NYSE Directors
Centris Group

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MONTHS IN REVIEW: April-May 2013

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

The Second Circuit has made it clear that although R.E. v. NYC Dept. Of Educ., 694 F.3d 167 (2d Cir., 2012) was decided in late 2012, the principals regarding retrospective testimony will be applied retroactively to administrative decisions decided prior to R.E. The impact of R.E. is such that it is important for CSEs to remain diligent about documenting in their IEPs all of the special education services that will be provided to the student. The concept of "programmatic special education services" should not be relied upon. IEPs should describe the actual program and services a child is scheduled to receive.

Second Circuit Court of Appeals

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1. Retroactive Application of *R.E.*

P.K. and T.K. ex rel S.K. v. New York City Dept. Of Educ., 2013 WL 2158587 (2d Cir., 2013)

SALIENT FACTS:

The parents of a student with autism challenged the CSE's recommendation for the student's kindergarten year. The CSE recommended a 6:1:1 class with individual OT and group speech therapy. The CSE refused the Parents' requests that the student continue to receive ABA therapy as she had in preschool. The IHO held that the district's failure to offer appropriate speech therapy and parent counseling and training ("PC&T") and the failure to conduct an FBA and develop a BIP resulted in a denial of FAPE. The SRO reversed the IHO's decision. The SRO

relied upon retrospective testimony from the district's teacher that the student would have received a higher level of speech services than those delineated in her IEP. Similarly, the SRO relied upon district testimony that although the IEP failed to include PC&T, this service was built into the proposed program. Accordingly, the SRO concluded that taking the hearing record as a whole, there was sufficient evidence that the student would have received FAPE had she enrolled in the District's program.

COURT'S DECISION:

As a preliminary matter, the court noted that at the time of the SRO's decision, R.E. v. NYC Dept. Of Educ., 694 F.3d 167 (2d Cir., 2012) had not yet been decided. In R.E., the court determined that retrospective testimony that the district would have provided additional services beyond those listed in the IEP may not be considered in Burlington-Carter tuition reimbursement cases. Applying the retrospective testimony standard to this case, the court held that the IEP was substantively inadequate, because it failed to provide the level of individualized instruction the student required. The court pointed out that, while district testimony may have accurately reflected the "care and individual instruction" that would have been available in the proposed placement, it bore no resemblance to the mandates of the IEP. Accordingly, the court affirmed the district court's determination that the district failed to provide FAPE.

WHY YOU SHOULD CARE:

It is clear from this case that, although R.E. was decided in 2012, courts will retroactively apply the retrospective testimony standard to administrative decisions decided before R.E. Accordingly, administrative hearing officers will likely apply the R.E. standard to all cases. Therefore, districts must remember that if the special education service is not delineated in the IEP, they will be foreclosed from presenting evidence at the hearing that had the student actually attended the district's program, the student would have been provided those services. Neither the SRO nor the court may justify an IEP based on extrinsic evidence about the services a student would have actually received in the public school placement. Parents are entitled to rely on the IEP for a description of the services that will be provided to the student. If the IEP fails to delineate the actual services that will be provided, the parents' decision whether to accept the proposed program will be based only upon what is stated in the IEP. CSEs should follow the old adage - if it isn't in writing, it didn't happen!

Federal District Courts

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1. Testimony About The Details of the Specific Classroom Not Delineated in the IEP Considered Impermissible Retrospective Testimony.

J.F. and L.V. ex rel N.F. v. New York City Dep't of Educ., 2013 WL 1803983 (S.D.N.Y., 2013

SALIENT FACTS:

The CSE convened to develop an IEP for a student with a speech-language impairment. Rather than conduct its own evaluations, the CSE relied heavily on the progress reports from the Aaron School, where the student was parentally placed, at the time of the CSE meeting. Although at Aaron, the student was placed in either a 6:1:1 or 8:1:1 setting, the CSE recommended a 12:1 special class. The parents did not take issue with the class size. Rather, the main source of the parents' contention was the functional level of the students in the proposed class. According to the parents, the proposed 12:1 class would have been inappropriate because the other students in the class were significantly lower functioning than the student. Although the composition of the students in the proposed class was not delineated in the IEP, the parents sought to admit testimony regarding the functional grouping of the class. The district challenged this testimony on the grounds that R.E. prohibits (a) retrospective testimony about details of an IEP not specifically enumerated in the IEP itself and (2) parents from speculating about the district's ability to implement the IEP.

COURT'S DECISION:

In R.E., the court held that courts may not award tuition reimbursement based on the parents' "mere speculation" that the district will not adhere to the IEP. The district argued that allowing the parents to challenge the classroom placement would have required the court to speculate that the district would not have adhered to the IEP mandates that the student be appropriately grouped for functional purposes. The court interpreted R.E. to "preclude parents from citing evidence about the proposed classroom [] that would not have been available at the time of filing the [] complaint." The court pointed out that the reasoning behind R.E.'s retrospective testimony prohibition was to prevent parties from "gaming the system: either through a 'bait and switch' on part of a school district…or through sandbagging on the part of the parents." However, any inquiry into the class grouping would have been to address issues previously raised in the complaint (namely the functional grouping of the proposed class). Therefore, allowing the parents to challenge the functional grouping of the class would not have afforded them an opportunity to "game the system." The court wrote:

> [I]f parents or students hope to challenge one of the many aspects of the placement classroom [that is] too detailed to be included in the IEP, courts must allow them to look beyond the four corners of the IEP.

State law mandates that students with disabilities be placed in classes with peers of "similar individual needs" including: (1) levels of academic or educational achievement and learning characteristics, (2) levels of social development, (3)

levels of physical development, and (4) the management needs of the students in the classroom. Without further guidance from the Second Circuit, "[t]he court declined to adopt a reading of R.E. that would either substantially alter a school district's obligations in developing an IEP or preclude parents from enforcing New York's regulations regarding placement classrooms."

Accordingly, the court held that it was permissible for the parents to offer testimony regarding the appropriateness of the functional grouping of the proposed class. As a result, the court remanded the matter to the IHO to make an initial finding of whether the placement recommendation violated IDEA.

WHY YOU SHOULD CARE:

As the court articulated, the main question in this case is: under what circumstances are prospective challenges to classroom placement so speculative, or so unrelated to the IEP, that they are foreclosed under R.E.? The Regulations of the Commissioner of Education mandate that special classes be composed of students with disabilities with similar individual needs. See 8 NYCRR §200.6(h)(3). The Regulations indicate that "chronological age range within special classes of students with disabilities who are less than 16 years of age shall not exceed 36 months." 8 NYCRR §200.6(h)(5). Further, with a limited exception, the range of achievement levels in reading and mathematics of the students in the special class may not exceed three years. 8 NYCRR §200.6(h)(7). Where a parent challenges the composition of the proposed special class, the district may not invoke the retrospective testimony analysis of R.E. in an attempt to foreclose the parents from offering testimony regarding the composition of the class. Moreover, this is another occasion where class profiles, which describe the achievement levels of the students in the proposed class become important. Unlike an IEP, districts are not expressly required to provide parents with class profiles. See Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 (2d Cir. 2005). However, class profiles may be a useful tool for districts to use to prove that a proposed class is appropriate. Where the class profile illustrates that the student would have been appropriately grouped for functional purposes and the profile was provided to the parent at the CSE meeting (if possible) and certainly before the parent has made the decision to unilaterally place the student, the profile will likely become a useful tool at the hearing.

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2. Parent's Pecuniary Interests in Promoting Business, Results in a Finding that The Equities Weigh Against the Claim for Reimbursement.

M.L. and S.L ex rel E.L. v. East Ramapo Central School Dist., 2013 WL 1311127 (S.D.N.Y., 2013)

SALIENT FACTS:

For 2009-10, the District recommended an 8:1+2 class for a student classified with an other health impairment ("OHI"). The district notified the parents that the student's annual review for 2010-11 would not occur until after the school year began. As a result, for 2010-11, the parents unilaterally enrolled the student in the Children's Education Initiative ("CHEIN"). CHEIN was described as a nonprofit school for children with disabilities, which was established and maintained in part by the student's parents. In October 2010, the district convened an "annual review" and recommended the student's placement in an 8:1+2 in-district special class. The parents maintained the student's placement at CHEIN and the district developed an IESP.

Although the IHO found that the district denied FAPE, he held that the equitable considerations weighed against reimbursement. Specifically, the IHO noted that:

1. Prior to the commencement of 2010-11, the father met with the district Superintendent to seek funding for CHEIN;
2. The father sought funding from the district for other resident students attending CHEIN;
3. There was no clear record of communication between the parties that evidenced that the parents intended to return the child to the public school or, for that matter, were interested in doing so;
4. The communications between the parties related primarily to the possibility of CHEIN relocating into the district;
5. The parents signed the August 22, 2010 contract with CHEIN before the CSE meeting with the district.

The SRO affirmed the IHO's determination that the equities weighed against awarding the parents any reimbursement.

COURT'S DECISION:

The court held that the IHO was justified in denying the parents reimbursement on equitable grounds. The court wrote:

> [The] father was not simply seeking reimbursement for the expense of sending the child to CHEIN. He was acting director of CHEIN and was seeking to promote the scope of CHEIN's business.

On these grounds, the court held that it was proper for the IHO and SRO to deny reimbursement.

WHY YOU SHOULD CARE:

In tuition reimbursement cases, the District must prove that it offered FAPE. Where the district fails to sustain this burden or concedes that it failed to

offer FAPE, the burden shifts to the parents to prove that the unilateral placement was appropriate. Even if the unilateral placement is deemed appropriate, the parents may be denied an award of reimbursement of tuition if there are equitable considerations that weigh against such an order. As was the case here, where the parents have a pecuniary interest in placing the student in a nonpublic school, and that interest clearly supports the position that the parents had no intention of enrolling the student in public school, the equities may weigh against an order of tuition reimbursement. Moreover, where, as here, the totality of the circumstances proves that no matter what the district recommended, the parents were going to unilaterally enroll the student, the district may argue that the parents predetermined the student's placement. Under these circumstances, the equities may weigh against an award in the parents' favor.

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3. Student's Progress Under Pendency IEP Resulted in a Finding that District Offered FAPE.

B.J.S. ex rel. N.S. v. State Education Department/ University of the State of New York, et al., 2013 WL 1879646 (W.D.N.Y., 2013)

SALIENT FACTS:

The parents of a child with autism filed suit against the Commissioner of Education, the SRO and the district alleging that for 2005-06, each denied the student FAPE. In contrast to the SRO's decision, the IHO's decision was favorable to the parents. Prior to the beginning of 2005-06, the parents disagreed with the recommended IEP. Without having a newly agreed upon IEP in place prior to the start of the 2005-06 school year, the district continued to educate the student pursuant to the last agreed upon IEP ("Pendency IEP"). The IHO concluded that the 2005-06 IEP denied FAPE and the SRO reversed.

COURT'S DECISION:

The court accepted the Magistrate Judge's recommendation (see 2013 WL 1879297) that it affirm the SRO's order in the district's favor. The Magistrate Judge determined that the issues were moot as the 2005-06 school year had expired without the IEP for that year being implemented, and the 2005-06 IEP had been superseded by subsequent unchallenged IEPs. Nevertheless, the Magistrate Judge considered the merits of the case. During 2005-06, the student was educated pursuant to his pendency IEP, not the IEP developed for 2005-06. Although the student was educated under the pendency IEP, the Magistrate Judge noted that, the student "continued to pass all of his classes and advance from grade to grade" and was expected to graduate in June of 2006. The Magistrate Judge wrote:

> [The] record…establishes as a matter of law that [the student's] education pursuant to the pendency placement permitted [the student] to make "satisfactory progress" as required under the IDEA.

Accordingly, the Magistrate Judge recommended that the court grant relief in the district's favor and find that the district offered FAPE during 2005-06. The court agreed with the Magistrate Judge's recommendations and dismissed the parents' claims.

WHY YOU SHOULD CARE:

Prior to the start of the school year, the district must have an IEP in place for a classified student. In the event the district fails to do so, the parents may pursue due process on the grounds that as a result of this failure, the district denied FAPE. Unless the parents have made a unilateral placement, during the pendency of the hearing, the student must be educated pursuant to the last agreed upon IEP (unless the district and parents otherwise agree). If there is evidence that the student made meaningful progress, *albeit* pursuant to the pendency IEP, the district may be found to have offered FAPE.

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4. Parents Permitted to Depose District Staff In Preparation for Appeal of IHO Decision to The SRO.

M.L. and B.L. ex rel. K.L. v. New York City Dept. Of Educ., 2013 WL 1891378 (S.D.N.Y., 2013)

SALIENT FACTS:

During the hearing, the district presented testimony from the ESY teacher, but failed to present any testimony from the teacher or paraprofessional who would have provided services to the student during the 10-month school year. In preparation for the appeal to the federal court, the parents sought permission to conduct two "additional evidence" depositions of the district's teacher and paraprofessional for the 10-month school year program. The parents argued that the depositions were necessary to fill in "an important and sizeable 'gap' in the existing record." The district objected on the grounds that the discovery sought was speculative and would be inadmissible because the parents had "numerous opportunities" to develop the record during the hearing.

COURT'S DECISION:

The court observed that unlike a typical administrative appeal, which is based solely on the administrative record and discovery is generally not permitted, IDEA is different. Specifically, under IDEA, the taking of additional evidence is a matter left to the discretion of the trial court. The court pointed out that, "courts

generally accept evidence that was not withheld in bad faith, is relevant, and does not change the administrative review into a trial *de novo*." However, IDEA "does not permit a party to duplicate testimony already provided at the administrative hearing." In this case, the district neglected to present testimony that would have established that the student's recommended 10-month class would have been appropriate. As such, the concerns about generating a duplicative record was not present here. The court wrote,

> In its review of the decision of the [SRO], [the court] will have to determine whether [the student] was provided with a FAPE and whether the [] IEP created for [the student] was "reasonably calculated to enable [the student] to receive educational benefits."

In light of its finding that the requested depositions were neither cumulative nor duplicative of evidence in the record, the court granted the parents' request to conduct limited discovery (*to wit* a 90 minute deposition of each witness). Presumably recognizing that the parents may attempt to use any information gathered during the depositions to argue that the district would have failed to offer FAPE during the 10-Month school year, the court included the caveat:

> In granting the [parents'] request to conduct this limited discovery, it is not precluding [the district] from making any arguments with respect to the admissibility of this evidence should [the parents] choose to use it in support of their summary judgment motion.

WHY YOU SHOULD CARE:

Taking additional evidence in IDEA proceedings is a matter left to the discretion of the trial court. See 20 U.S.C. §1415(i)(2)(C). New York State Regulations contain no express discovery provisions. Application of a Student Suspected of Having a Disability, Appeal No. 11-092 & 11-094, fn. 25 (Oct. 25, 2011)[1]. The only provision in the Regulations, which contemplates the exchange of documents in an impartial due process hearing concerns the exchange of five-day disclosure packets. See 8 NYCRR §200.5(j)(3)(xii)(a) ("[e]ach party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing"). On occasion, a district may fail to offer testimony regarding whether it offered FAPE. This may be the case where the district made a conscious effort not to present Prong I testimony about this issue, or where the district concedes that it failed to offer FAPE. In either case, the hearing record will not reflect any testimony as to Prong I of the Burlington-Carter test. If, upon considering the arguably sparse hearing record, the court determines that the district offered FAPE, on appeal, the

[1] A Florida Appellate Court held that in the absence of State law the IHO lacked authority to order discovery. See S.T. v. Sch Bd. of Seminole County, 783 So. 2d 1231 (Dist. Ct. App. 2001).

parents will have little to challenge regarding the district's offer of FAPE. Accordingly, the parents may request an opportunity to depose particular witnesses who would have had personal information about the district's offer of FAPE. Because these individuals did not testify at the hearing, the concerns about developing a duplicative record are not present and a federal court may grant the parents' request to depose particular district staff members.

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5. Student's Progress in General Education Setting Undercuts Parent's Claim for 960 Hours of Compensatory Services.

B.M. and E.M. v. New York City Dept of Educ., 2013 WL 1972144 (SDNY., 2013)

SALIENT FACTS:

The parents of a child with autism challenged the district's FAPE recommendation for 2010-11. The district recommended that the student continue to be educated in a general education setting with support services (i.e. special education teacher support services ["SETSS"] as well as the daily services of a paraprofessional). The parents alleged, among other things, that the paraprofessional was not working with the child constructively, did the student's work for him and failed to sufficiently monitor him. Additionally, the parents alleged that the mainstream teachers were insufficiently trained to manage a student with autism. In their closing brief, submitted after the conclusion of the hearing and before the IHO rendered her decision, the parents challenged the qualifications of the SETSS teacher and guidance counselor. According to the parents, the fact that the SETSS teacher was not certified to teach special education and the guidance counselor was inexperienced with autistic students resulted in a denial of FAPE. As relief, the parents requested 960 hours of compensatory services.

COURT'S DECISION:

The court noted that the student's report cards illustrated that he received passing grades in all of his core academic subjects, which he took in the general education setting. Further, the court noted testimony from the SETSS teacher that he was addressing the student's behaviors such as picking up gum from the floor. The court found persuasive district testimony that the student had made social progress including developing "a wide circle of acquaintances" and "a peer group at his school with whom he socialized and ate lunch."

As to the IHO's consideration of the arguments contained in the parents' closing brief regarding the qualifications of district staff, the court noted:

> IDEA provides that the party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice unless the other party agrees otherwise." 20 USC §1415(f)(3)(B).

According to the Second Circuit, "in the absence of [this] requirement, a parent could 'sandbag the school district' and 'take advantage of a school district…that inadvertently or in good faith omits a required service from the IEP." R.E. v. New York City Dept. Of Educ., 694 F.3d 167 (2d Cir., 2012). Accordingly, the court held that the IHO had "exceeded her jurisdiction in predicating her conclusion that the district failed to offer [the student] a FAPE" based on the qualifications of the SETSS teacher and guidance counselor. Nevertheless, the court pointed out that the SETSS teacher had completed course work in child psychology and differentiating instruction, worked with autistic children as a student teacher, received SETSS coaching, and participated in a 6-week SETSS training program.

In taking into consideration the evidence of the student's social and academic progress, the court affirmed the SRO's determination that the district offered the student FAPE. As such, the parents' demand for 960 hours of compensatory services was denied.

WHY YOU SHOULD CARE:

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint unless the other party agrees or the original complaint is amended prior to the impartial hearing. See 8 NYCRR §200.5(i)(7).

When presenting evidence that the student progressed pursuant to the district's IEP, it is important to present evidence of measurable progress. For example, a comparison of the IEP at issue with the IEP of the previous school year, that demonstrates that the student made progress may be persuasive in an administrative hearing. As was the case here, the IEP from the previous school year described the student as reading at the third grade level, writing at the fourth grade level, and being able to write a paragraph on a single idea. The IEP at issue described the student as reading and writing on the fifth grade level, and being able to write two paragraphs on a single idea. The court took this information into consideration in rendering its determination that the district offered the student FAPE based upon clear, measurable progress.

New York Supreme Court

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1. Injuries Student Sustained in Regular PE Did Not Warrant Finding that Section 504's Team's Recommendation Was Negligent.

Merrill by Delamerced v. Enlarged City School District of Troy, et al., 113 LRP 22490 (N.Y.Sup., 2013)

SALIENT FACTS:

After a student with gross motor deficits fractured his leg while participating in a regular gym class, the parents commenced a personal injury claim against the district. The parents argued that the 504 Team should have placed the student in adapted physical education ("APE"). According to the parents, the student's placement in APE would have been more appropriate for his skill level and physical limitations.

COURT'S DECISION:

The court noted that while physical therapy ("PT") evaluations substantiated the 504 Team's recommendation of physical therapy services, these evaluations did not support a recommendation that the student be placed in APE. According to the physical therapist, although the student's gross motor testing was slightly below average for his age, it did not preclude him from participating in regular PE. The court held that the district established that it had no notice of a physical or mental impairment that would have precluded the student's participation in PE. Accordingly, the court found in favor of the district on the issue of whether the 504 Team negligently failed to recommend APE for the student.

WHY YOU SHOULD CARE:

Adapted physical education is "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program." See 8 NYCRR §200.1(b). In order to determine a student's eligibility for APE, the district should conduct an assessment of the student's physical therapy needs. The first step in an assessment program is screening. The purpose of screening is to identify students who should be evaluated further. According to SED, a wide variety of measures can be used in a screening process, including those tests which are routinely given by the district (e.g., physical fitness tests) or less formal measures such as checklists and rating scales. Students should be referred for more testing by the CSE if:

a) they consistently score below the 20th percentile (or equivalent) on standardized measures for physical education,

b) they consistently fall below criterion-referenced standards associated with physical education, or
c) the physical education teacher feels, based on his/her professional judgment, that the student may have a unique need. See SED Guidance, "Adapted Physical Education: Regulations, Recommendations, and Resources".
(*available at*: http://www.p12.nysed.gov/ciai/pe/documents/qa.pdf).

Instituting a formal assessment program does not imply that all students receive an in-depth evaluation. However, if the district is aware that a student has gross motor deficits, the district should conduct an in-depth evaluation of the student's physical therapy needs (i.e. a PT evaluation). When reviewing this evaluation, the CSE should include the PT who conducted the evaluation. While the district should keep in consideration IDEA's preference for educating the student with typical students to the maximum extent appropriate, where the district is aware that the student has gross motor deficits that warrant placement in APE, the CSE should make a recommendation based on this information. However, in the event the district is unaware that the student has needs warranting placement in APE, or negligently failed to assess whether a student has such needs, and the student sustains an injury in regular physical education, the district may be found to have been negligent for failing to place the student in APE.

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