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Read All About It!

A Synopsis of Salient Cases in Special Education

INTRODUCTION

This month, the courts and SRO continue to find in favor of the district where parents claim procedural errors, which have not resulted in a denial of FAPE. Specifically, one MDT's failure to review all of the information in the student's file did not warrant a reversal of its determination that the student's behavior was not a manifestation of his disability. The SRO reasoned that any defect was cured by virtue of the fact that several of the MDT members served on the CSE where the student's file was reviewed extensively. However, all is not completely rosy for districts this month. The SRO has concluded that parents are entitled to have their private evaluators conduct classroom observations of students in the districts. As we have discussed below, this decision has rather troubling implications for school districts.

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Court Decisions

1. No Obligation to Reimburse Tuition Merely Because the Parents Believed That Student Would Receive Best Education Possible.

B.O. and P.S. ex rel. K.O. v. Cold Spring Harbor Cent. Sch. Dist., 2011 WL 3850860 (E.D.N.Y., 2011)

SALIENT FACTS:

The CSE recommended an integrated co-teaching class with a number of related services including; individual reading instruction, OT, counseling, and group speech-language therapy for a student classified as OHI based upon his ADHD diagnosis. After rejecting the recommendation, the parents placed the student at Eagle Hill, a private school serving the needs of students with language-related disabilities. At Eagle Hill, where the student resided during the school week, he was placed in a special class with no mainstream opportunities. The parents were unsuccessful in convincing the IHO or SRO that the district denied FAPE.

COURT'S DECISION:

The court first addressed the parents' allegation that the district improperly denied them a meaningful opportunity to participate in the formulation of their son's IEP. The court noted that both parents, and their educational advocate, attended and actively participated in the CSE meeting. Next, the court addressed the parents' argument that a meeting held with district staff in the parents' absence two days before the CSE meeting, denied the parents a meaningful opportunity to participate. The court noted that districts are entitled to pre-meet and develop a proposal, as long as the district staff then came to the CSE meeting with open minds.

In affording limited credibility to the testimony of the parents' experts regarding the CSE recommendation, the court noted that none of the parents' experts were familiar with the district's program, observed the student, or were substantially familiar with the student, yet all testified that the recommended program was inappropriate. On the other hand, the court found persuasive that all of the district's professionals who knew the student for much of his educational career, had observed the student in his district classroom, and testified that the recommendation was appropriate.

Next, the court addressed the parents' argument that the district conceded that the student required a more restrictive placement. At the hearing, the parents presented tape recordings of conversations with district employees, which the parents had surreptitiously recorded, wherein the parents claim the employees admitted that the recommended co-teaching class was inappropriate. The court concluded that, in addition to the recordings being irrelevant, any variation between what was said on the recordings and the final recommendation were nothing "other than the evolving [] opinions of committed educators." Further, letters of inquiry sent from the district to out-of-district programs were "investigatory, and do not reflect a final determination that an out-of-district placement...would be necessary to comply with IDEA."

WHY YOU SHOULD CARE:

This case illustrates a number of important points for school districts. First, when defending a placement recommendation, it is important that school district professionals observe the student in the district's placement. It is equally important that these individuals are sufficiently familiar with the student and the recommended placement. Second, districts are allowed to pre-meet in the parents' absence as long as the meeting participants come to the CSE meeting with open minds. See 8 NYCRR 200.5(d)(2). Third, when exploring whether a residential placement is appropriate, districts may send letters to perspective placements inquiring whether, on paper, the student would be a good "fit." Doing so may not result in a concession that the student needs a residential placement. However, districts should be cognizant not to frame the language of a letter to appear as a solicitation. You should contact your school attorneys, for assistance in drafting these letters.

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2. District Had No Obligation To Reimburse Parents for Out Of State Placement.

D.D.-S. by B.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040 (E.D.N.Y., 2011)

SALIENT FACTS:

A student with a learning disability had been enrolled in the district until 2006, when her parents unilaterally enrolled her in Landmark, a Massachusetts private school. At Landmark, the average class size was between 5-8 students, with most students receiving 1:1 tutorials. At the hearing, the parents requested tuition reimbursement for the 07-08 and 08-09 school years and for services provided during the summer of 2008. For 07-08, the IHO concluded and the SRO affirmed that the recommended integrated co-teaching program offered the student FAPE and denied reimbursement. Although the district conceded that it failed to provide FAPE for 08-09, the SRO denied reimbursement because Landmark was not the LRE. Further, in upholding the CSE's finding of ineligibility for ESY services, the SRO denied reimbursement for summer services.

COURT'S DECISION:

For 07-08, the court deferred to the well-reasoned decision of the SRO that the district offered FAPE and denied reimbursement for this school year. Because the district conceded that its failure to finalize an IEP for 08-09 denied FAPE, the only issue on appeal was whether Landmark was appropriate. Although the court

concluded that the student progressed at Landmark, the court affirmed the SRO's denial of reimbursement because it was not the LRE. The court reasoned that the student was capable of performing at grade level with appropriate supports within the district's high school, and therefore, did not require a residential placement. Regarding the request for reimbursement for the summer services, the court found persuasive that for the first marking period of 07-08, the student's grades ranged from B+ to A. Therefore, the court held that there was no evidence of substantial regression and the parents were not entitled to reimbursement.

WHY YOU SHOULD CARE:

Simply because a district may have denied FAPE based upon its failure to have an IEP in place at the start of the school year, does not automatically entitle parents to reimbursement for their unilateral placement. Rather, the private placement must be appropriate. Specifically, it must provide educational instruction specifically designed to meet the unique needs of the student and must satisfy the LRE requirements.

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3. Removal of 1:1 Aide and Recommendation of More Restrictive Placement Did Not Deny FAPE.

C.D. and R.D. ex rel. R. D. v. Bedford Central School District, 111 LRP 62694 (S.D.N.Y., 2011)

SALIENT FACTS:

Parents of a student with speech language deficits and ADHD unilaterally placed their son in Winston Prep and requested tuition reimbursement. The parents' alleged that the absence of a speech language therapist and district psychologist from a Sub-CSE meeting denied FAPE. The parents also alleged that the co-teaching integrated recommendation and the removal of a 1:1 aide from the IEP, coupled with the district carrying over goals from one year to the next, denied FAPE. In a 39 page decision, the SRO rejected the parents' contentions and held that the district offered FAPE.

COURT'S DECISION:

First, the court addressed the parents' allegations that the district's recommendation of a co-teaching class for English and Math was inappropriate. The court noted that during 2006-2007, the student was in a general education population. However, in anticipation of the student entering middle school in the fall of 2007, the district realized that he required more intensive supports. Because the co-teaching model would allow the student to enjoy the support of a special education teacher, while still maintaining contact with mainstream

students, the court concluded that the co-teaching recommendation was appropriate.

Second, the court concluded that the recommendations of a consultant teacher ("CT") for the student's other content areas was also appropriate. In the student's CT classes, like his co-teaching classes, there were no more than six special education students. Therefore, the student would actually receive small group attention.

Next, the court rejected the parents' allegation that the removal of the 1:1 aide denied FAPE. The court found persuasive that for the school year when a 1:1 aide was recommended, the student was in a general education elementary school class with no special education supports. Given the nature of the co-teaching class providing small group attention, with the support of a special education teacher, the court concluded that the 1:1 aide was unnecessary.

Despite the decrease in the student's grades by the end of 2006-2007, the court concluded that the district did not deny FAPE. The court found persuasive that the decrease in grades directly corresponded with a time when the student was being inconsistently medicated by his parents, had failed to finish projects and suffered frequent absences.

Next, the court held that the carry-over of goals from year to year did not result in a denial of FAPE because it was clearly evident from the record that the student needed to continue working on the same skills. Further, the court found persuasive that the parents never objected to the goals at the respective CSE meetings.

Finally, the court addressed the procedural deficiencies allegedly arising out of the Sub-CSE convened to develop the student's IEP for 2008-2009. Because nothing in IDEA enumerates a speech language therapist as a mandated member of the CSE or Sub-CSE, the court held that this individual's absence did not result in a denial of FAPE. While school psychologists are required members of the CSE, they are only required members of the Sub-CSE when a "new psychological evaluation is reviewed or a change to a program option with a more intensive staff/student ratio is considered." No new psychological evaluation was reviewed by the Sub-CSE. Further, the placement recommendation made by the Sub-CSE remained the same as that recommended by the CSE the preceding year. Therefore, the court concluded, the absence of the psychologist did not deny FAPE.

WHY YOU SHOULD CARE:

When a CSE proposes to place a student in a more restrictive setting with programmatic supports, it may determine that supports recommended when the student was in the less restrictive placement are now unnecessary. However,

before making decisions to remove services from an IEP, CSEs should conduct a detailed review and engage in a thorough discussion of the student's current levels of performance and special education needs.

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State Review Officer Decisions

4. District Obligated to Permit Private Evaluator to Conduct Classroom Observation.

Application of a Student with a Disability, SRO Appeal No. 11-074 (Aug. 24, 2011)

SALIENT FACTS:

A CSE convened to develop a 10-11 IEP for a student with autism and diagnoses of ADHD and anxiety, elected to conduct an FBA. When the parents' treating psychologist raised concerns regarding the qualifications of district personnel to conduct the observations necessary for the FBA, the district hired a private evaluator to conduct the evaluations. Thereafter, a psychologist retained by the parents to evaluate the student requested the district's permission to conduct a classroom observation. The district denied the request based upon its longstanding practice of not to permitting outside evaluators to conduct classroom observations.

The district prohibition was based on the belief that a single observation was a mere snapshot, and as such unreliable. The district also believed staff who worked with the student would be more reliable reporters of the student's needs and abilities. Moreover, the district believed that by prohibiting such observations, they were protecting student confidentiality. In lieu of the observation, the district offered to arrange for the private psychologist to meet with district staff to discuss the student, receive progress reports, receive the student's educational records, or have specific behavioral data collected by district staff.

At the hearing, the parents argued that, because state and federal law permitted parents to have an IEE conducted at their expense, and because the psychologist required an observation in the classroom to evaluate the student's needs, the district erroneously precluded the psychologist's access. The IHO rejected the district's arguments, and directed the district to permit the observation within 30 days of the date of the decision.

SRO'S DECISION:

The parents appealed and the district cross-appealed. The SRO considered the case on its merits. The SRO noted that, although the parents did not request

reimbursement for the private evaluation, it qualified as an IEE because "an IEE is broadly defined to include any evaluation by a qualified examiner who is not employed by the [district]..." (*citing* 34 CFR §300.502[a][3][I]; 8 NYCRR §200.1[z]).

As to the authority of the private evaluator to observe the student in the classroom, the SRO relied upon an OSEP opinion letter in affirming the IHO's conclusion. See *Letter to Mamas*, 41 IDELR 10 (OSEP 2004). In this letter, OSEP concluded that, although IDEA does not provide parents with a general right to observe their children in the district classroom, there may be circumstances in which access may be required. However, the OSEP letter did not authorize a classroom observation. The SRO also noted OSEP's position that "if the district's 'assessment procedures make it permissible to have in-class observations of a child, the independent evaluator has the right to do so'" (*citing Letter to Wessels*, 16 IDELR 735 [OSEP 1990]). Next, the SRO concluded that the private evaluator must meet the district's criteria and restrictions for its own evaluators.

Notwithstanding the district's offer to allow the private evaluator to consult with district staff in lieu of the observation, the SRO relied upon the evaluator's testimony that the observation was "essential." Further, over the district's objection, while the SRO noted that the psychologist said he would be evaluating the performance of the student's teachers, the SRO seemed to find credible the clarification that the evaluator would only evaluate the teachers' interactions with the student rather than their effectiveness as educators. Accordingly, the SRO affirmed the IHO's determination that the parents were entitled to have their private evaluator observe the student in the classroom subject to the same restrictions as its own district evaluators.

WHY YOU SHOULD CARE:

Traditionally, districts have denied access to private evaluators to conduct classroom observations for a variety of reasons including, but not limited to, concerns about the privacy of the other students, classroom disruption, the snapshot nature of such observations, observer bias, and concerns about receiving requests for multiple evaluations. However, this case illustrates that where parents obtain an IEE at their own expense, and a classroom observation is deemed necessary by the evaluator, the district may be required to permit the evaluator to observe the classroom. This decision has troubling consequences for districts. Specifically, where a private evaluator seeks to conduct an FBA, the district may need to provide this evaluator access to the classroom on a number of different occasions. Second, although the district may not be familiar with the private evaluator or his or her practices, the district may still need to provide access to the classroom. The good news is that the SRO noted that districts may establish limitations on the depth and breadth of observations through adoption of policies that apply to district and private evaluators. Therefore, if the district

limits classroom observations to a certain amount of time, or to a limited number of classes, the private evaluator's observation will have the same limitations. So, if your district has not already done so - consider a policy for classroom observations!

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5. One MDT's Failure to Review Student's File At MDR Cured by Participation of Members of Student's CSE.

Application of the Board of Education, SRO Appeal No. 11-083 (Aug. 12, 2011)

SALIENT FACTS:

A student classified as OHI, based upon his ADHD and learning disability in math, was subjected to an FBA. The behaviors identified in the FBA included; the desire to provoke others, impulsivity and hyperactivity, passive noncompliance, exhibiting distracting or annoying behaviors, and use of obscene language. Following the development of the student's BIP, disciplinary charges were brought against him as a result of his misconduct occurring on three separate occasions. The misconduct allegedly included a bullying incident, damaging school property and the use of vulgar language in the classroom. The MDT determined that the student's misconduct was not a manifestation of his disability, or the result of the district's failure to implement his IEP. The IHO disagreed. Specifically, the IHO found that the MDR failed to review all relevant information in the student's file. Further, the IHO concluded that the MDR predetermined that the student's behavior was not a manifestation of his disability. Specifically, the IHO found that shortly after the parents' psychiatric consultant joined the MDR, she was informed that the MDR had already made its determination in her absence.

SRO'S DECISION:

On appeal, the SRO first concluded that the MDT reviewed all of the information in the student's file that was relevant to the matters before it. The SRO found persuasive that several members of the MDT also participated in the student's CSE meetings. Thus, the SRO concluded that the failure of the MDT to review actual documents at the MDR was cured by the participation of many of the individuals who reviewed documents at the CSE meetings. Regarding the IHO's predetermination conclusion, the SRO relied upon the audio recording of the MDR, which revealed that, although prior to the psychiatrist joining the MDR, the director of pupil personnel discussed the pending charges, the focus of the meeting, and the applicable standard for a finding of a manifestation, no determination had been made until after the psychiatrist joined the meeting.

Next, the SRO addressed each of the behavioral incidents separately. First, the SRO noted that the extent and ongoing nature of the misconduct was unclear.

Further, the SRO noted that the student's BIP provided that when he is given consequences for behavior, it is important that these consequences be given immediately after the conduct. However, there was no indication in the record that consequences were given immediately or as soon as possible after the bullying incidents, thus the terms of the BIP had not been followed. Consequently, the SRO found the "record insufficient to make a determination as to whether the student's conduct regarding the 'bullying' incident was a manifestation of the student's disability." Nevertheless, the SRO declined to remand the matter to the MDR, and annulled the IHO's finding that the bullying incident was substantially and directly related to the student's disability.

Because the incident where the student used inappropriate language consisted of the type of behavior that was targeted by the student's BIP and referenced in his most recent evaluations, the SRO concluded that this behavior had a direct and substantial relationship to his disability. Therefore, the SRO affirmed this part of the IHO's decision.

Regarding the incident where the student damaged school property, the SRO wrote that, "the student's acknowledgment of the wrongfulness of his actions, his admission that he would never touch the [] computers 'because they are very expensive,' and...selection of the monitor [he intended to damage]...strongly weighs against a finding of impulsivity." Moreover, the SRO noted that neither the IEP nor BIP indicate that property damage was an ongoing concern needing to be addressed. Therefore, the SRO concluded that the property damage incident was not a manifestation of his disability.

WHY YOU SHOULD CARE:

This case illustrates important points for MDTs. First, a defect resulting from the MDT's failure to review all relevant information in the student's file may be cured by the participation of individuals who consistently attended the student's CSE meetings and recently reviewed the special education file prior to making their determination. However, don't put yourself in that situation. It is still good practice that MDTs review all relevant information contained in the student's special education file. If members of the MDT come to the MDR with an open mind, are prepared to review all information relevant to the subject behavior, and engage in a full discussion regarding the nexus between the student's behaviors and disability, it is likely it will not be found that the MDT engaged in predetermination. Further, where the nature of the student's disability is grounded in impulsivity, and the subject behaviors are continuous in nature, and the student has demonstrated thoughtful and predetermined behavior, it is unlikely that there will be a manifestation.

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Case of Interest

6. District Ordered to Reimburse Cost of Private Evaluation Notwithstanding Ineligibility Determination.

J.P. and L.P. ex rel. P.P. v. Anchorage School District., 111 LRP 61561 (Alaska, 2011)

SALIENT FACTS:

The parents of a student with reading difficulties referred their son to the district's IEP team. In addition to failing to conduct an evaluation within Alaska's statutory 45 day time frame, the district also failed to provide the parents with a copy of the Procedural Safeguards Notice. Despite the unambiguous language of the parents' request for a "full comprehensive evaluation of their son [] for any disability…" the district asserted that it was unclear what the parents were requesting. Nevertheless, the parents obtained a private evaluation at their own expense. After requesting a copy of the private evaluation, the district conducted its own evaluation, and relied upon a number of the test results contained in the private evaluation. Thereafter, the school district determined the student was ineligible for services under IDEA. Both the IHO and Superior court held that the district was obligated to reimburse the parents for the cost of the private evaluation on the grounds that the district failed to evaluate the student within 45 days of its receipt of consent to do so.

COURT'S DECISION:

The State Supreme Court agreed with both the IHO and Superior court and also noted that if the parents disagreed with the district's assessment, they would be entitled to an IEE. The court wrote, "…the district's duty to evaluate children for eligibility under IDEA is not dependent upon the ultimate determination that the child is 'disabled.'" The court continued, "children…are entitled to be evaluated for services if an evaluation is properly requested on their behalf; the IDEA does not condition the entitlement to this screening upon the outcome of the screening. And school districts are mandated to provide these evaluations in a timely manner." The court also found persuasive that the district relied upon a number of the tests performed in the private evaluation. The court reasoned, "…by delaying its evaluation and relying on the private evaluation paid for by [the parents], the district partially avoided the cost of completing its statutorily mandated assessment of [the student's] eligibility for services and entirely avoided the cost of the independent assessment his parents would have been entitled to request in response to the district's assessment." Accordingly, the court affirmed the Superior court's order.

WHY YOU SHOULD CARE:

Parents may be entitled to recover costs of private evaluations obtained where the district has: (1) failed to timely conduct its own evaluations, and (2) relied upon the private evaluation(s) in making its eligibility determination. Districts must remember that IDEA's child find obligation does not depend upon the ultimate eligibility determination.

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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.

