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MONTHS IN REVIEW: July/August, 2011

Read All About It!

A Synopsis of Salient Cases in Special Education

INTRODUCTION

This month was a particularly exciting month in special education law. Although there were several "run-of-the mill" decisions regarding tuition reimbursement, there were also several decisions, which provided districts with more flexibility, and perhaps, less responsibility. Specifically, a federal district court agreed with the SRO that a district did not violate IDEA or fail to provide FAPE when it developed a BIP without conducting an FBA. As you may know, IDEA, its implementing regulations, and State law all require that a BIP be based upon the results of an FBA. However, now an FBA may no longer be required in certain circumstances.

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Court Decisions

1. Failure to Consider and Include Recommendations Made in Private Evaluation and by Private School Teacher Resulted in Denial of FAPE.

New York City Department of Education v. V.S. by D.S., Slip Copy, 2011 WL 3273922 (E.D.N.Y., 2011)

SALIENT FACTS:

At the CSE meeting convened to develop an autistic student's 2009-2010 IEP, the student's Rebecca School special education teacher suggested that he should be placed in a 2:1 special class. Recommendations made in a private neuropsychological evaluation conducted while the student attended Rebecca included a small, structured environment with low noise level and small student to teacher ratio. The CSE recommended a 6:1:1 special class located in the general education school. In the district's school, the special education students ate lunch with typical students in the school cafeteria, which was very noisy. In the parents' due process demand, they claimed a denial of FAPE TEACCH, alleging that the recommended program offered an inappropriate teaching methodology, and that the school's large student population was inappropriate. On appeal from the IHO's decision, which determined that the district denied FAPE, the District requested reimbursement for the Rebecca tuition paid during the pendency of the hearing. The SRO held that tuition paid pursuant to pendency was not reimbursable. Further, as the SRO appeal commenced after the conclusion of the school year at issue, the SRO held that the matter was moot and dismissed the appeal.

COURT'S DECISION:

The Court determined that the issues in dispute were capable of repetition yet evading review, therefore, the matter was not moot. The court concluded that the district's recommendation of 6:1:1 denied FAPE. The court reasoned that the failure of the CSE to consider the neuropsychological recommendations of a small, structured setting, was erroneous. The court found persuasive that both the neuropsychological and the teacher who worked with the student recommended a setting with a small student to teacher ratio. Further, the preponderance of the evidence supported the IHO's conclusion that the placement in the public school would result in "sensory overload" for the student, which would interfere not only with his learning, but also that of the other students. The court also noted that the District failed to present any evidence that the TEACCH methodology would be an effective methodology for the student. Therefore, taking the totality of the circumstances, the court concluded that the district denied FAPE.

As to the second prong of the Burlington analysis, the court found that the parents proved that the Rebecca School was appropriate. The Rebecca School employs a developmental individual difference relationship ("DIR") teaching methodology, which focuses on helping children progress through nine developmental levels, develops their sensory processing, and improves their relationships with others. The court observed that the student made progress while using the DIR methodology. Specifically, the DIR methodology helped the student

develop spontaneity and creativity, which TEACCH would not help him do. At the Rebecca School, the student "had greatly improved his language skills, his ability to self-regulate, and his interactions with adults and peers."

Regarding the equity analysis, the court rejected the district's argument that the equities weighed against reimbursement because the parents signed an enrollment contract with the Rebecca School eight days prior to the CSE meeting. The court noted that the parents cooperated by visiting the recommended program. The district also argued that tuition at Rebecca School could not be reimbursed as Rebecca was a for-profit school and IDEA only authorizes reimbursement for private non-profit schools (citing 20 USC §1415[i][2][C]). In rejecting this argument, the court wrote, "[t]o read IDEIA's specific authorization of certain remedies as a bar against the provision of other remedies necessary to effectuate the act's goal would be contrary to the Supreme Court precedent." Accordingly, the court denied the district's motion to vacate the SRO's decision.

WHY YOU SHOULD CARE:

This case reminds CSEs that when they have access to private evaluations or a representative of the student's private placement who is familiar with the student, it must consider their recommendations. Failing to do so and making a contrary recommendation, without reason, may result in a finding that the district denied FAPE. This case also resolves an argument that districts have made before, i.e.: reimbursement should be denied on the basis of a parental placement in a for-profit school. However, as discussed by the court, IDEA does not contain such a provision, and may not be construed as such.

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2. No Obligation To Conduct FBA Where BIP Was Developed Using A Variety of Existing Data.

A.L. and V.R. ex rel. E.L. v. New York City Dept. of Educ., Slip Copy, 2011 WL 3427143 (S.D.N.Y., 2011)

SALIENT FACTS:

An autistic student had various behaviors that interfered with learning, including ritualistic behaviors, non-contextual vocalizations, and difficulty focusing and interacting. In addition to recommending a 6:1+1 special class with a "dedicated Behavioral Management Paraprofessional," the CSE developed a BIP. Although no FBA was conducted, the BIP was based upon evaluations prepared by the student's private school along with a variety of input from his current teachers and service providers. After visiting the recommended school and class, the

parents rejected the placement and argued, in their demand, that the district's failure to conduct an FBA denied FAPE. The SRO disagreed. The SRO also concluded that the lack of specified transition services on the IEP to assist the student in adjusting to his new placement did not deny him FAPE. The SRO reasoned, "the proposed placement 'would have been responsive' in addressing [the student's] needs during the transition."

COURT'S DECISION:

In agreeing with the SRO's determination, the court rejected the parents' argument that the CSE improperly developed a BIP without first conducting an FBA. The court wrote, "[the district] relied on a variety of assessments and reports, including substantial input from [the student's] then-current instructors, in formulating a [BIP] that adequately addressed his needs and therefore afforded him a FAPE." The court continued, "[t]he CSE went through each behavior and used the information provided by [the private school] to craft the IEP and BIP, incorporating those strategies that [the student] had best responded to in the past." Here, the preponderance of the evidence supported the SRO's conclusion that "the CSE had sufficient information about [the student's] behaviors to craft an IEP that addressed those needs and afforded [the student] a FAPE."

WHY YOU SHOULD CARE:

Previous case law provides that failure to conduct an FBA does not render an IEP legally inadequate where the behavioral issues were otherwise addressed in the IEP itself. See A.C. ex rel. M.C. v. Board of Educ. of The Chappaqua Central School District, 553 F.3d 165, 172 (2d Cir., 2009). Although this is still good law, this case has created a variation. Now, where a district had failed to conduct an FBA, but relied upon the most recent information regarding the student's behaviors in formulating the BIP, the district will not likely have denied FAPE. However, as the Regulations of the Commissioner of Education require that the BIP is based on the results of the FBA (8 N.Y.C.R.R. §200.1[mmm]), districts should not discontinue conducting FBAs. This case should only be used to demonstrate that failure to conduct an FBA when developing a BIP may not result in a denial of FAPE. Don't forget to conduct the FBA, but if you do, a good BIP may still hold up.

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3. Parents' Independent Contingency Fee Agreement Will Not Bind the District

K.F. ex rel. L.A. v. New York City Dep't of Educ., 2011 WL 2565353, 111 LRP 54098 (S.D.N.Y., 2011)

SALIENT FACTS:

Parents of a student with a disability, who prevailed on their IDEA claim, moved for attorneys' fees at the rate of $450 per hour. The parents' retainer agreement consisted of a contingency fee arrangement, which entitled the attorneys to this hefty hourly rate. However, according to the agreement, the attorneys never intended to collect fees from the parent. Instead, the agreement stated the attorney would only seek attorney's fees if the parents prevailed and the firm was entitled to recover from the district. The parents sought a total reimbursement in the amount of $110,837.87. This sum included expenses related to the time the attorneys spent traveling from their home in upstate New York to the location of the hearing in Brooklyn, New York, and time charges of a second senior attorney.

COURT'S DECISION:

The test of reasonableness of an hourly rate is, that rate which a paying client would be willing to pay. In determining what is reasonable, the court should "endeavor to determine 'the market rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." In determining the attorneys' relative experiences, the court noted several of the attorneys' achievements including authorship of a guide for parents on impartial hearings, 19 years of experience as a school administrator, and authorship of briefs in IDEA actions. However, the court noted that the issues in the case were neither novel nor complex, and thus did not require the attendance of two senior attorneys at all of the hearing dates.

One of the most important factors noted by the court was the contingency agreement entered into by the parties. The court wrote, "[t]he significance of a client agreed-upon rate of $450 ... takes on less significance when the client knows it will never pay that amount." The court observed that other special education attorneys practicing in the community did not typically collect large payments from parents. Specifically, in several instances where attorneys purportedly charged higher fees, they often recovered fees from the district at a lesser rate with the parents making up the balance. Under the circumstances of this case, the court reduced the requested hourly rate from $450 to $375.

WHY YOU SHOULD CARE:

Simply because parents are the prevailing party does not automatically entitle them to reimbursement of attorney's fees at any rate agreed to per a presentation agreement. Rather, the attorney fees must still pass a reasonableness test. To determine what a reasonable attorney's fee is, districts must consider the twelve Arbor Hill factors, which include, but are not limited to, the experience of the attorneys, the novelty of the case, and the time spent on the matter. See Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany, 493 F.3d 187, n.

3 (2d Cir., 2007). As this case demonstrates, where the parents have entered into a contingency fee agreement, inquiry must be made into the terms of that agreement. Specifically, the district must inquire as to whether the terms entitle the attorneys to recover from the district. Under these circumstances, a district may convince a court to reduce a substantial fee request on the grounds that the attorney is using the parents' prevailing party status as a windfall to recover exorbitantly high profits from the district.

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4. District Had No Obligation to Reimburse Cost of Tuition at Residential School Merely Because Student Might Regress In Public School.

C.T. v. Croton-Harmon Union Free School Dist., 2011 WL 2946706 (S.D.N.Y., 2011)

SALIENT FACTS:

The parents of an ED student were unable to convince the SRO or court that the student's possible regression in the public school warranted a residential placement. In the student's seventh grade, he began abusing alcohol and marijuana. He also had a history of behavioral problems including cutting class and physical violence. Notwithstanding these difficulties, the student maintained passing grades. In the student's eleventh grade year, his parents enrolled him in a wilderness program in Utah. Prior to his completion of the program, the parents referred the student to the DOR's CSE. The CSE convened, absent a representative from the student's private school, classified the student with an emotional disturbance and recommended a general education curriculum in the DOR's public school with learning lab and counseling. The parents rejected the recommendation on the basis that the student would relapse if he returned to the District and requested a residential placement.

COURT'S DECISION:

The court concluded that the IEP was appropriate. The parents made numerous allegations regarding the procedural sufficiency of the IEP. First, the court held that the absence of a representative from the student's school at the CSE meeting did not deny the student a FAPE. The court reasoned that the CSE considered evaluations and learning plans from the private school's staff in addition to reports from the district's psychologist and learning lab teacher who would have assisted the student. Regarding the parents' argument that the district's failure to conduct an FBA resulted in a denial of FAPE, the court reasoned that the IEP included numerous strategies to provide greater structure to

the student's school day, with the overriding goal of helping him stay focused in school. Therefore, the FBA was unnecessary. Regarding the substantive sufficiency of the IEP, the court agreed with the SRO that the IEP was appropriate. Specifically, the IEP identified areas of continued struggle for the student - oppositional behavior and difficulties dealing with authority - and devised goals tailored to meet those needs. Further, in addition to recommending counseling, the IEP stated that the student would be enrolled in more academic classes to ensure that his day was sufficiently structured.

Regarding the parents' request for a residential placement, the court noted that the Second Circuit requires that "a court point to objective evidence of a child's regression in a day-program before finding that a residential placement is required by the IDEA." Here, "the weight of the evidence demonstrated that [the student] had progressed significantly in his months away [in Utah] and [he] could return to the high school with the benefit of increased support services and more structure to his school day." Regarding the parents' concern for relapse, the court wrote, "[t]o the extent [the] concerns of 'relapse' focused on substance abuse, such issues cannot provide a basis for residential placement under the IDEA." Further, "while a residential placement may have been the most effective way to treat the student's substance-abuse problem, that treatment was not the District's responsibility." Accordingly, the court granted the district's motion for summary judgment.

WHY YOU SHOULD CARE:

Merely because parents have expressed concerns about their child's possible relapse or regression if he or she returns to the public school from a residential placement, does not mean a District has an obligation to place the student in the residential school without clear and objective evidence of the student's regression in a day program. However, it is essential that CSEs convened to develop IEPs for residential students re-entering the district include representatives of the residential placement. The representatives will be able to provide information about current levels of performance and suggest transition strategies. In the event the district is unable to secure the representatives' attendance, the CSE should make good faith efforts to obtain and consider reports prepared by current teachers and providers.

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5. A CSE's Removal of Services Recommended by CPSE Only Two Months Prior Resulted in FAPE Denial.

P.K. ex rel. S.K. v. New York City Dept. of Educ. (Region 4), 2011 WL 3625317 (E.D.N.Y., 2011)

SALIENT FACTS:

After a preschool student's diagnosis of severe autism in 2006, the CPSE provided speech therapy and ABA services. In January 2008, the DOE's CPSE recommended an 8:1 preschool class, at-home ABA, and weekly 1:1 speech-language and OT therapy sessions. Two months later, in March of 2008, the CSE classified the student with autism and recommended a 12-month program in a 6:1 special class, 1:1 OT, 3:1 speech-language therapy, and eliminated ABA. In 2008-2009, the parents placed the student in MCC, a special education school for students with autism, rejected the CSE's recommendation, and filed for due process requesting reimbursement for MCC tuition. The IHO concluded that the CSE denied FAPE based upon, among other things, the failure of the March IEP to provide sufficient speech-language services or the required parent counseling and training ("PC&T"). The SRO disagreed. Specifically, the SRO concluded that the student would be provided the necessary speech-language and PC&T at the recommended school.

COURT'S DECISION:

The designated court magistrate judge concluded that the combination of terminating the student's 1:1 speech and ABA therapy *and* failing to provide PC&T deprived the student of a FAPE. Specifically, the magistrate relied on the significant progress the student was just beginning to make with these services, the consistent expert opinions that the student required continued 1:1 speech and ABA therapy to maintain her progress, and the absence of any evidence suggesting that the student would receive a non-trivial educational benefit without these supports. As to the second prong of the Burlington analysis, the magistrate concluded that the parents satisfied their burden of proving that MCC was appropriate because it provided the services found lacking in the March IEP (i.e. speech, ABA, and PC&T). Regarding the equities analysis, the magistrate concluded that the parents' enrollment of the student in MCC before rejecting the DOE's recommendation was not so unreasonable as to warrant reduced reimbursement. Notwithstanding the DOE's and parents' numerous objections to the magistrate's report, the court adopted the report in its entirety and granted the parents' motion for summary judgment.

WHY YOU SHOULD CARE:

Oftentimes CSEs convened to develop IEPs for students transiting from preschool to school-age may remove certain services provided in the CPSE IEP (e.g. SEIT, at-home ABA). As this case illustrates, CSEs may not employ practices of blanket removals of services simply because the student is no longer eligible for

"typical" CPSE services. Rather, CSEs must consider the student's needs and suggestions made by the student's current service providers in making its decision to remove certain services. CSEs must also remain cognizant of when the CPSE recommendation was made. When a CSE recommends removal of services, which the CPSE found necessary to recommend only two months prior, the CSE's motivation for this action will likely raise the court's suspicion.

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State Review Officer Decisions

1. Holder of Special Education Internship Certificate Qualified to Teach Special Education Class.

Application of the Board of Education, SRO Appeal No. 11-054 (July 21, 2011)

SALIENT FACTS:

For 2009-2010, a student with autism had been parentally placed in the Rebecca School ("Rebecca"). The CSE recommended a 12-month special education program consisting of a 6:1+1 special class in a special school with a number of related services. Although the parents initially agreed, after visiting the assigned school they rejected it and indicated their intent to place the student in Rebecca for 2010-2011 at the district's expense. Among other things, the parents alleged that the district failed to implement the IEP because (1) the teacher in the assigned school did not possess the appropriate certification, and (2) there was no OT on staff at the assigned school to provide the student's IEP-mandated services.

SRO'S DECISION:

First, the SRO rejected the parents' failure to implement claim on the basis that prior to the start of 2010-2011, the parents indicated their intent to parentally place the student. The SRO reasoned that to conclude otherwise would require him to speculate what the district would do if required to implement the IEP.

Nevertheless, the SRO contemplated the merits of the parents' claims regarding the special education teacher and provision of OT services. The SRO held that nothing in the record provided conclusive evidence that the teacher would be unable to instruct the student appropriately such that a denial of a FAPE would have occurred. The teacher held an internship certificate in special education. The SRO concluded that, "[a]n internship certificate is 'recognized by [SED] as a valid credential authorizing the holder to act within the area of service for which the certificate is valid' and does not mean that the person holding an

internship certificate is an 'uncertified teacher.'" Therefore, if the student attended the assigned school, the teacher would have been qualified to teach. Further, the parents alleged that because the assigned school had difficulties implementing students' IEPs in the past, it would also have difficulty implementing their daughter's IEP. Considering the speculative nature of this allegation, the SRO concluded that the evidence in the hearing record demonstrated that the student would receive her IEP services in the recommended placement. Thus, the SRO concluded that the district offered FAPE and denied tuition reimbursement.

WHY YOU SHOULD CARE:

Where prior to the start of the school year, parents have indicated their intent to parentally place their student out of district for the upcoming school year, the district will have no obligation to implement the student's IEP. Although a district may have had difficulty implementing students' IEPs in the past, a parent's argument that it will fail to implement the student's IEP will fail, especially where the parent has definitively indicated the intent to privately place the student. Second, the holder of an internship certificate in special education is qualified to teach a special education class. Federal law requires that special education teachers be "highly qualified." See 34 C.F.R. §300.18. The Regulations of the Commissioner of Education provide, a "[s]pecial education teacher means a person, including an itinerant teacher, certified or licensed to teach students with disabilities..." 8 NYCRR 200.1(yy). Therefore, although a parent may request that the student's special education teacher hold a teaching certificate, as the SRO has set forth, this may not be required.

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2. Where Period of Suspension Resulting From MDT's Determination Has Expired, Issues Regarding MDR's Determination Will Be Rendered Moot.

Application of a Student with a Disability, SRO Appeal No. 11-064 (July 13, 2011)

SALIENT FACTS:

A student with autism was issued a notice of eight disciplinary charges in relation to a series of incidents occurring in the month of January, 2011. Prior to being issued the charges, the district's behavioral consultant conducted an FBA and developed a BIP. Disruptive behavior and an escalating pattern of aggression were among the behavioral concerns listed in the FBA. The student was found guilty of all eight charges during the first phase of the superintendent's hearing. The disciplinary proceeding was recessed so that the manifestation determination review ("MDR") could be conducted by the manifestation determination team ("MDT"). The MDT reviewed the student's FBA, BIP, IEP, and a recent

psychological assessment report. The MDT determined that the first four charges were not a manifestation of the student's disability, but charges five through eight were. Accordingly, the superintendent issued an out-of-school suspension from February 3, 2011 through the end of the school year on the first four charges. The IHO upheld both the MDT and superintendent's determinations.

SRO'S DECISION:

First, the SRO engaged in an expansive discussion of the applicable standards relevant to MDRs. Specifically, the SRO noted that courts have not required the MDT to review every piece of information contained in the student's file, rather the MDT must review the information pertinent to its decision. Ultimately the SRO dismissed the appeal as moot because (1) the period of the student's suspension expired, thus, a decision on the merits would have no affect; and (2) the CSE had already convened and developed a new IEP for the student. The SRO then considered the District's cross-claim regarding the IHO's findings that the testimony of the private psychologist and the father were credible. In affording due deference to the credibility determinations of IHOs, the SRO concluded that a complete review of the record did not compel a conclusion contrary to that of the IHO. Therefore, the SRO declined to modify the IHO's credibility determinations.

WHY YOU SHOULD CARE:

Where a student with a disability is subject to a disciplinary suspension, the district's MDT must convene to determine whether the student's misconduct has a direct and substantial relation to his disability. As this decision illustrates, it is acceptable for the MDR and the superintendent's hearing to occur at the same meeting. However, once the student's guilt has been determined, the penalty phase of the meeting must be recessed until the MDT has made a determination. A challenge to an MDT determination may be rendered moot where the student's suspension has expired. Further, a parent's argument that an exception to the mootness argument exists where the conduct complained of is "capable of repetition yet evading review" will likely fail under these circumstances. To be capable of repetition, yet evading review, there must be a reasonable expectation or demonstrated probability of recurrence. Where the conduct complained of relates to an MDR, it will be speculative rather than reasonably expected that the district and parent will be involved in dispute over the same issue.

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3. District Had No Obligation to Reimburse Parents for Transportation To and From Day-Placement Recommended By District.

Application of the Board of Education, SRO Appeal No. 11-069 (July 21, 2011)

SALIENT FACTS:

As part of a student's IEP, he was provided door-to-door transportation to and from the district's recommended 12:1:1 therapeutic day program. In the summer of 2010, an incident involving another student occurred on the bus wherein the other student became physically aggressive. After the school year commenced, the CSE reconvened at the mother's request to discuss the student's transportation schedule. As a result of the meeting, the CSE amended the IEP to shorten the student's bus route, and included a notation on the IEP that "the bus situation was being resolved." Thereafter, the parents began transporting their son to and from the day program. In the parents' demand, they requested that the district provide transportation to their son without the presence of the student involved in the summer incident, and reimburse them for the costs they incurred for transporting their son. Although the IHO found that the student was not threatened by the other student, he ordered the district to reimburse the parents.

SRO'S DECISION:

On appeal, it was undisputed that the student required transportation as a related service. However, the SRO noted that, "there were times when the parents opted to transport their son to his educational placement themselves and chose not to use the available special transportation offered by the district." The SRO wrote, "[a] party must establish more than a *de minimus* failure to implement all elements of the IEP, and instead must demonstrate [a failure] to implement substantial or significant provisions of the IEP such that the district precluded the student from the opportunity to receive educational benefits." The SRO found persuasive the testimony of the bus driver that, although the student involved in the incident would sometimes be verbally abusive to her, he was never physically or verbally abusive to the student. Moreover, the bus driver did not notice any change in the student's behavior after the incident. The SRO concluded, "the effect of the July 2010 incident upon the student does not show that the special transportation provided by the district deviated from the IEP to such a degree that the student was precluded from the opportunity to receive educational benefits at the therapeutic day school." Therefore, the SRO annulled that portion of the IHO's decision, which awarded the parents reimbursement and dismissed the appeal.

WHY YOU SHOULD CARE:

A District may be liable for its their failure to implement an IEP where it has failed to implement a substantial or significant provision of the IEP that has precluded the student from an opportunity to receive educational benefits. However, as this decision illustrates, where the basis of the parents' claim for

failure to implement is a result of the parents' failure to cooperate with the district's attempts to implement the IEP, the district will not be liable.

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4. A CSE's Refusal to Include Private Evaluator's Specific Recommendations in IEP Did Not Render IEP Inappropriate.

Application of the Board of Education, SRO Appeal No. 11-058 (July 7, 2011)

SALIENT FACTS:

A private psychologist offered 14 recommendations in a report developed for a student with a learning disability. These recommendations included, 1:1 specialized intervention to address weaknesses related to her dyslexia, preferably implemented by a reading specialist trained in the Orton-Gillingham methodology, with a focus on phonological and visual processing; a smaller classroom environment with more supports or a classroom with a special education teacher; and increased focus on writing skills.

The Sub-CSE considered the results of a psychoeducational evaluation at its annual review. The Sub-CSE recommended a general education setting, with a 45-minute per day special class in reading in a 2:1 setting, in addition to related services and program modifications, similar to those recommended by the private psychologist (i.e. extended time and preferential seating). For 2010-2011, the Sub-CSE maintained a similar recommendation as it made for 2009-2010. The resulting IEP documented discussions of the student's current functioning and the district's position that, based upon work samples, observations, and benchmark assessments, the student had progressed in and was performing at grade level in all subject areas. The parents disagreed and filed a demand.

SRO'S DECISION:

Regarding the annual goals contained in the 2009-2010 and 2010-2011 IEPs, the SRO concluded that a "review of the student's annual IEP goals...establishes that they contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress or gauge the need for continuation or revision, and contained adequate evaluative criteria." See 8 N.Y.C.R.R. §200.4(d)(2)(iii).

Notwithstanding the student's private psychologist testifying that the CSE's removal of counseling from the 2010-2011 IEP would be detrimental, the SRO disagreed. The SRO found persuasive the psychologist's comments at the end of 2009-2010 that the "student's self-esteem was good, that she was aware that

everyone had strengths and weaknesses, that she was able to identify her own personal strengths and weaknesses." Testimony from the director of special education, the student's regular education teacher, and speech-language pathologist described the student as "bubbly," "ideal," and "confident."

The SRO concluded that because the student had "exhausted" the Earobics computer program, which was the main focus of the S/L consultation, and her articulation did not negatively affect her academically or socially, there was no need to continue the services.

The SRO concluded that the CSE had no obligation to specify methodology in the IEP (i.e. Orton-Gillingham), despite the recommendations made by the private psychologist. The SRO noted that "a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher." On this point, the SRO found persuasive that the student was employing the reading strategies she had been taught.

The SRO rejected the parents' argument that the CSE's refusal to evaluate the student to determine his needs for ESY services resulted in a denial of FAPE. The SRO reasoned that the assessments conducted after the student's winter recess and once after a 5-day break did not demonstrate that the student exhibited substantial regression during breaks from the recommended program. Further, even if the student was improperly evaluated, this deficiency did not rise to the level of a deprivation of FAPE. Specifically the SRO found persuasive the testimony of the student's special education teacher that in order to demonstrate regression after a short break, the student would have had to misspell all of the spelling words that she had previously spelled correctly. Here, that was not the case. Accordingly, the SRO concluded that the district provided FAPE.

WHY YOU SHOULD CARE:

Although CSEs must consider the results of private evaluations, it is not necessary that the CSE incorporate all of the recommendation made therein. Rather, based upon the student's special education needs, the CSE must make an appropriate recommendation. This case also confirms an important point for CSEs - there is no obligation to include specific methodology on an IEP. Generally, teaching methodology is the province of the teacher based upon his or her determination of what works best for the student. It should be noted, however, that for students with autism, ABA is an exception to this rule.

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Case of Interest

1. Parents' Prevailing on Prong 2 Does Not Automatically Entitle Full Reimbursement Where Unilateral Placement Provides Services Beyond What Is Required for Student

C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist., 635 F.3d 1155 (9th Cir., 2011)

SALIENT FACTS:

The guardian ad litem ("Guardian") of a student with a disability sought reimbursement from a District, which failed to provide FAPE, for the full cost of the student's enrollment in a private program ("Center"). Although an ALJ found that the student received significant educational benefits from attending the Center, he declined to award the parents full reimbursement for all of the services rendered by the Center, because the Center did not meet all of the student's educational needs. The district court disagreed and awarded full reimbursement, as IDEA does not require a private placement to provide all services that a disabled student needs in order to permit full reimbursement.

COURT'S DECISION:

The Ninth Circuit Court of Appeals noted that the ALJ's basis for his partial award was that, "the Center could not provide a comprehensive program to meet *all* of [the student's] unique educational needs (e.g., the Center could not instruct him in arithmetic)." However, the appeals court agreed with the district court in noting that it is well settled law that, "[t]o qualify for reimbursement under [] IDEA, parents need not show that a private placement furnishes *every* special service necessary to maximize their child's potential." (*citing* Frank G v. Bd. of Educ., 459 F.3d 356, 365 [2d Cir., 2006]). Therefore, the district was obligated to reimburse the parent for the services provided at the Center. However, the Court wrote, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced, but equity does not require a reduction in reimbursement just because a parent [] cannot afford to give the child everything (or cannot find a program that does)." Therefore, "while the Center did not satisfy all of [the student's] needs, everything that the Center provided was proper, reasonably priced, and appropriate, and the program benefitted him educationally."

WHY YOU SHOULD CARE:

This case reminds districts that where they have failed to provide FAPE, they will be required to reimburse the parents for services provided by an appropriate unilateral placement, even if the private placement has not furnished

every service the student needs. However, this case illustrates another important point. Just because the District has failed to provide FAPE, and the parents have proven that the unilateral placement is appropriate, does not automatically entitle the parent to full reimbursement for all of the services provided by the unilateral placement. This is especially the case where the unilateral placement provided more services than were required to meet the student's special education needs (*cross reference*: Application of the Board of Education, SRO Appeal No. 11-031, at 22 [June 17, 2011] [*citing* C.B. in noting that while parents may be reimbursed for the costs of an appropriate private program, parents may not therefore use the district's failure to provide FAPE as an opportunity to maximize the students' potential at the district's expense).

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