 2012)**

**SALIENT FACTS:**

For 2005-06, a seventh grade student with a learning disability was provided with a number of services, including but not limited to: (1) resource room ("RR") for three days out of a six day cycle; (2) individual speech; (3) use of an

  

auditory enhancer; and (4) summer academic intervention services. In March 2006, the CSE convened to review a private auditory processing evaluation, the district's educational evaluation, and a private assistive technology evaluation. Based upon recommendations made in these evaluations, the CSE approved the following additional services for the balance of the 05-06 school year: (1) a personal laptop with Microsoft Office for students, and (2) a personal auditory enhancer. The CSE also approved individual tutoring for three hours per week in the summer.

In May 2006, the CSE convened for the student's annual review. Progress reports from 2005-06, which reflected that in the mainstream environment with support services, the student was passing all of his classes with a grade of "3" out of "4", were reviewed. The CSE also noted that the student completed her ELA and Math State Assessments without accommodations. Based upon the student's average performance, the CSE made the same recommendations for 2006-07 as it had for 2005-06 with two exceptions. The CSE increased RR services from three days out of a six day cycle to daily and added daily individual tutoring by a special education teacher to encourage the student's progress. Although, at the meeting, the parent agreed with the recommendation, and signed a consent form to this effect, she filed for due process, claiming the 06-07 recommendation was inappropriate and seeking tuition reimbursement for Landmark, a non-SED approved private school for students with language-based LDs.

**COURT'S DECISION:**

In IDEA suits the inquiry is: (1) whether the State complied with the IDEA procedures, and (2) whether the IEP was reasonably calculated to enable the student to receive educational benefits. If both requirements are met, the district has offered FAPE. As to the second criterion, a District will offer FAPE if it provides an IEP which is likely to produce progress, not regression, and if the IEP affords the student with an opportunity greater than mere trivial advancement. When an LD student is in a mainstream class, passing grades and regular advancement from grade to grade will generally provide evidence of satisfactory progress. This is consistent with IDEA's strong preference for children with disabilities to be educated, to the maximum extent appropriate, with their non-disabled peers. Where a student is capable of progressing in a mainstream environment with supplementary aids and services, she should be. When the court is required to make a judgment regarding the substantive adequacy of an IEP, deference to the administrative agencies is particularly important. Consistent with this principle, the court afforded due deference to the well-reasoned decisions of the IHO and SRO that the district offered FAPE. The Court found that there was substantial evidence in the record to support the position that the student was likely to make progress under the 2006-07 IEP. The court wrote:

> Those special education services and supports being offered to [the student] within [the district] were tailored to meet [the

  

student's] specific needs and were essentially similar, or more, than the services that had been provided to her during the previous academic year and from which [the student] had received significant educational benefit. Specifically, [the student] had performed at or above grade level in almost every area tested and had met grade level standards, advancing a grade each academic year, with the special education programs and services previously provided to her. Accordingly, the services and programs offered to [the student], which increased the services previously provided [] by increasing the frequency of the [RR] component and adding one daily period of individual tutoring by a special education teacher, were likely to produce continued non-trivial progress during [] 2006-07.

Thus, the court concluded that the district offered FAPE.

**WHY YOU SHOULD CARE:**

It is well settled law that IDEA ensures an appropriate education, not one that provides an optimal program that might be thought desirable by loving parents. Accordingly, while a special school placement, which focuses on the student's particular disability, might be preferred by the parents, it may not be necessary for the CSE to recommend this placement. This is particularly true when the District has an appropriate program which offers FAPE. FAPE is offered when the IEP is reasonably calculated to afford the student an opportunity for more than mere trivial advancement. When the student has demonstrated progress with particular IEP supports and services, contrary to the parents' assertion, an IEP which recommends similar supports and services for the following year may continue to offer FAPE.

## *Office of State Review*

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## 1. District's Failure to Classify Student Was Procedural Violation Which Did Not Warrant Compensatory Education Services.

**Application of a Child with a Disability, 12-014 (2012)**

**SALIENT FACTS:**

On two occasions, the parents of a student with ADHD, ODD and a conduct disorder referred the student to the CSE. On both occasions, the CSE determined that the student was ineligible. The student graduated from high school with a Regents diploma with honors. The Parents filed a demand for due process challenging the CSE's refusal to classify the student and as relief requested compensatory education services. Notwithstanding the Parents' arguments regarding the absence of the parent member from the CSE, the IHO held that the

  

CSE was properly comprised. The IHO held that the district violated its child find obligations by failing to evaluate the student after she had failed multiple classes, and by basing its ineligibility determination on insufficient evaluative data. Specifically, the district did not conduct a physical evaluation, social history, or FBA. Nevertheless, the IHO concluded that in light of the fact that the student graduated with an honors diploma, these failures did not rise to the level of gross violations warranting an award of compensatory services.

## SRO'S DECISION:

Regarding the argument that the CSE was improperly comprised in light of the absence of the parent member, the SRO held that there was no need for a parent member to attend the meeting. The CSE was not considering the student's placement in: (1) a special class, (2) a special class outside of the district, (3) a school primarily serving students with disabilities, or (4) a school outside of the student's district. Accordingly, a Sub-CSE could have convened rather than a full CSE. Because a Sub-CSE does not include a parent member, the SRO held that the absence of the parent member from the CSE was of no consequence.

In the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation, or if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time. The SRO wrote:

> Given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (citations omitted), the receipt of which terminates a student's entitlement to FAPE (citations omitted), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility in order for the student to qualify for an award of compensatory education (citations omitted), it is a rare case where a student graduates with a Regents high school diploma and yet still qualifies for an award of compensatory education (citations omitted).

As such, the SRO dismissed the Parents' appeal and found in favor of the District.

## WHY YOU SHOULD CARE:

It is well settled law that procedural violations will not result in a FAPE denial unless the procedural inadequacies: (1) impeded the student's right to FAPE, (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the student, or (3) caused a deprivation of educational benefits. A district's failure to classify a student may fall into the third category as a procedural violation, which has denied

FAPE. However, where the student has since graduated, the student's attainment of a Regents high school diploma, an educational benefit, will likely undercut any claims that the student is entitled to compensatory services as a result of the district's violations of IDEA.

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## 2. Nothing Sticks With the Parents' "Everything But the Kitchen Sink" Approach to Due Process.

**Application of a Student with a Disability, Appeal No. 12-024 (2012)**

### SALIENT FACTS:

The parents of a student with multiple disabilities rejected the District's 6:1+1 placement recommendation. To address the student's need for self-regulation, and in turn help the student be available to learn, the CSE also recommended a 1:1 crisis management paraprofessional. The parents alleged that the District denied FAPE on several grounds including: (1) the telephone participants did not have the same information as the members of the CSE; (2) the District failed to conduct a re-evaluation, and therefore the recommendation was based upon insufficient evaluative information; (3) the 6:1+1 placement recommendation and 1:1 paraprofessional were inappropriate; (4) the IEP did not recommend parent counseling and training ("PC&T"); and (5) the IEP goals were inappropriate. The parents also made numerous objections to the appropriateness of the assigned school and requested reimbursement for the parental placement at the Rebecca School ("RS").

### SRO'S DECISION:

*Telephone Participants:*

In affirming the IHO's decision that the district offered FAPE, the SRO first held that although the RS teleconference participants may not have been provided with copies of the information reviewed by the CSE, there was no evidence that this "compromised [their] ability to meaningfully participate in the development of the IEP." The school psychologist testified that at the meeting, she verbally discussed the evaluation reports, which were reviewed by the CSE at the meeting.

*Annual Goals:*

Despite the parent's claims, the SRO determined that the annual goals were appropriate, as they were derived from the RS reports and the child's RS special education teacher had an opportunity to participate in the development of the goals.

*Sufficient Evaluative Data:*

  

Based upon the CSE's reliance on a two month old progress report from RS, a four month old classroom observation conducted at RS by the district, a recent private psychological evaluation, and the district's four month old psychoeducational evaluation, the SRO concluded that the CSE relied upon sufficient evaluative information. The data provided information about the student's abilities and related needs in the areas of language processing, articulation, social/emotional functioning, academics, cognition, activities of daily living, sensory regulation, and fine and gross motor skills. Although the district did not conduct its own evaluations relevant to the student's functioning, the RS reports provided information about the student's needs.

*6:1+1 and 1:1 Aide Recommendations:*

While at RS, the student was placed in a 6:1+2 with related services. The CSE noted the private psychologist recommendation of a small, structured classroom setting with individual attention and instruction with behavioral support; a 1:1 behavior based program for students with autism; and an ESY program. The Commissioner's Regulations provide that a 6:1+1 special class placement is designed to address students whose management needs are determined to be highly intensive and who require a high degree of individualized attention and intervention. Consistent with the Regulations and needs as identified by the RS staff and the private evaluator, the CSE recommended a 6:1+1 special class in a special school with a 1:1 crisis management paraprofessional and related services. The SRO held that this placement recommendation coupled with the 1:1 aide were appropriate based upon the student's intensive needs.

*PC&T and Appropriateness of the Assigned School:*

The SRO held that the District's failure to specify PC&T in the IEP did not constitute a denial of FAPE because it was a programmatic feature of the assigned school. Despite the parents' argument that the assigned school would have failed to implement the student's IEP, the SRO agreed with the district that this issue was "in part speculative insofar as the parents did not accept the [] CSE's recommendation…and instead enrolled the student in a private school of their choosing." Further, the record did not support the conclusion that had the student *actually* attended the assigned school, the district would have deviated from significant provisions of the student's IEP. The parent's concern that the size of the school would be overwhelming for the student based upon her belief that the student had increased behaviors in large crowds, was without merit. The school was appropriately structured to reduce interaction between classes. Although the student could have come into contact with other students during lunch, the SRO found that seating was arranged to decrease interaction and there were eight adults to supervise the student at lunch. Further, although there was no evidence that the student would become dysregulated as a result of large buildings or students engaging in behaviors in his presence, there was evidence that supported the conclusion that should the student experience behaviors, the assigned school was capable of implementing a sensory diet to decrease anxiety.

**WHY YOU SHOULD CARE:**

Although in this case, the District was not found to have denied FAPE, the SRO generally requires that individuals participating by phone must have copies of the documents reviewed by the CSE. If the teleconference participants do not have copies of the information, the CSE should make every effort to provide the teleconference participants with this information (via facsimile or email), and once the teleconference participants confirm receipt of the material, the meeting should resume. In fact, when you know there will be telephone participation, it is best to obtain fax and email information in advance, in case the parents present new evaluation materials at the meeting. If such information is not provided, at an impartial hearing, the district will have an additional burden of proving the failure to provide this information did not impact the telephone participants' opportunity to fully participate in the meeting.

Although a District has not conducted its own evaluation relevant to a parentally placed student's present levels of academic and functional performance, the District may still develop an IEP based upon sufficient evaluative information, where the CSE relies upon recent progress reports from the private school. In basing its recommendations on this data, the student's special education needs and abilities, and the concerns of the parent, the CSE may make an appropriate recommendation, which will survive the parents' due process complaint, which arguably includes allegations based upon everything but the kitchen sink!

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## 3. District Had No Obligation to "Explore" Out-of-District Placements Where FAPE Has Been Offered.

**Application of a Student with a Disability, Appeal No. 12-017 (2012)**

**SALIENT FACTS:**

The CSE recommended an 8:1+1 special class with related services for a student diagnosed with autism and PDD-NOS. Thereafter, in a letter to the district, the parent requested that the district send an application to Camphill, a nonpublic, non-SED approved, out-of-State residential school. The parent did not want Camphill because he wanted a residential placement, rather, the parent believed Camphill might provide a more appropriate environment, and he wanted "to see if there was something [else] that might work." In response to the letter, the CSE convened and determined that the student had made progress in the district's program. Nevertheless, the CSE agreed to explore approved in-State day and residential placements. However, the district refused to send an application to Camphill, because it was required to exhaust all State-approved options before exploring non-approved, out-of-State options. Despite agreeing to send out applications, the CSE did not change its 8:1+1 special class recommendation. The

  

parent filed a due process complaint seeking an order requiring the district to apply to Camphill. In finding that the district's recommended program was appropriate, the IHO rejected the Parents' request. Further, the IHO found that the district did not have an obligation to send an application to the parent's preferred school, Camphill, and that the district cannot ignore the continuum of placements in making recommendations for the student. Specifically, the CSE was provided with "virtually no information" about the school to consider whether the program was appropriate, "especially before less restrictive in-State placements were considered."

**SRO'S DECISION:**

Contrary to the parent's argument, the SRO first concluded that the CSE had sufficient evaluative data upon which to base its recommendations. The CSE relied upon a recent BOCES AT evaluation, which provided information about the student's speech-language abilities, communication needs, and sensory functioning. In addition, the CSE considered parent observations and concerns, and teacher progress reports, which provided narrative updates about the student's progress. In addition, an independent speech-language evaluation provided information regarding the student's communicative abilities. The SRO concluded that, based upon the reliability of the evaluative information before it, the CSE developed an IEP that accurately and thoroughly described the student's SPAM areas.

Next, the SRO addressed the parents' argument that the IEP was inappropriate because the student had not achieved meaningful progress in the district placement and the district's ABA methodology was inappropriate. District staff testified that since entering the district's 8:1+1 program, the student's progress had been minimal, slow and inconsistent. Nonetheless, the student had achieved several IEP annual goals, although his progress toward several other goals was inconsistent. Overall, district staff testified that the student's progress was consistent with his cognitive and adaptive abilities. In the beginning of 2011-12, the student attended the district's recommended program. The student's special education teacher testified, and the SRO agreed that, given the student's substantial cognitive and language impairments, as well as interfering behaviors, the student was making meaningful educational progress.

As to the parent's concerns about ABA, the SRO noted that IDEA does not explicitly require a CSE to specify methodology in the IEP. In most cases, the precise teaching methodology to be used by the teacher is a matter left to the teacher. Nevertheless, the SRO noted that the district's 8:1+1 class, in which the student received meaningful educational benefit, employed an ABA methodology. Further, the SRO noted district testimony that "the student required ABA." As such, the SRO concluded that the district's program was appropriate. Although the director of special education testified that she believed the CSE placement was appropriate, she said the CSE was willing to explore residential placements as the

district was looking to work with the parent and understand his perspective on having a child, who functions at the "severe" level.

Based on the foregoing, the SRO determined that the district offered FAPE, and therefore, declined to order the district to apply to Camphill, or determine the appropriateness of Camphill.

**WHY YOU SHOULD CARE:**

Although a district may be inclined to explore out-of-district placements in an effort to appease parents and their curiosity about other programs, there is no legal obligation to do so when the district has offered FAPE. By exploring out of district placements at the parents' request, when a district has already offered FAPE, it may inadvertently open itself up to scrutiny. Specifically, by applying to out-of-district programs, the district is tacitly conceding that it may not have an appropriate in-district program. Further, if the student is accepted into an out-of-district placement, but the district then refuses to place the student there, and the parents file for due process, the district will be left to defend its decision not to send the child to the placement. Although parents are always looking for a better placement or a "faster cure," when the CSE makes a recommendation which it feels is appropriate and which satisfies the LRE, it should resist the urge to keep looking.

## *OSEP Letter of Interest*

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### 1. Comparable Services and Temporary Goals for In-State Transfer Student Must Be Developed During CSE Meeting.

***Letter to Finch*, 112 LRP 23103 (OSEP, 2012)**

**OSEP's OPINION:**

OSEP clarified that a district that receives an in-state transfer student is not entitled to develop the student's comparable services and goals unilaterally or informally. The letter writer, Dr. Finch, inquired whether, without an IEP team meeting, the district and parent, of an in-state transfer student who enrolls mid-year, may develop temporary goals that are aligned with the student's annual goals for those services as reflected in the student's IEP from the sending school district. OSEP's interpretation of transfer situations, as described in IDEA, resulted in it responding to this inquiry in the negative. OSEP explained that the receiving district's IEP Team determines those services that are comparable to the services described in sending district's IEP. Unless the parents and district agree, in writing, to excuse a mandated member from this meeting, a complete IEP Team must be comprised. In the alternative, OSEP explained that the district and parent

  

may agree, in writing, to foregoing the IEP Team meeting if the student already had an annual review.

**WHY YOU SHOULD CARE:**

New York's State law on transfer students is more specific than guidance provided by OSEP. Specifically, in New York, when an in-State student transfers to another New York State district in the same school year, the receiving school district must, in consultation with the parents, provide the student with FAPE, which includes services comparable to those described in the sending district's IEP, until the receiving district either: (1) adopts the sending school's IEP; or (2) develops, adopts and implements a new IEP that is consistent with Federal and State law and regulations. See 8 N.Y.C.R.R. §200.4(e)(8)(i). Thus, in New York, when a student transfers into the district with a pre-existing IEP, a district representative (i.e. the Director of Special Education, the Assistant Superintendent for Pupil Services, or the CSE Chairperson) and parent must agree, in writing, to provide the student with services comparable to those described in the sending district's IEP. As soon as reasonably possible after the student transfers, the CSE should convene to review the transfer student's progress and to either adopt the sending district's IEP; or develop, adopt, and implement a new IEP. According to OSEP, districts and parents may agree, in writing, to forego a CSE meeting - at least until a new IEP becomes effective.

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*This publication is intended to provide general information and is not meant to be relied upon as legal advice. If you have questions about anything discussed we urge you to contact your school attorney.

  