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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review two decisions of the Second Circuit Court of Appeals, a decision from the Federal District Court in the Southern District of New York, one appeal from the Office of State Review ("SRO"), and an Opinion Letter from the United States Department of Education, Office of Education and Special Services ("OSEP").

In one Second Circuit Court of Appeals decision, the Court reiterates its strong preference for parents to exhaust their administrative remedies, even in situations where the parent has not alleged an IDEA violation. In the other, the Court further limited the situations in which retrospective testimony of an alleged inappropriate placement would be considered while considering services provided in an earlier school year. The Southern District Court of New York reversed an IHO determination in which the IHO raised issues on her own accord in order to find the school district failed to offer FAPE. In a decision on an administrative appeal, we look at how the SRO untangled a complicated series of hearings for a youngster, ultimately determining that the student's present levels of functioning, and the parties' subsequent efforts to appropriately place the child, mandated a limited award of compensatory education. Last, we analyze a troubling opinion letter from OSEP which seems to suggest a way parents may be represented by an attorney or advocate at a CSE meeting while denying the same opportunity to school districts.

Second Circuit Court of Appeals
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I. Parent's ADA and Section 504 claims Subject to IDEA Exhaustion Requirements.

***L.K. v. Sewanhaka Central High Sch. Dist.*, --- Fed.Appx. --- , 2016 WL 853433 (2d Cir 2016)**

SALIENT FACTS:

Two high school-aged children were diagnosed with chronic fatigue syndrome in 2009. The parent requested that the district provide home instruction following the diagnosis. The district initially denied the request, although approved it two-years later. The parent brought an action in federal court alleging disability discrimination under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act ("ADA"), and Equal Protection claims because her children lost two years of schooling due to the district's denial of the parent's request for home instruction.

COURT'S DECISION:

The Second Circuit Court of Appeals affirmed the District Court's unpublished decision in its entirety, holding that the parent's ADA and Section 504 claims were subject to the exhaustion requirements of IDEA. The court found that a claim of missed educational opportunity is exactly the sort of individualized claim that IDEA broadly addresses, noting that the parent received her Section 504 procedural safeguard notices when the district first declined to provide home instruction. The Court concluded that as long as relief is *available* under IDEA, a parent must first exhaust her administrative remedies before submitting disability discrimination claims to the courts for adjudication.

The Second Circuit dismissed the parent's Equal Protection claims that the district conspired against the children to deprive them of their educational rights. The court held that the parent's claim was vague, amounting to little more than a suggestion that a conspiracy existed based purely on the fact that all alleged members of the conspiracy were employees of the same school district.

While not clear from the decision, it would appear that the parent filed her claim because her IDEA and Section 504 statutes of limitations had expired. Some novel theory was required to skip over the well-settled exhaustion requirement. The equal protection claim, i.e. that the district engaged in a nefarious conspiracy to circumvent the law and deprive children of home instruction, appears to be the theory upon which she relied.

WHY YOU SHOULD CARE:

This case is also a reminder of the difficulty of managing parents' expectations. The district was eventually successful in defending against the claim; however, the costs of litigation might have been avoided, or at least minimized, by helping the parent to better understand her options to support her children under Section 504.

Hearing procedures apply to many complaints a parent may have about the provision of educational services by school districts, whether under IDEA or Section 504. School districts should maintain a practice of providing families with their various procedural safeguard notices whenever a parent requests a change in educational services, whether due to disability, health, or any other basis, and not rely on the annual calendar or website publication of those notices. Here, the district was able to demonstrate it provided the parent with those safeguard notices, and the court stressed the importance of the exhaustion requirement and the importance of developing an administrative record. An ounce of prevention, providing the parent with the procedural safeguard notice, proved to be worth a pound of cure.

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II. District's Robust IEP Survives Challenges Despite Failure to Offer Parent Training.

***J.C. v. New York City Dept. of Educ.*, --- Fed. Appx. ---, 2016 WL 1040160 (2d Cir. 2016)**

SALIENT FACTS:

A student classified with a speech and language impairment and diagnosed as autistic had attended the Rebecca School from 2006-07 through 2010-11. The parents signed an enrollment contract in January 2011 for the student to attend the Forum School ("Forum") for the 2011-12 school year. In March 2011, the CSE convened and recommended a 12-month, 6:1:1 setting after considering less restrictive small class settings. The student's mother requested a setting with more high functioning students. After the meeting, the parents received a "deferred placement notice," which entitled the student to an immediate placement in the district on request, but that otherwise the IEP would go into effect July 2011.

Upon receiving the placement notification (dated June 10, 2011), the parent called the proposed placement on June 16, 2011 to set up an appointment to view the setting. She was unable to do so. She wrote to the district indicating that she was told by the transportation coordinator that the recommended placement would be closed for the summer. The parents challenged the CSE's 2011-12 IEP and placement recommendation at an impartial hearing, requesting tuition

reimbursement for the student's attendance at Forum.

ADMINISTRATIVE DETERMINATIONS:

After eight days of hearing, the IHO held that the district failed to offer the student FAPE, finding that 1) the district failed to timely notify the parents that the student's placement recommendation had changed to an alternate site; 2) the district failed to demonstrate the student would benefit from a 6:1:1 program; 3) the recommended placement would not have contained a functional peer group; and 4) the District failed to respond to the parents' concerns regarding the placement. The IHO found that the parents' unilateral placement was appropriate for the student's needs and that the equities supported tuition reimbursement. The District appealed the IHO's decision, and the parents cross-appealed for a ruling that the district failed to offer FAPE for failure to conduct an FBA, develop an appropriate transition plan, or offer parent counseling or training. The SRO reversed the IHO's decision and found that the district offered the student FAPE.

DISTRICT COURT'S DECISION:

The parents appealed to the Southern District of New York which upheld the SRO's decision. The court held that despite not conducting an FBA, the CSE considered the student's behavior and management needs. Moreover, the Rebecca witnesses – who were familiar with the student's performance from the previous school year and before the student entered Forum – testified in the underlying hearing that the student's behaviors did not seriously interfere with instruction. The Court reasoned that there was no support for the parents' claim that a behavior plan was necessary, or that the District should have conducted an FBA to address "minor behavioral issues." Similarly, the absence of a transition plan to support the student's move from Forum to the recommended placement was found not to have deprived the student of FAPE, because there is no requirement in the IDEA or case law mandating transition support.

Regarding parent training, the Court found that the failure to provide parent counseling or training was an error. However, its absence had no direct effect on the substantive adequacy of the IEP. The Court noted that the parents had received "extensive parent training in the past and have been actively involved in their child's education, communicating regularly with teachers and service providers." Despite the absence of parent counseling and training on the IEP, and despite the fact that the Commissioner's Regulations require the service, its omission did not rise to the level of a FAPE denial.

Concerning the parents' challenge to the CSE's placement recommendation, the Court noted that, while the parents may be heard on the issue of placement, they have no right to participate in the selection of their child's specific school or classroom. Further, the Court focused on the timing of the parents' rejection,

noting that the 10-day placement letter was sent before the parents' took the opportunity to tour the proposed placement.

COURT OF APPEALS' DECISION:

The Second Circuit affirmed the District Court's decision and upheld the reasoning and decision of the SRO. The Court reiterated that the absence of parent training was a "less serious" omission not rising to the level of a FAPE violation. Similarly, the Court deferred to the reasoning of the SRO concerning the CSE's determination not to conduct an FBA, holding that "so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address the behaviors[,]" FAPE has been offered.

Concerning the parents' challenge to the CSE's placement recommendation, the Court stressed the importance of R.E. and M.O. and the prohibition against considering speculative challenges in special education matters. The Court held that a challenge to grouping, or whether the student would be placed with an appropriate peer group, is *exactly* the kind of speculation that should not be considered.

WHY YOU SHOULD CARE:

The district court's decision took note of how the parents had been engaged in repeated due process hearings with the district for most of the child's educational career. This history appears to have worked against the family on the issue of parent training, where the district court relied on prior years' provision of counseling and training to have relieved the district of the responsibility to provide the service. Typically, this shouldn't happen; the proper lens in considering the appropriateness of an IEP focuses on the four corners of the document. Consideration of what services were offered in previous years does not often factor into a hearing officer or judge's determination. However, this is a reminder that details do matter. These decisions, collectively, may hint at a further move away from "gotcha" games in which parents and clever attorneys engage in an effort to poke holes in an IEP.

For the IEP in question, the committee was able to include a wealth of information from the child's private school providers. Where a child is unilaterally placed in a private school, the CSE should solicit as much participation from private school staff as possible to ensure that the IEP fully describes the student. A full description of the student's abilities and needs, and the supports recommended to address a student's deficits can serve to further strengthen the IEP. Functionally, a "bullet-proof" IEP should be drafted with a "belt and suspenders" approach.

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Federal District Courts
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I. IHO's Decision to Consider Appropriateness of Placement Recommendation *Sua Sponte*[1] Overturned.

***Q.W.H. v. New York City Dept. of Educ.*, 116 LRP 9236 (SDNY 2016)**

SALIENT FACTS:

A student with a variety of diagnoses – including mixed language disorder, ADHD, and a seizure disorder – attended the Cooke Center Grammar School ("Cooke"), a private school not approved by NYSED for the placement of children with disabilities, for a number of years. In February 2012, the CSE convened to review the student's progress, and recommended a twelve- month program in a 12:1+1 setting in a specialized school, along with a host of related services. In August 2012, the parent received notice from the district of the proposed placement to begin in September of that year. The parent visited the placement on the second day of school in September, where she was told by an Assistant Principal that 1) the student was not on the class roster, but would likely be placed in the classroom, as it was the only class available for children on the student's instructional level, 2) the current students' functional abilities ranged from 1st to 7th grades, 3) the paraprofessional would teach small-group instruction, and 4) the student would be the youngest child in the class. After observing the proposed placement, the parent unilaterally enrolled the student in Cooke. The parent then filed for due process, arguing the IEP was procedurally and substantively inappropriate and sought tuition reimbursement for the student's attendance at Cooke for the 2012-13 school year.

ADMINISTRATIVE DETERMINATIONS:

The IHO found that the district offered the student an appropriate IEP at the February 2012 CSE meeting based upon credible testimony of the district's psychologist. However, the IHO found that the district failed to offer testimony concerning the proposed placement, specifically whether there was an actual class for the student to attend, or testimony concerning the number of students in the proposed class. The IHO directed the district to fund the student's tuition at Cooke for the 2012-13 school year.

Both parties appealed to the SRO. The SRO upheld the IHO's rulings as to the IEP and reversed the decision outright – without analysis of the record – as it applied to placement, holding that any challenge in light of R.E. was speculative and not an appropriate basis to justify a unilateral placement when the student

[1] *Sua sponte,"* or of the fact finder's own accord. IHO's are prohibited from considering issues not raised in a parent's due process request unless the district consents to its inclusion.

never attended the proposed placement. The parent appealed to the Southern District Court of New York.

COURT'S DECISION:

The federal district court upheld both the IHO and SRO's decision as each related to the appropriateness of the IEP. Regarding the question of placement, the court stressed that challenges to a proposed placement must not be speculative, and that once an IEP has been shown to offer FAPE, the school district has discharged its burden to demonstrate that FAPE was offered. The court found that the SRO was not entitled to deference on the issue of placement as the SRO's decision did not review the factual record of the underlying hearing to determine whether the parent's issues were speculative or otherwise. Turning to the IHO's decision, the court found that the a) the parent failed to raise the issue that there was no 12:1+1 class in the school in the due process request, and b) even had the parent done so, the remaining allegations were speculative in nature, or rather that the "placement would not have adhered to the IEP."

The court analyzed with particularity each of the placement challenges raised by the parent. First, the court rejected the argument that the school had only one middle school-aged class, with the remaining classes in the school being reserved for high school students – arguably an inappropriate peer group. The court held this was a challenge to the IEP as opposed to whether the district could implement the IEP. Similarly, the challenge to the methodology or curriculum of the proposed classroom was a belated challenge to the content of the IEP rather than any actual issue with the proposed placement. Third, any concern regarding the abilities of the anticipated peer group was found by the Court to be speculative and not ripe for challenge until and unless the student attended the recommended setting.

WHY YOU SHOULD CARE:

Since R.E., various courts in the Second Circuit have moved to focus impartial hearings on the IEP itself. This has had a practical effect of shortening the time it takes to present witnesses and evidence at the administrative level. This case illustrates how, notwithstanding the efforts of parents to argue otherwise, many due process challenges highlight parents' *fears* as to whether a program can be implemented rather than the bona fides of the IEP. This is by definition speculative. The trend over the past couple years has been to rein in the scope of a hearing to examine what actually occurred, focusing on issues like the development of the IEP, the participation and input of the parents, the evaluative bases of the recommendation, and the needs of the child at the time. The Courts have issued increasingly strong warnings as to their disinterest in hearing complaints of what "might" or "could" happen if a student were placed in a recommended program.

Districts should focus on ensuring their CSE's follow IDEA's procedures for developing an IEP. The trend is returning focus to the IEP as the most important result of a school district's efforts to ensure FAPE is offered. In this instance, every level of review found that the IEP was appropriate.

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Office of State Review

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I. Compensatory Education Relief at Hearing Evaporates Under Pendency.

***Application of a Student with a Disability*, Appeal No.15-075 (8/21/2015)**

SALIENT FACTS:

The student diagnosed with autism had received comprehensive services from the district since preschool in the 2011-12 school year. For the 2012-13 school year, when the student was transitioning into kindergarten, the CSE recommended a special class program in a public school setting along with speech and language therapy, occupational therapy, and physical therapy. The parents filed for due process ("Hearing I"), and as part of the student's stay-put placement, the student began receiving 10 hours a week of 1:1 home instruction. For the 2013-14 school year, the CSE met in June 2013 and recommended a 12 month program in a 6:1+1 special class in a specialized school, plus similar related services as had been recommended for the previous school year. The student attended the recommended placement at the public school. The parents filed another due process complaint (Hearing II) which was not consolidated with Hearing I.

For Hearing II, the parents alleged that the CSE based its recommendations on insufficient evaluative materials, failed to provide parent counseling and training or conduct an FBA, failed to offer sufficient levels of speech services, and failed to recommend an appropriate program or provide 1:1 home-based ABA services similar to those the student had received in preschool. The parents sought, among other things, prospective placement at the School for Language and Communication Development ("SLCD"). The student attended the district's recommended program during the course of Hearings I and II.

After the due process complaint for Hearing II was filed, the district reconvened the CSE for the 2014-15 school year and recommended that the student attend a program at SLCD. In addition, a decision was issued in Hearing I in which the IHO ordered the district to amend the IEP to provide 20 hours a week of 1:1 home ABA services, two hours of which were reserved for parent counseling and training, fund an assistive technology evaluation and FBA, reimburse the

parents for the costs of a private neuropsychological evaluation, and provide after-school compensatory education in the form of a) 100 hours of 1:1 speech and language therapy and b) 750 hours of 1:1 ABA services. The district did not appeal the decision in Hearing I. Following the decision in Hearing I, Hearing II continued for another ten months.

HEARING II – IHO'S DECISION:

The IHO held that the district failed to offer the student FAPE for the 2013-14 school year, finding that the CSE had predetermined not to provide home ABA services on the IEP and failed to conduct an appropriate evaluation of the student, neglecting to assess or describe his cognitive functioning. However, the IHO found that the IEP contained an appropriate description of the student's present levels of performance and needs, and that the goals – while lacking socialization goals – were nonetheless appropriate. Inexplicably, the IHO also found that home ABA services offered under pendency were not appropriate for the student, as the services focused on homework completion instead of the student's goals, and that any claim for additional services was moot in light of the pendency award. The IHO found that the IEP was properly implemented; however, the recommended program lacked an appropriate peer group for the student or sufficient communication and socialization opportunities.

The IHO ordered the district to provide compensatory education in the form of a) two stand-alone 45-minute sessions of a "social skills program" to address the inappropriate peer grouping in the 6:1+1 program, and b) 20 60-minutes sessions of parent counseling and training services. The IHO declined to award any additional relief as the placement request was moot in light of the 2014-15 SLCD recommendation, and because home ABA services had been provided under pendency. The parent appealed the IHO's decision, arguing that a) the IHO should have followed the decision in Hearing I as to whether ABA was appropriate for the student, b) the IHO failed to issue a new pendency order following Hearing I's decision by increasing ABA services to 20 hours a week, both moving forward from September 2014 and retrospectively, c) the IHO exceeded his jurisdiction in finding the pendency ABA services were inappropriate, and d) that the student was entitled to compensatory education in the form of ABA and speech and language services for the time before the student began attending SLCD.

SRO'S DECISION:

The SRO held at the outset that the determination in Hearing I precluded no findings made by the IHO in Hearing II. The SRO noted that each hearing dealt with different school years, and that the purpose of the IDEA was to annually consider a student's changing needs. The SRO dismissed the parents' claim

concerning pendency, finding that the IHO did not limit or change the student's pendency award improperly.[2]

The SRO found that the IHO had improperly utilized evidence that post-dated the June 2013 CSE meeting, deviating from the requirement that the appropriateness of an IEP be based on what the CSE knew at the time of the meeting. After considering remand, the SRO determined the limited issues on appeal and the limited nature of the relief sought – along with the length of the two hearings just completed by the parties – did not warrant a return to either IHO.

The SRO also denied the parents' request for compensatory ABA services and speech language therapy, finding that the additional ABA services and speech language therapy were not necessary following receipt of pendency services, and denied the parents' claim for any increase in compensatory relief.

WHY YOU SHOULD CARE:

Compensatory education is one of the most individualized and fact-specific forms of relief under IDEA. This case illustrates the challenges a fact-finder faces in assessing a child's needs following a finding of a FAPE violation. The length of the two hearings for this family illustrates the rationale behind consolidation of the two separate claims before the same hearing officer.

The takeaway for the CSE from this chaotic fact pattern is never to stop working with the family. Tensions often increase during an impartial hearing; positions solidify and tempers may flare. The process is, by design and development, adversarial. Nevertheless, the district must continue to work with the family, even throughout such a trying series of events, to service and evaluate the student, and must continue to hold annual meetings and develop appropriate IEPs.

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Office of Special Education Programs – Advisory Opinion

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I. OSEP Limits Conditions Under Which a CSE Meeting May Be Rescheduled When a Parent Brings an Attorney to the Meeting.

***Letter to Andel*, 116 LRP 85488 (2016)**

[2] The SRO also noted that the parents and the district reached an interim agreement concerning pendency during Hearing II which, among other things, increased the student's ABA services to 20 hours a week, and that this agreement was reached before the issuance of the decision in Hearing I.

The U.S. DOE's Office of Special Educational Programs ("OSEP") recently issued an advisory letter as to what steps a district may take when a parent is accompanied by an attorney to a CSE meeting without giving the district prior notice. In sum and substance, OSEP recommended that a CSE meeting should not be canceled and rescheduled under those conditions unless the parent agrees, and unless there is no delay in services or denial of FAPE from rescheduling the meeting.

HISTORY:

This recent opinion letter is the latest in a string of opinions – merely advisory in nature — describing OSEP's "longstanding opposition to attorneys attending CSE meetings." OSEP first expressed its animosity in the "Q&A" commentary on the 1999 passage of the federal regulations implementing IDEA.[3] In response to Question 29 ("Can parents or public agencies bring their attorneys to IEP meetings, and, if so under what circumstances?"), OESP wrote that the choice to invite attorneys to a student's committee meeting was solely up to the inviting party, premised on whether the attorney possessed "knowledge or special expertise regarding the child." Further, such a determination would have to be made on a case-by-case basis by the parent or district choosing to invite the attorney. OSEP expressed the concern that the invitation of an attorney by either the parent or the district had the potential for creating an adversarial atmosphere and was likely "not in the best interest of the child."

OSEP reiterated this position in *Letter to Clinton* stating that there was nothing in the federal rules (which the Commissioner's Regulations mirror), to prevent a school district from inviting its attorney to a committee meeting. Nonetheless, OSEP offered its opinion that the invitation of attorneys should be strongly discouraged.

CURRENT OPINION:

Recently, OSEP was asked what was permitted if a parent was accompanied to a CSE meeting by an attorney without notifying the district. The question posed was whether the district could insist that either 1) the meeting proceed without the attorney participating, or 2) the meeting be rescheduled so that the district's counsel could attend. At the outset, OSEP noted that while the district must send the parent a list of CSE attendees in advance of the meeting, the parent has no such obligation. OSEP repeated its opinion that the invitation of attorneys should be discouraged.

OSEP observed that the CSE could be rescheduled if the parent agreed as long as it didn't result in a denial of FAPE. If the parent insists on proceeding with

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[3] Assistance to States for the Education of Children with Disabilities and Early Intervention Programs for Infants and Toddlers with Disabilities, Final Regulations, Analysis of Comments and Changes, 64 FR 12478 (Mar. 12, 1999).

the meeting, or if rescheduling would delay services or deny FAPE, rescheduling on the basis of the attorney's presence was not an option.

WHY YOU SHOULD CARE:

OSEP's interpretation grants significant control over a CSE meeting to a parent who brings an attorney or advocate without first notifying the district. Under the OSEP opinion, there is almost no incentive for the parent to give notice, as proceeding with the meeting provides the parent with representation while the district has none. In this scenario, there is also little benefit to the parent agreeing to reschedule the meeting. Any effort to reschedule the meeting over a parent's objection may lead to a finding of a FAPE denial in a subsequent impartial hearing. While the courts or the SRO have yet to interpret this opinion, it certainly appears that OSEP's stance invites an adversarial atmosphere rather than diffuses it and encourages the parent not to provide notification when he or she intends to bring an attorney or advocate.

OSEP failed to explain how allowing a parent to be represented by an attorney, while depriving the district of the same right, avoids the "adversarial" circumstances disdained in their earlier opinion. If anything, this opinion encourages parents to set up a situation where they are represented and districts are left to fend for themselves. A practice or policy which allows one party access to counsel while denying the same right to the other side is unfair and fosters the adversarial relationship OSEP claims it wishes to avoid. In light of this opinion, districts should consider taking a proactive stance and including their counsel in CSE meeting notices when anticipating a contentious meeting and/or in those situations where a parent has previously been accompanied by an attorney or advocate. Should the parent arrive unaccompanied by counsel or an advocate, the district can then make a decision whether to proceed with or without its attorney. Moreover, if the parent does appear with an attorney or advocate, the district will be represented. Under any other circumstance, the district will be denied its right to representation.

The meeting notices to parents can still include a separate note asking parents to advise the Committee whether they intend to be represented at the upcoming meeting. While there is no obligation to notify the district that a parent will be represented, the failure to respond when asked may, along with other evidence, suggest a claim that parents acted in bad faith and may support a finding that the equities weigh against the parents.

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