NYSE Directors
Centris Group

By Jack Feldman

MONTHS IN REVIEW: March – April, 2012

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

In this issue of the "Attorney's Corner", we review salient special education cases and decisions from the Office of State Review. In addition, we also review two federal court cases, one of which deals with the issue of restraint. In this case, the Eastern District federal court found that one district's use of handcuffs as a means by which to restrain a student was reasonable in scope.

Federal District Courts

***

1. A Placement Need Not Be Completely Free From Distractions to Be Appropriate for a Student with Distractibility Difficulties.

J.A. and S.A. ex rel. N.A. v. New York City Dept of Educ., 2012 WL 1075843 (S.D.N.Y., 2012)

SALIENT FACTS:

The parents of a student who had been unilaterally placed in the Aaron School ("Aaron") participated in their child's annual review. Representatives of Aaron participated at the CSE meeting by telephone. The CSE considered updated

Aaron evaluations and observations. The CSE discussed the student's issues with attention and over-stimulation. The CSE considered a 12:1 class. In rejecting this recommendation, the CSE reasoned, "[the student's] need for continuous redirection warrants the additional support of a paraprofessional within the classroom." As such, the CSE recommended a 12:1+1 class with related services and modifications including "access to sensory tools and sensory breaks and water breaks as needed."

COURT'S DECISION:

As to the procedural adequacy of the IEP, the parents alleged that the CSE's failure to include evaluation procedures in formulating the annual goals resulted in a denial of FAPE. However, the court agreed with the SRO that this omission did not interfere with the student's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process or cause a deprivation of educational benefits. Specifically, the SRO noted that the student's proposed placement had evaluative mechanisms in place to assess the student, to measure the student's progress toward his goals and to alter these goals and objectives, if necessary.

As to the substantive adequacy of the IEP, the classroom teacher testified that he accommodated students with attentional and sensory deficits by pre-teaching and allowing frequent breaks. The evidence that the student required constant redirection was insufficient to demonstrate that the recommended 12:1+1 in-district program was inappropriate. The court concluded that the district considered the student's need for redirection and distractibility by placing him in a small, supportive 12:1+1 class. Accordingly, the court found that the IEP was substantively adequate and tailored to enable the student to make educational progress.

WHY YOU SHOULD CARE:

The salient question in determining whether a proposed placement is appropriate is whether educators will be available to meet the student's educational needs in the proposed setting. Where the educators are capable of meeting the student's needs by providing appropriate services and supports, and the IEP appropriately addresses the student's needs, the District will have provided FAPE.

***

2. Restraint Warranted Where 11-Year-Old Student's Behavior Poses a Danger to Others.

E.C. v. County of Suffolk, et al., 2012 WL 1078330 (E.D.N.Y., 2012)

SALIENT FACTS:

An 11-year old student classified as a student with multiple disabilities was restrained while on the playground after exhibiting dangerous behaviors towards other students and staff. The student had a BIP and an IEP, which stated that he needed to be provided with verbal commands more than once. After being asked to stop throwing pebbles, the student held an eight-inch rock over his head. After the teacher assistant asked the student to put the rock down, the student refused. Thereafter, the student became upset and began yelling, running around the playground, attempting to punch staff members and peers, and elbowing staff. The playground security guards, who were not familiar with the student's BIP or IEP, but were aware that the student "'had problems and learning disabilities," and had assisted staff when the student became upset in the past, came onto the scene. The security guards restrained the student for approximately ten minutes by holding him in the seated position on the ground and restraining his arms. Eventually, the student was handcuffed. The Parents alleged that the District deprived the student of his civil rights by, among other things, unlawfully detaining the student and discriminating against him on the basis of his disability.

COURT'S DECISION:

While the court acknowledged that "school officials are subject to the limitations of the fourth amendment, the reasonableness of seizures must be determined in light of all of the circumstances, with particular attention being paid to whether the seizure was justified at its inception and reasonable in scope." The parents argued that the seizure was not justified in its inception because the student's known disabilities required the implementation of his BIP and IEP. In rejecting this argument, the court noted that the specific facts of the case substantiated the position that the seizure was reasonable from its inception. Specifically, the student "became extremely agitated and a danger to himself and other bystanders" when asked to put the rock down. Further, the court concluded that the restraint was reasonable in scope. Specifically, the security guards brought the student down to a sitting position on the ground, and upon believing that their restraint was upsetting the student, they freed him, but needed to re-restrain him by using handcuffs when he continued to act out. As such, the court dismissed the parent's numerous claims against the district including, but not limited to claims of unlawful imprisonment, violation of the student's 4th Amendment rights against unlawful seizures, and violation of the student's Equal Protection rights.

WHY YOU SHOULD CARE:

In New York, school districts are prohibited from using corporal punishment and aversive interventions (e.g. physical restraint which is intended to induce pain or discomfort) to reduce or eliminate maladaptive behaviors. See 8 NYCRR §19.5. However, physical restraint interventions, which are not intended to induce pain, may be used in emergency situations. Where the student has

exhibited behavior, which poses a danger to himself or others, physical restraint may be necessary when all other options have been exhausted (e.g. BIP). Even under these circumstances, to overcome a claim that the district violated the student's 4th Amendment rights against unreasonable seizures, the restraint must be justified at its inception and reasonable in scope. In this case, it was.

Office of State Review

***

1. Recommended Placement in Building with 600 Other Students Offered FAPE to Student with Sensitivity to Noise.

Application of the New York City Board of Education, Appeal No. 12-021 (2012)

SALIENT FACTS:

A preschool student with a diagnosis of PDD-NOS attended a 6:1+3 center-based special class, where he received services of a 1:1 behavior management paraprofessional, and related services of OT and S/L therapy. The CSE convened to determine the student's eligibility for school-age services and recommended a 6:1+1 special class placement, a crisis management professional, a BIP, adaptive PE, and related services of OT and S/L therapy. The parents rejected the recommendation on the grounds that the placement was inappropriate, and informed the district in writing that they were withdrawing the student. The parents took issue with both the student's classroom being on the fifth floor of a building with no elevator, and the number of students in the building. The building that housed the recommended class included both the recommended special school and another school with 600 students. The parents alleged that the noise level and activity would trigger the student's self-injurious behavior and tantrums. Shortly after receiving the parents' letter, the district issued the parents a "Nickerson Letter" advising them that (1) it was unable to identify an appropriate placement site for the student, and that (2) the parents had the right to place the student in an appropriate approved placement at district expense. The parents rejected this offer, unilaterally placed the student in the Rebecca School, a non-SED approved school, and sought tuition reimbursement.

SRO'S DECISION:

First, the SRO agreed with the district, that the IHO erred in determining that the District denied FAPE, as evidenced by its issuance of a Nickerson Letter. Specifically, the IHO wrote, "I am hard pressed to see how the issuance of [the Nickerson Letter,] a court ordered remedy for a denial of FAPE[,] constitutes a basis, in and of itself, for finding a denial of a FAPE." A Nickerson Letter is a New York City tool, created as a result of a federal law suit, which allows parent-

recipients to place their children unilaterally when the NYC DOE is unable to find an appropriate placement."

The SRO rejected the parents' claim of a denial of FAPE as a result of the District's failure to provide services during the summer preceding the student's enrollment in the school-age program. The SRO held that the student was the responsibility of the CPSE through August and that the parents withdrew the student prior to the summer. Thus, the CSE had no obligation to provide the student with services prior to the start of the 10-month, September to June school year.

Notwithstanding the parents' arguments regarding the inappropriateness of the assigned school, the SRO wrote, "[a]lthough one can understand the parents' preferences for a school with an elevator, and a small student population, their preferences...do not equate to a violation of the district's obligation to offer the student [a] basic floor of opportunity." The SRO noted that the student did not have gross motor delays and was able to navigate the stairs. Although the student was sensitive to noise, there was testimony that the student would always be accompanied by his paraprofessional, who would address any issues the student had with crowds or noise. As such, the SRO reversed the IHO's finding of a denial of FAPE.

WHY YOU SHOULD CARE:

A recommended placement may appear inappropriate on its face as a result of the environment in which the recommended program is located, however, the District may survive a claim of a denial of FAPE where it can prove that it offered appropriate aids and services to enable the student to make progress. While a student who was sensitive to noise or is easily distracted may ordinarily have difficulty in a school with a large student population, the District may create an appropriate program for the student by providing him with the necessary supports to ensure that he is appropriately redirected.

***

2. Finding of a Provision of FAPE Results in Reversal of Partial Reimbursement.

Application of the New York City Board of Educ., Appeal No. 12-022 (Mar. 5, 2012)

SALIENT FACTS:

For a student with an SLD, the CSE recommended a 10-month 12:1+2 class in a community school, and an ESY related service program of S/L, OT and counseling. Upon receiving a letter from the district specifying the assigned

school, the parent rejected the recommendation. The parent reasoned that after touring the assigned school, she found it inappropriate because the classroom was "chaotic and noisy," and she thought the students "seemed low functioning and extremely hyper." Although the IHO found that the district failed to provide FAPE and found that the Aaron School, the Parents' unilateral placement, was appropriate, the IHO reduced reimbursement to fifty percent of the cost of tuition. The IHO reasoned that, although the parents notified the district of their disagreement with the assigned school, they never notified the district by a 10-day Notice of the unilateral placement, nor of their intent to seek reimbursement.

SRO'S DECISION:

The SRO rejected the IHO's award of partial reimbursement on the grounds that the district offered FAPE. First, the SRO addressed the IHO's determination that the district's failure to develop a BIP resulted in a denial of FAPE. The SRO agreed with the district that the student's echolalia, social issues, and occasional refusal to participate in required tasks, unless it was on her own terms, did not "seriously interfer[e] with classroom instruction." The SRO wrote:

> The CSE determined…that the student's behavior could be addressed by a special education teacher through the implementation of the academic, social, and health/physical management needs reflected in the IEP with a structured setting, predictable routine, preplanning or previewing, visual and verbal cues, positive reinforcement and token economy, redirection, preferential seating, visual and verbal prompts, sensory tools and breaks, enhanced auditory input, visual schedule, movement breaks to keep her sensory system organized, and OT.

Next, the SRO addressed the IHO's holding that the district denied FAPE by offering related services during the summer instead of a 12-month academic program. The SRO noted that absent from the record was any evidence that the student would experience substantial regression, thus warranting an ESY program. Rather, the parent and Aaron school teacher testified that the student would experience "regression," without characterizing same as "substantial." Nevertheless, the CSE considered the student's need for a 12-month program and determined that if it stopped all services, the student could experience significant regression. Thus, the CSE recommended related services during the summer.

Regarding the parents' claim that the district would have been unable to meet the student's needs if she had been enrolled in the assigned school, the SRO refused to speculate about "what might have happened had the district been required to implement the IEP." The SRO noted the well-settled legal position that, "if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it." Because the parents rejected the IEP and enrolled the student at the Aaron School prior to

the time that the district became obligated to implement the IEP, the district was not required to establish that the student would be appropriately grouped upon the implementation of her IEP.

WHY YOU SHOULD CARE:

Where there has been a finding that a district has denied FAPE and that the private placement is appropriate, tuition reimbursement may be reduced or denied when the equitable considerations support this determination. Specifically, where the parent has failed to comply with the 10-day notice requirement or has predetermined the student's placement by unilaterally placing the student, reimbursement may be reduced or denied in its entirety. Parents may argue that the district would have been unable to meet the student's needs in the recommended placement, therefore their unilateral placement prior to the start of the school year was necessary. However, IHOs, SROs, and courts are hesitant to speculate about what would have happened if the district was required to implement the student's IEP. Districts may only be liable for failure to implement an IEP where the duty to do so has been triggered (i.e. the school year has started), and it has failed to implement the IEP as written.

***

5. Do The Best You Can With What You Have.

Application of the Board of Education, Appeal No. 12-029 (2012)

SALIENT FACTS:

For a student with autism who was parentally placed on home instruction at the time of the annual review, the CSE recommended a 12-month 6:1+1 special class and residential placement at the School for Adaptive and Integrated Learning ("SAIL"). The parents claimed that the recommendation was inappropriate on the grounds that the CSE failed to recommend OT or PT services, and recommended inadequate levels of home instruction and S/L services. The parents sought an order directing the district to place the student at BOCES or a private residential program on Long Island.

SRO'S DECISION:

The salient issue on appeal was whether the IEP, at the time it was developed by the CSE, offered the student FAPE in the LRE for 2011-12. In preparation for the student's annual review, an OT evaluation was completed at the district's expense by a private OT therapist. The purpose of the OT evaluation was to determine whether the student would require OT in his home, which the therapist also considered his school environment, because he was on home instruction. Although for the previous school year, the student received 30 minutes of individual OT at home, the OT therapist determined that the student no longer required OT services at home. The therapist concluded that the "student's

fine motor and bilateral hand skills to perform activities of daily living (ADLs), self-care, assembly tasks, pre-vocational and vocational tasks, were 'adequate to function in his current environment.'" The PT evaluator reported that the student's distractibility and noncompliance during the evaluation impeded his ability to complete tasks and that the student exhibited low tone, posture, and trunk control. The CSE determined that the student was able to navigate his home environment independently and that PT may be an option once he had reached the residential setting. The residential school staff testified that had the student attended SAIL, it would have conducted OT and PT assessments to determine his needs in the residential environment. Based upon the information before the CSE at the time of the recommendation, the SRO concluded that the recommendations were appropriate.

The SRO rejected the Parent's argument that the recommended program was inappropriate because it was not in the LRE. Specifically, the Parents argued that SAIL was not the LRE because it was "too far from home." The CSE chairperson testified that the district struggled to find residential placements close to the student's home; there are very few residential programs on Long Island; the student had been rejected from the three Long Island residential facilities that might have been appropriate for him; and the CSE ultimately recommended SAIL, because it determined it was the LRE. Although SAIL's location did not meet the parents' desires, the SRO held that the distance between the school and the student's home did not violate the LRE requirement, and that SAIL offered FAPE.

WHY YOU SHOULD CARE:

IEPs must be based upon a student's current level of functioning. To determine the student's current level of functioning, the CSE may determine that evaluations are necessary. As the evaluations will be relied upon by the CSE in making its determination of appropriate programs and services, these evaluations must be thorough, accurate and reliable. To do so, it is necessary that the environment in which the student is evaluated is conducive to conducting the evaluation. However, the CSE may properly recommend that follow-up evaluations be conducted at the start of the school year in the environment in which the student will be educated and the services provided. Until that time, the CSE must make the best recommendation based upon what they know at the time of the meeting.

***

Jack Feldman is a Senior Partner with Frazer & Feldman, LLP, a law firm in Garden City.

Eboné Woods, an associate with Frazer & Feldman, LLP, provided research and assistance.

*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.