NYSE Directors
Centris Group

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MONTHS IN REVIEW: June – July, 2012

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

This has been a particularly exciting month in special education law. First, the Second Circuit Court of Appeals took note of the fact that IDEA does not articulate a standard for the deference federal courts should afford administrative decisions, and articulated its own standard. No longer will federal courts in this jurisdiction afford administrative decisions from IHOs and the SRO absolute deference. Rather, only those administrative decisions which are thorough and supported by the record will be afforded due deference upon appeal to federal court. Second, after 20 years of New York being the only State in the nation to require additional parent members as mandated members of the CSE, the Legislature has amended the Education Law to repeal this requirement. Now, additional parent members will no longer participate in CSE meetings unless their presence is requested at least 72 hours prior to the meeting.

Second Circuit Court of Appeals

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1. Amount of Deference District Courts Must Afford Administrative Decisions_Depends on the Thoroughness of the Decision.

M.H. and E.K. ex rel. P.H. v. New York City Dept. of Educ., 2012 WL 2477649 (2d Cir., 2012)

SALIENT FACTS:

The Second Circuit Court of Appeals ("Court") reviewed the consolidated cases of two unrelated judicial rulings regarding two children with autism. In the first decision, the court approved the lower court's deference to an IHO's decision. In the second decision, the court explained why the lower court's Magistrate Judge erred in giving the IHO and SRO's opinions too much weight. Both discussions engaged in a thorough analysis of the amount of deference courts must afford to an administrative review, the purpose of IDEA in providing education, and annual goal carryover.

LOWER COURT'S DECISION IN THE FIRST CASE: PARENTS PREVAILED

In the first case, the IHO found that the district denied FAPE and granted the parents' request for tuition reimbursement. The IHO reasoned that the IEP's annual goals were "'generic and vague' and 'not based on [the student's] actual needs and abilities, but on the grade he was expected to be placed in.'" In support of this position, the IHO cited the CSE Chairperson's testimony that she drafted the annual goals for a first grade student rather than a kindergarten student. When she realized after the CSE meeting that the student was entering kindergarten, rather than re-convene the CSE, the Chairperson merely crossed out the "1st grade" reference in the goals and changed it to "kindergarten." In reversing the IHO's decision, the SRO held that the district offered FAPE. The SRO minimally cited to the facts, evidence, or testimony, but reasoned that "...the annual academic goals contained in the IEP were appropriate for [the student] and that they provided meaningful guidance to the teacher responsible for implementing the goals."

The parents appealed this decision to the Southern District of New York ("lower court"). In reversing the SRO's decision and agreeing with the IHO, the court conducted, "a careful rehearsal of the facts, [and] engaged in a point-by-point consideration of the IHO and SRO's decisions." Because "the opinion of the SRO was neither cogently reasoned nor supported by adequate evidence," the lower court rejected it and based its analysis on the reasoning and conclusions of the IHO. Ultimately, the lower court agreed with the IHO that the IEP did not provide a program that would meet the student's needs. Specifically, the lower court concluded that the district's classroom provided insufficient ABA therapy, but the parents' unilateral placement was appropriate. The district appealed from this decision.

LOWER COURT'S DECISION IN THE SECOND CASE: DISTRICT PREVAILED

In the second case, the IHO conducted an extensive review of the testimony, evidence, and transcript in denying the parents' request for reimbursement and finding that the District offered FAPE. Remarkably, the IHO was untroubled by the IEP's "wholesale importing" of all of the student's goals from the previous year. The IHO believed that the goals remained appropriate in light of the testimony that the student learned very slowly. As to the district's recommended program,

the IHO concluded that the 6:1:1 class was appropriate because it would "enable [the student] to make some success, improve his skills, and get individualized assistance, with people who understand autism." As a result, the IHO denied the parents' request for tuition reimbursement.

In dismissing the parents' appeal, the SRO summarized the factual and procedural history "at some length" and "briefly considered the parties' arguments." The SRO failed to discuss any procedural or substantive arguments individually. Instead, he reiterated the language of IDEA's implementing regulations and stated that "he [found] no need to modify the IHO's decision."

The Parents appealed to the lower court, which appointed a Magistrate Judge to review the case and make recommendations about its disposition. In affording deference to the administrative decisions, the Magistrate Judge recommended that the lower court deny the parents' appeal, and thereby affirm the IHO's finding that the District provided FAPE. The Magistrate Judge wrote,

> [T]his Circuit leaves little room to analyze substantive deficiencies in the evidence presented by the [District] at the hearing. Instead, case law appears to indicate that as long as the [District] is able to produce an expert to support its position at a hearing and received a positive determination by at least one of the administrative officers, the [District's] position is nearly assured victory in the federal courts.

The Magistrate Judge expressed skepticism that all 22 pages of goals and short-term objectives were reviewed during the 45-minute CSE meeting. Further, he agreed with the Parents that it was doubtful that the student would make progress under the IEP which did not recommend ABA, especially given testimony from those who met and evaluated the student that he required ABA to progress. Nevertheless, in applying his articulated deference standard, the Magistrate Judge deferred to IHO and SRO's decisions and recommended that the court dismiss the parent's appeal. The lower court accepted this recommendation.

SECOND CIRCUIT COURT OF APPEALS DECISIONS:

***Deference Owed to Administrative Findings*:**

Under the two-part inquiry established by IDEA, which was expanded by the courts to a three-part inquiry, to review state administrative decisions, the court must first ask whether the State complied with the procedures set forth in IDEA when developing the IEP. Second, the court must ask whether the IEP developed through IDEA procedures is reasonably calculated to enable the child to receive educational benefits. The Circuit Court explained, "[i]f an IEP is deficient - either procedurally or substantively - the court must inquire whether the private schooling obtained by the parents for the child is appropriate to the child's needs."

In contemplating the appropriateness of the private school, the court considers the third inquiry of whether relevant equitable considerations exist, which relate to the reasonableness of the action taken by the parents.

The Circuit Court noted that, although Rowley answered several questions, it "left many issues unresolved, including: How much weight is 'due' to the administrative rulings?" Accordingly, the Circuit Court reviewed cases addressing this issue. In Gagliardo, 489 F.3d at 114, the court held that a state administrative finding does not merit deference unless it is "reasoned and supported by the record." In Walczak, 142 F3d at 123, the Court concluded, "at least in cases where the substantive adequacy of the IEP is challenged, the district court's review is limited to an examination of 'objective evidence' indicating whether the child is likely to make progress or regress under the proposed plan." In Grim, 346 F.3d at 380, the Court concluded that the district court had not applied the proper standard in rejecting both the IHO and SRO's findings that the IEPs were appropriate. Specifically, the lower court chose between the views of conflicting experts on controversial issues of educational policy (i.e. effective methods of educating dyslexic students) in direct contradiction of state administrative officers who heard the same evidence. As such, the Second Circuit felt that the lower court had exceeded its authority by failing to give deference to the IHO and SRO opinions.

***Decision in the First Case (Parents Prevailed in the Lower Court)*:**

As a preliminary matter, the Court articulated the purpose of IDEA, despite the fact that the statute failed to articulate any specific level of educational benefits that must be provided through an IEP. The court wrote, "the purpose of [IDEA] was 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.'"

The court explained,

> Where the IHO and SRO disagree, reviewing courts are not entitled to adopt the conclusions of either state reviewer according to their own policy preferences or views of the evidence; courts must defer to the reasoned conclusions of the SRO as the final state administrative determination. However, when (as here), the district court appropriately concludes that the SRO's determinations are insufficiently reasoned to merit that deference, and in particular where the SRO rejects a more thorough and carefully considered decision of an IHO, it is entirely appropriate for the court, having [] found the SRO's conclusions unpersuasive even after appropriate deference is paid, to consider the IHO's analysis, which is also informed by greater educational expertise than that of judges, rather than to rely exclusively on its own less informed educational judgment.

The Court noted that the lower court declined to defer to the SRO's conclusory reversal of the IHO's determination regarding the annual goals. The SRO stated only that the goals "comprehensively addressed [the student's] needs in 'the relevant areas'" without actually analyzing the measurability of the student's academic goals as the IHO had. The Court of Appeals held that,

> The district court's decision to disagree with the SRO was proper. This was not a situation in which the court credited the conclusions that were most consistent with its own subjective analysis…Rather, the court assessed whether the SRO's conclusions were grounded in a 'thorough and careful' analysis. The court rejected them only when it found that they were not supported by a preponderance of the objective evidence."

Despite the IHO determining that the blanket substitution of "kindergarten" for "1st grade" in the annual goals led to the conclusion that the annual goals were not individualized and inaccurately reflected the child's special education needs, the SRO ignored this issue. Moreover, beyond concluding that all of the "79 short-term objectives" were appropriate to meet the student's needs, the SRO failed to thoroughly address or consider the appropriateness of the short-term objectives. Accordingly, the Court affirmed the lower court's decision to reject the SRO's findings, and defer to the well-reasoned conclusions of the IHO that the district denied FAPE.

Because the SRO found that the district offered FAPE, he did not address the appropriateness of the unilateral placement. However, upon finding against the district on the question of FAPE, the lower court deferred to the IHO's well-reasoned conclusions that the private school met the student's needs. On appeal, the school district argued that the private placement was inappropriate because it did not provide related services during the school day. The Circuit Court rejected this contention, holding that, "although the related services do to some extent enhance [the student's] learning ability, there is nothing in the record to suggest that it is necessary that they be provided during the school day in order for [the student] to receive appropriate benefit from them." Regarding the student's need for mainstreaming, the Court noted that in the district's school, the special education children use a separate entrance, eat in a separate cafeteria, and do not share academic classes. However, at the unilateral placement, the special education class is located within a mainstream school building and the student participated in two non-academic classes with general education children. Accordingly, the Circuit Court affirmed the lower court's determination that the IHO had properly held that the private school was appropriate.

Next, the court addressed whether the IHO exceeded the scope of her review by addressing issues regarding teaching methodology. Generally, the party

requesting the due process hearing can only raise issues at the hearing that were raised in the complaint, unless the other party agrees. The other party may demonstrate their agreement be raising issues at the hearing that were not raised in the due process complaint. Here, the district raised the issue of teaching methodology in its opening statement and through testimony elicited by its first witness. However, claims regarding teaching methodology were not raised in the Parents' complaint. When, at the hearing, the parents attempted to rebut the district's claims regarding teaching methodology, the district objected on the grounds that these claims were not raised in the complaint, and therefore, the parents were foreclosed from raising them. However, the IHO, lower court, and the Circuit Court agreed that the district "opened the door" to the issue of teaching methodology, therefore, the parents could respond.

***Second Decision (District Prevailed in the Lower Court)*:**

Although the Circuit Court agreed that the Magistrate Judge was too deferential to the administrative review process, in applying the correct deference standard, the Circuit Court affirmed the lower court's decision, and thereby, agreed with the Magistrate Judge's recommendation.

First, the Circuit Court addressed the procedural compliance issues. The parents alleged that they waived the participation of a parent member under duress, and that the absence of such a participant denied them active participation in the IEP development. Because the parents failed to offer any evidence of duress besides their own testimony, which the IHO heard and found unpersuasive, the Circuit Court deferred to the IHO and SRO's findings. Next, the Court addressed the parents' argument that the district's photocopying of goals from a prior IEP, and incorporating them into the new IEP, violated IDEA's requirement that an IEP include appropriate, measurable goals. The Circuit Court agreed with the Magistrate Judge that the photocopying was disturbing. However, the Circuit Court concluded that the IHO's determination that the photocopying remained sufficient was based in part on district staff testimony that the goals, although a year old, remained appropriate for the student who learned slowly. As such, because the IHO, who had the benefit of hearing and weighing witness testimony on this issue, concluded that the photocopied goals were immaterial, the Circuit Court concluded that deference was properly due to this determination.

Next, the Circuit Court addressed the substantive adequacy of the IEP. The Chairperson testified that she chose the 6:1:1 program instead of the ABA program because it would address the student's need for careful supervision. The IHO credited the testimony that the CSE wanted the student to be in a classroom as much as possible, and that providing therapy in the classroom afforded the opportunity for the therapist to conduct indirect consultant teacher services. In disagreeing with the IHO's credibility assessment, the Magistrate Judge noted that the only people who had met and evaluated the student insisted that he required

1:1 ABA. Nevertheless, the Magistrate Judge deferred to the determinations of the IHO and SRO.

In applying a different reasoning, the Circuit Court noted that the IHO's determination was based on his assessment of credibility of the witnesses testifying before him and his own understanding of educational methodology. As such, the Circuit Court determined that he was entitled to deference. Further, the Circuit Court held, "[w]hile the court may have doubts about the IHO's credibility assessment, it did not have further evidence on the basis of which to challenge this determination." Accordingly, although there was conflicting evidence regarding what methodology would benefit the student, the Circuit Court deferred to the IHO's determinations on this matter.

WHY YOU SHOULD CARE:

While loving parents may desire the best education for their child, the purpose of IDEA is to "open the door" of public education to children with disabilities. IDEA does not require that children receive the best or most expensive education that the parents desire. Rather, they are entitled to an appropriate education.

IDEA does not provide a standard for the deference owed to administrative decisions. Rather, case law has carved out a flexible standard. Specifically, district courts must defer to the decisions of administrative officers only when those decisions are well-reasoned and supported by facts. When a district court appropriately concludes that the SRO's determinations are insufficiently reasoned to merit that deference, and in particular where the SRO rejects a more thorough and carefully considered decision of an IHO, it is appropriate for the court to reject the SRO's conclusions, and to consider the IHO's analysis. This is especially so, because the IHO's decision is considered to be informed by greater educational expertise than that of federal judges. As such, under these circumstances, the court should not rely exclusively on its own educational judgment or preference. Based upon the Circuit Court's decision, it appears that deference owed to either the IHO or SRO depends upon the level of educational expertise required to make that decision.

When the district presents its case to the IHO, the record must be clear and must contain evidence to substantiate the district's position. Moreover, at both the IHO and SRO level, the district must preserve its procedural and substantive arguments. When a court defers to the administrative determinations, it defers on all aspects of the IHO or SRO decision. Although appeals may give you a second bite at the apple, deference may deprive you.

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2. Failure to Consider Last Year's Progress Invalidates New IEP.

E.S. and M.S. ex rel. B.S. v. Katonah-Lewisboro Sch. Dist., 2012 WL 2615366 (2d Cir., 2012)

SALIENT FACTS:

For 2006-07, a high school student diagnosed with schizoaffective disorder and borderline intellectual functioning, was parentally placed in a private school. For 2007-08, the CSE convened to develop the student's IEP. On the basis that the student made little progress at the private school, the CSE which convened to develop the student's IEP for 2007-08, ignored progress reports and teacher reports from the private school. The District contended that the student's "lack of progress" [at the private school] justified the IEP it designed for 2007-08.

COURT'S DECISION:

The Court of Appeals affirmed the district court's decision that the school district offered FAPE during 2006-07, but denied the student FAPE during 2007-08. The Court of Appeals noted that the district court found that the student was making progress (despite his low test scores) while he attended school in the district prior to 2006-07. Further, the district noted that the progress reports, along with the testimony of the student's special education teacher, "establish[ed] by a preponderance of the evidence that the student was progressing while in the district and was likely to continue doing so if he remained there." The Court noted that "[w]hile [the school district] may not have provided [the student] an optimal education [while enrolled in the district]...IDEA requires only a 'basic floor of opportunity.'"

However, the court held that the 2007-08 IEP failed to offer the student the opportunity for more than trivial advancement. The court held that an IEP must reflect the student's progress in the previous school year, regardless of where the student attended school. Failing to do so may result in a program that does not afford the student an opportunity for meaningful progress, as was the case here. The Circuit Court noted that, although the student continued to progress at the private school, the CSE failed to take this into consideration when developing the 2007-08 IEP, and the IHO and SRO failed to consider this progress in their determination that the district offered FAPE. Progress reports from the student's private school teachers, as well as standardized test scores and expert evaluations, indicated that the student made progress in communication skills, social skills and in almost every academic area. Instead of considering these reports, the CSE considered the report of its evaluator who had never observed or met with the student or otherwise attempted to evaluate him while he was at the private school. As such, the Court concluded that the 2007-08 IEP, having been designed without considering the student's progress at the private school was likely to cause the student to regress or make only trivial advancement.

More troubling to the court was the repetition of annual goals and short-term objectives from the 2006-07 IEP to the 2007-08 IEP. The private school's report detailed student progress on his goals and objectives during 2006-07. However, the 2007-08 IEP did not reflect this progress. The lower court held that the CSE should have tailored the 2007-08 goals and objectives to take into account the objectives the student had already achieved rather than merely repeating these objectives and anticipating that the student would continue to work on them.

Because the Court determined that the district denied FAPE, it continued to assess the appropriateness of the private school. The Court found that the private school developed an IEP in which he achieved success in meeting his objectives. Because the District denied FAPE, the Court reasoned that the parents were justified in keeping the student in the private school, and affirmed the district court's order that the parents were entitled to tuition reimbursement for 2007-08.

WHY YOU SHOULD CARE:

Obviously, CSEs are obligated to consider a student's progress during the previous school year when developing an IEP for the following school year. This is true even where the student has been parentally placed during the previous school year. Where the District has not evaluated or observed the student while he or she was parentally placed during the previous year, it would be imprudent for the CSE to ignore the private school reports or assessments regarding the student's performance during the previous year. While the District may wish to observe, or otherwise evaluate the student at the private school, it may not always be feasible to do so. This is especially so when a student has been parentally placed in a remote location. Under these circumstances, in preparation for the CSE meeting, the District should request progress or teacher reports, report cards, results of school-administered standardized testing, or the results of any other tests administered by the private school and participation by representatives of the private school who can provide anecdotal information. Reviewing these reports will give the CSE a picture of the student's current needs and abilities so that the CSE may develop an IEP that accurately reflects the student.

Federal District Courts

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1. Deliberate Indifference to Peer-on-Peer Harassment Results in District Liability.

Preston v. Hilton Central Sch. Dist., 2012 WL 2829452 (W.D.N.Y., 2012)

SALIENT FACTS:

Parents of a student with Asperger's claimed that for nearly one school year, the student's classmates in two classes repeatedly taunted him with profanity-

laced insults, which included references to his autism and intellectual disabilities. Specifically, the parents alleged that students had made comments to the student such as, "fuck you, you autistic piece of shit" and "fucking retard." The parents maintained that they reported the comments to various district employees by phone, email and during in-person meetings. The parents alleged further that the district failed to investigate or attempt to stop the harassment. On two separate occasions, after the parents complained about the harassment to the school principal, an aide was assigned to accompany the student to the classes in which he was bullied. However, the aide's presence had no effect, and after a few weeks, the aide stopped accompanying the student. This was the extent of the district's intervention. At no time did the student's teachers or aide, when present during the bullying, either discipline the bullies or otherwise intervene to limit or control their misconduct. In their complaint, the parents alleged that "the district, by and through the actions of its agents, was deliberately indifferent to the disability-related harassment of [the student] by other students, such that the district acquiesced in [the student's] harassment, and became liable for it."

COURT'S DECISION:

As a preliminary matter, the Court noted the difference between IDEA and Section 504 of the Rehabilitation Act. The Court wrote, "in contrast to IDEA, which is designed to address incorrect or erroneous special education plans, the ADA and the Rehabilitation Act address discrimination against disabled students." A *prima facie* case under Section 504 has three-prongs. Specifically, the plaintiff must show: (1) that he is a qualified individual with a disability; (2) that the defendants are subject to Section 504; and (3) that he was denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant by reason of disability. For peer-on-peer harassment in the school setting, the student does not need to be physically prevented from access. Rather, the court explained,

> [T]he student must establish that harassment by students that is so severe, pervasive, and objectively offensive, and that so undermines and distracts from the victim's educational experience that the victim-student [is] effectively denied equal access to an institution's resources and opportunities.

The district argued that the parents did not sufficiently allege that the district-defendants discriminated against the student solely by reason of his disability, and as such, the Section 504 claims should be dismissed. However, in similar peer-on-peer harassment cases under Title IX, the Supreme Court has explained that individual defendants need not be, themselves, motivated by discriminatory animus. Rather, liability for discrimination may be imputed to teachers and administrators for students' peer-on-peer harassment where the district-defendants "displayed 'deliberate indifference' to the underlying harassment, where the harassment itself [is] motivated by discriminatory animus"

(*citing* Davis, 526 US 629, at 643-644). In light of the allegations that district staff failed to act on the numerous reported and observed instances of peer-on-peer bullying of the student on the basis of his disability, thereby acquiescing to the harassment, and imposed no discipline on the harassers, the court found that the Parents' claims survived the district's motion to dismiss. Specifically, the court held that the allegations sufficiently stated a claim that the district acted with deliberate indifference and that this failure to act denied the student access to educational opportunities.

WHY YOU SHOULD CARE:

Especially in the wake of the implementation of DASA, districts must be more cognizant and proactive when faced with claims of disability-related bullying and harassment within the school setting. As you know, DASA requires districts to investigate all verbal or written reports of harassment, bullying and discrimination. See Education Law §13(3); 8 NYCRR §100.2(kk)(1)(ix)(2)(ii)(a). The failure to investigate reports of alleged harassment may not only result in a violation of DASA, but it may satisfy the "deliberate indifference" standard required for a Section 504 discrimination claim. This is the case even if the failure is not motivated by discriminatory animus. The Second Circuit has made clear that it is not necessary to prove that the district-defendant fully appreciated the harmful consequences of the discrimination. Instead, deliberate indifference may be found when the district's response to known discrimination is clearly unreasonable in light of the known circumstances. See Gant v. Wallingford Bd. Of Educ., 195 F.3d 134, 141 (2d Cir., 1999). As such, it is imperative that all claims of disability-related harassment in the school setting are thoroughly investigated and when harassment is found, that steps be taken to bring it to an end. Failure to do so may result in the district being liable for a violation of DASA and discrimination against the student on the basis of disability.

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2. Court Refuses to Hear Parents' Explanations for Belated Filing of Due Process Complaint Resulting From District's Failure to Provide Procedural Safeguards Notice.

R.B. ex rel. A.B. v. Dep't of Educ. of the City of New York, 112 LRP 38281 (S.D.N.Y., 2012) (*cross ref*: R.B., 2012 WL 2588888 [S.D.N.Y., 2012])

SALIENT FACTS:

The Parent of a student with a traumatic brain injury failed to file his request for an impartial due process hearing within the statutorily permitted two-year limit. Although the CSE recommended an out-of-district residential

placement for 2006-07, by September of 2006, the district had not secured a specific placement. As such, the parent unilaterally enrolled the student in a private school. The parent did not file his demand for an impartial hearing seeking reimbursement until March of 2009, two and a half years after the time the parent knew of the district's violation. The IHO denied the district's motion to dismiss on the grounds that the complaint was untimely, found that the district's failure to file an Answer to the complaint waived the untimeliness affirmative defense, and awarded the parent reimbursement. On appeal, the SRO reversed the IHO's decision and concluded that the failure to raise the untimeliness affirmative defense in an Answer did not waive the defense. Because the parent's claims arose no later than September of 2006, when the student was unilaterally enrolled, the parent had until September of 2008 to bring his claim for reimbursement and the due process complaint filed in March 2009 was therefore untimely.

On appeal, the parent urged the federal court to reverse the SRO's decision. The court pointed out that where a parent seeks reimbursement based on an alleged denial of FAPE, the claim generally accrues when the parent enrolls the student in the unilateral placement. In this case, the enrollment occurred in September 2006. The court rejected the parent's argument that the parent could not have known for certain until the end of 2006-07 that no placement was forthcoming for the school year. Once the student began attending the private program at the beginning of 2006-07, the parent was on notice that he faced a substantial monetary loss because of his decision. The parent clearly had reason to know of his injury in September 2006 when he committed to sending the student to the private school of his choice despite the attendant economic risks. An exception to the two-year statute of limitations applies where the District has withheld information from the parent it was required to provide. The parents argued that this exception applied because the District failed to provide him with a copy of the procedural safeguards notice at the CSE meeting convened to develop the 2006-07 IEP. However, the federal court held that this failure was not fatal as long as the district provided the notice once per year. As such, the court dismissed the appeal.

COURT'S DECISION ON MOTION TO RECONSIDER:

The parent filed a motion requesting that the court reconsider its decision. Upon reconsideration, the court noted that the parent modified his argument. Specifically, now the parent claimed that the district *never* provided him with his procedural safeguards notice during 2006-07. However, the Court pointed out, because the parents failed to make such a claim at the administrative level, the Court was now prevented from considering that argument on appeal.

Nevertheless, the parent filed a second motion for reconsideration (R.B., 112 LRP 38281). Here, the Court noted that its refusal to hear the parents' reimbursement case might have "significant adverse ramifications" for the student.

Nonetheless, the Court declined to revisit its previous rulings that the parents' due process complaint was untimely.

WHY YOU SHOULD CARE:

Districts must provide parents with a copy of the procedural safeguards notice at least once per year and also:

(1) Upon initial referral or parental request for evaluation;
(2) Upon the first filing of a due process complaint notice to request mediation or an impartial due process hearing;
(3) Upon the parent's request;
(4) Upon a decision to impose a suspension or removal that constitutes a disciplinary change in placement; and
(5) Upon the first receipt of a State Complaint. 8 NYCRR §200.5(f)(3).

The procedural safeguards notice explains parents' rights under IDEA, one of which includes the right to file a request for an impartial due process hearing. Parents have two years from the date they knew or should have known about the alleged action that forms the basis of their complaint. 8 NYCRR §200.5(j)(1)(i). However, the two-year timeline does not apply if the parent was prevented from requesting the hearing due to specific misrepresentations by the district that it had resolved the problem forming the basis of the complaint, or because the district withheld information from the parents it was required to provide. Parents may argue that the two-year timeline does not apply where the district has failed to provide the procedural safeguards notice, a document it is required to provide. Where the district has failed to provide the procedural safeguards notice when required to do so, the parent may argue that the timeline for filing a demand should not apply. As such, districts should be diligent about providing the procedural safeguards notice at the required time and should keep adequate records of having done so.

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State Review Officer

1. A District's Failure to Provide Transportation Denies FAPE.

Application of the Board of Education, Appeal No. 12-082 (2012)

SALIENT FACTS:

On behalf of a foster care parent of a child with autism, the private foster care agency, which held legal custody of a student with autism, filed a demand for due process challenging the CSE's refusal to recommend door-to-door transportation on the student's IEP. The IHO held that the district denied FAPE by failing to recommend transportation. Specifically, the IHO found that the

student's disabilities were such that he required special transportation to address his behavioral, communication and health needs. Accordingly, the IHO directed the CSE to reconvene to determine the type of transportation the student required and amend the IEP to reflect same. However, the IHO refused to award the parents reimbursement for the costs associated with providing the student transportation in the past as this request was not part of the Complaint.

SRO'S DECISION:

On appeal from the IHO's decision, the district argued that because the student did not have any mobility impairments or physical disabilities, he was not entitled to special transportation. Further, the district argued that because the vast majority of students in the district either walked to school or are driven by their parents, the student should be held to the same standard.

First, the SRO addressed the issue of standing. IDEA authorizes parents to request impartial hearings. The district argued that in this case, neither the foster parent nor foster care agency satisfied the definition of a "parent." As such, the district argued that neither was authorized under IDEA to bring the action, and therefore, both lacked standing. The law defines "parent" as "a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent)." See 34 CFR §300.30(a)(2); 8 NYCRR §200.1(ii)(2). However, the district argued that the biological father's parental rights had not been terminated, thus there was a presumption in favor of the biological parent. The SRO noted that foster parents are qualified to act as parents, and there was no indication that the student's biological father attempted to act as a parent under IDEA to any extent. Therefore, the SRO determined that the presumption in favor of the biological father did not apply. Accordingly, the SRO concluded that the foster parent had standing to bring the claim, and therefore the foster care agency had standing to bring the claim on the foster parent's behalf.

Regarding the underlying transportation issue, the SRO noted an 11th Circuit Court decision where the court held, if the student cannot access his or her special education without provision of a related services, such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (*citing* Donald B v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir., 1997]; see also VESID Memo, "Special Transportation for Students with Disabilities [Mar. 2005] [SED advising that CSEs should consider a student's mobility, *behavior*, communication, physical and health related needs when determining whether a student requires transportation as a related service]).

The CSE discussed the fact that the student scored extremely low in the areas of communication, health and safety and adaptive behavior. Further, the student required constant reinforcement to follow rules, was highly distractible, had difficulty focusing, and had difficulty with self-control, including

noncompliant and impulsive behavior. The SRO rejected the district's argument that the CSE had no evaluation or observable reports that would indicate that his disability had an impact on his ability to ambulate to and from school. District staff testified that they were unaware of which or how many streets the student would have to cross to reach his neighborhood school, or whether he could recognize traffic signs or their significance.

Based upon the evidence regarding the student's attentional deficits, his lack of appreciation of environmental dangers, and district staff testimony that the student was incapable of walking to school on his own, unlike other students his age, the SRO disregarded any argument that the student did not have mobility issues. As such, the failure of the CSE to consider the student's other deficits, which would warrant special transportation, resulted in the district denying the student FAPE when the CSE did not recommend transportation.

WHY YOU SHOULD CARE:

Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education. State law defines special education as "specially designed instruction...and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs." See Education Law §§4401(1); 4402(4)(a). When determining whether a student is entitled to special transportation, CSEs may be inclined to limit its consideration to a student's ambulatory difficulties. However, where a student has behavioral, cognitive or other deficits, which render it dangerous or unsafe for the student to walk to school, CSEs should also consider these needs.

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Amendment to the Special Education Law

Education Law §4402(1)(b)(1)(b).

Effective August 1, 2012, the Education Law has been amended to remove the requirement that CSEs include an additional parent member unless this individual's attendance is requested at least 72 hours prior to the meeting. The attendance of the parent member may be requested, in writing, by the parent, a person in parental relationship to the student, the student or another member of the CSE. The law requires that districts provide the parents/guardians with written notice of their right to elect to have an additional parent member attend CSE meetings. The notice must be accompanied by a statement prepared by the State Education Department ("SED") that explains the role of having the additional parent member at a CSE meeting ("Statement").

As of the date of this publication, SED has ***not*** published this Statement. As such, notwithstanding this amendment being effective immediately, we caution

districts against implementing this provision until SED has published the statutorily-mandated Statement. It is our recommendation that districts continue treating additional parent members as mandated members, inviting them to attend CSE meetings and listing them on the corresponding Meeting Notices. Failure to do so without providing parents with SED's Statement and written notice of their right to have the additional parent member attend the meeting clearly violates the law. As such, we recommend that districts continue to invite parent members to CSE meetings until SED has released the statutorily-mandated Statement. We have been advised that this Statement should be available by the start of the 2012-13 school year.

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Special Education Bill Vetoed

Bill No. A-10722A.

Congratulations to the Long Island Association of Special Education Administrators, Inc., Council of New York Special Education Administrators, the New York State PTA, The New York State Council of School Superintendents, and a multitude of Boards of Education across the State who were instrumental in convincing Gov. Andrew Cuomo to veto this special education Bill. The Bill would have reshaped the way CSEs across the State consider students' needs and ultimately make placement recommendations. Among other things, the Bill would have required CSEs to consider a student's "home environment and family background" when deciding on an appropriate program for students with disabilities. In doing so, the CSEs would undoubtedly have had to consider students' religious preferences. However, as a result of Gov. Cuomo's July 31, 2012 veto, the Bill has ***not*** become law.

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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.

