NYSE Directors
Centris Group

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MONTHS IN REVIEW: March-April 2014

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of Attorney's Corner, we review two decisions from the Second Circuit Court of Appeals and four federal district court decisions. The Second Circuit has instructed that IDEA's LRE mandate applies to extended school year ("ESY") programs in the same manner in which it applies to placement recommendations for the 10-month school year. While a District has no obligation to "create" a program for a particular student, when the CSE has determined that a student is ESY-eligible, the CSE must explore the continuum of special education programs in order to make an appropriate Summer recommendation in the LRE. A violation of IDEA's LRE mandates will likely result if the CSE recommends a special class program for an ESY-eligible student who has been successful in a general education environment with support sand services, simply because the District does not offer a general education Summer program. Under these circumstances, to ensure that it has offered the student an appropriate Summer program in the LRE, the District may have to explore general education Summer program options in neighboring public schools.

Second Circuit Court of Appeals

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1. IDEA's LRE Requirements Apply to ESY Programs.

T.M. v. Cornwall Central School District, 2014 WL 1303156 (2d. Cir., 2014)

SALIENT FACTS:

The CSE convened for the student's first grade year, found him eligible for ESY services and recommended that for the Summer, he be placed in the District's half-day 12:1:1 class with related services. For his 10-month program, the CSE recommended that the student be placed in a regular education class, except for English and Math, in which he would be placed in a 12:1:1 special class. The CSE also recommended that the student receive the services of a full-time 1:1 teaching assistant and other related services. The parents rejected the recommendation and filed for due process. The parents reasoned that the Summer recommendation was inappropriate because: (1) the District recommended a general education class the previous school year, (2) the student had been successful in a general education class the previous school year, and (3) the District recommended a general education program with two special class pull-outs for the upcoming 10-month school year. As such, the parents argued that because the District tacitly acknowledged that the student was capable of functioning in a general education program, it was inappropriate that it recommended a full-time special class during the Summer.

The IHO agreed with the parents. The SRO reversed the IHO's holding. The SRO held that the District was not required to provide an ESY program in a mainstream environment because the District was not required to provide an ESY program to nondisabled children. The District court agreed with the SRO and the Circuit Court agreed.

COURT'S DECISION:

On appeal, the District argued that the LRE requirement applies to an ESY placement *only if* the District had a less restrictive placement available, but excluded a disabled student from that less restrictive placement. Therefore, the district argued, because it did not have a mainstream ESY program, it was not required to offer the student a mainstream ESY placement. The Circuit Court disagreed that the LRE analysis was applied differently to a 10-month program and a 12-month program, and disagreed that the LRE requirement was limited by what programs the district already offers. The court wrote:

> IDEA's LRE requirement is not strictly limited by the range of ESY programs that the school district chooses to offer. Instead, the LRE requirement applies in the same way to ESY placements as it does to school-year placements. To meet that requirement, a school district must first consider an appropriate continuum of alternative placements; it then must offer the disabled student the least restrictive placement from that continuum that is appropriate to meet his or her needs.

However, the Court agreed with the District that "IDEA does not require a school district to create a new mainstream summer program from scratch just to serve the needs of one disabled child." Instead, the Court held that a district has broad discretion in how it structures its alternative ESY placements. For example, the District could choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity. Thus, once the District has determined that the student is ESY-eligible, it must consider the continuum of special education services beyond the four walls of the District's ESY program when making an appropriate recommendation.

WHY YOU SHOULD CARE:

Once the CSE determines that a student requires an ESY program to prevent substantial regression, the district must determine the LRE option. A District's refusal to consider a sufficient continuum of possible placements will deny the student FAPE, in the LRE, and may make it responsible for reimbursement if the parents find an appropriate alternative. If the District does not have a general education ESY program, it can still make a continuum of ESY placements available by considering a private summer program or a mainstream ESY program offered by another public school. To comply with the LRE requirement, for the ESY component of a 12-month educational program, as it would for the 10-month program, the district must consider an appropriate continuum of alternative placements, and then must offer the student the least restrictive placement from that continuum that is appropriate to meet the student's needs.

Another important piece of this decision is the Circuit Court's analysis of IDEA's pendency rule. The parents claimed that under pendency, they were entitled to have the child provided with services from specific service providers and rejected the District's offer to provide the student with the services mandated by his last agreed upon IEP. The court acknowledged that under IDEA's pendency entitlement, a district must continue funding whatever educational placement was the last agreed upon for the child until the administrative proceedings are complete. The term, "educational placement" refers to the general type of educational program in which the student is placed. Thus, the parents have no entitlement to a specific service provider. Once the district offered to provide the services delineated in the last agreed upon IEP, the parents had no right to demand that the district reimburse them for the services provided by the private providers.

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2. The Restrictiveness Of A Parental Placement Is Not Dispositive Of Its Appropriateness.

C.L. v. Scarsdale Union Free School District, 2014 WL 928906 (2d Cir., 2014)

SALIENT FACTS:

A child diagnosed with ADHD and a nonverbal learning disability as well as a history of anxiety, stuttering and fine motor development weaknesses was determined to be ineligible or special education services under IDEA. Thereafter, the Parents unilaterally placed him at the Eagle Hill School ("Eagle Hill") and sued the District for tuition reimbursement. The Court described Eagle Hill as a private school designed to educate children with language-based learning disabilities. The IHO held that the District denied FAPE and determined that the private school was appropriate. Although the SRO agreed that by refusing to classify the student, the District denied him FAPE, the SRO reversed the IHO's decision on the grounds that the private school was inappropriate, at least in part, because it was overly restrictive. The SRO reasoned that while at the private school, the student had no opportunities to interact with typical same age peers. The District court affirmed the SRO's decision and the Second Circuit Court of Appeals reversed.

COURT'S DECISION:

The Court acknowledged that restrictiveness is a factor in determining the appropriateness of a private placement. Although IDEA's LRE requirement was intended to prevent schools from segregating students with disabilities from the general student body, it was not intended to restrict parental options when public schools fail to comply with IDEA. Restrictiveness may be relevant in choosing between two or more otherwise appropriate private alternatives, or in considering whether a private placement would be more restrictive than necessary to meet the child's needs. However, the Court explained, "where the public school [] denied the child FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option." The Circuit Court wrote:

> When a public school district [] denies a child with a disability a FAPE, a private placement is not inappropriate merely because the environment is more restrictive than the public school alternative. When a child is denied a FAPE, his parents may turn to an appropriate specialized private school designed to meet special needs, even if the school is more restrictive.

Because the SRO's decision was based primarily on the restrictiveness of Eagle Hill without considering the services actually offered to the child or the progress the child made there, the court deferred to the IHO's decision. The Circuit Court pointed out that, "[c]lass sizes at Eagle Hill are tailored to the strengths and weaknesses of the individual students, and children with similar learning styles are assigned to the same classes." At Eagle Hill, the student was placed in a 3:1 ELA tutorial class twice daily to assist with his reading, comprehension, writing and study skills. For his other subject areas, the student was placed in a class of between five and nine students. The student's progress at Eagle Hill was assessed daily and adjustments were made as needed. For example, the student's advisor, who met with the student daily, observed him in class and

participated in weekly staff meetings about the student. As such, the Circuit Court deferred to the IHO's decision and awarded reimbursement of tuition to the Parents.

WHY YOU SHOULD CARE:

When the District has failed to provide a student with a disability with FAPE, the Parent may choose to unilaterally place the child in a private school and seek tuition reimbursement from the District. The parental placement must be appropriate, not perfect. Restrictiveness may be relevant in choosing between two or more otherwise appropriate private alternatives, or in considering whether a private placement would be more restrictive than necessary to meet the child's needs. However, restrictiveness is only one factor in determining the appropriateness of the parental placement. As the Circuit Court pointed out, a private special education school will necessarily be more restrictive than the public school as they do not educate disabled and nondisabled children together. According to this Court, the inflexibility resulting from requiring parents to secure a private school that is nonrestrictive or as nonrestrictive as the public school would "undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington-Carter." In addition to considering the restrictiveness of the parental placement, the reviewing authority must also consider the services actually provided to the child at the private school and whether they were tailored to meet the child's specific needs. In doing so, if the reviewing authority determines that the services are specifically tailored to meet the child's individual needs, the private school will likely be deemed appropriate.

Federal District Courts

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1. A Parent Must be Represented By Any Attorney When Filing Claims On Her Child's Behalf In Federal Court.

Reyes v. Board of Education of the Bellmore and Merrick School District, 2014 WL 1222012 (E.D.N.Y., 2014)

SALIENT FACTS:

Without being represented by counsel, a parent of a twenty-year old student with a disability filed claims alleging, among other things, that the student was illegally removed from school, was subjected to bullying and harassment, and denied FAPE in a safe environment.

COURT'S DECISION:

The Court explained that while unrepresented parents of children with disabilities may pursue IDEA claims on their behalf, they must hire an attorney to pursue IDEA claims on their child's behalf. The Court was careful in noting that a

parent of a child with a disability has a particular and personal interest in preventing discrimination against their child, and therefore, may pursue his own discrimination claim against the school in his own right. This right does not negate the longstanding rule that "a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child." See Cheung v. Youth Orchestra Foundation of Buffalo, Inc., 906 F.2d 59, 51 (2d. Cir., 1990). Thus, the parent was prohibited from pursuing claims on behalf of the student without being represented by counsel. However, the Court pointed out that, "given that [the student was] twenty years old, she [] may prosecute her claims against the [school district] in her own right."

WHY YOU SHOULD CARE:

An individual generally has the right to proceed *pro se* with respect to his own claims, but an unlicensed layman may not represent someone other than themselves in federal court. Thus, a non-attorney parent may not file an action in federal court on behalf of his or her child without being represented by counsel. See Armatas v. Maroulleti, 484 F. App'x 576, 577 (2d. Cir., 2012). However, once a child with a disability has reached the age of majority, she may file a claim in federal court alleging violations of her own IDEA rights without being represented by an attorney.

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2. An Informal FBA Did Not Violate IDEIA's Procedural Requirement Concerning FBAs.

E.H. v. New York City Dept. of Educ., 2014 WL 1224417 (S.D.N.Y., 2014)

SALIENT FACTS:

A student with Autism attended the Rebecca School ("Rebecca"), a private school described as "specializing in education for autistic children." The CSE, including the student's Rebecca Teacher and Social Worker, convened in February 2011 to develop the student's IEP for the 2011-12 school year. The CSE reviewed numerous documents including a District-conducted classroom observation of the student at Rebecca, a private Neuropsychological Evaluation and Rebecca progress reports. Relying on these evaluations and observation, the CSE considered the student's behavioral functioning and needs, conducted an "informal FBA" during the meeting, and developed a BIP. The CSE recommended that the student be placed in a 12-month 6:1:1 special class with related services of speech, OT and counseling; and a 1:1 paraprofessional. With input from Rebecca Staff, the CSE developed annual goals to address the student's various needs, including his behavioral needs. The Parent rejected the IEP, maintained her child at Rebecca and sued the District for tuition reimbursement. Holding that the District denied FAPE because, among other things, the District failed to conduct a formal FBA, the IHO awarded the Parents reimbursement. The SRO reversed and held that the

CSE had sufficient information before it to make an appropriate recommendation and that the informal FBA did not violate IDEIA.

COURT'S DECISION:

Regarding the District's failure to conduct a formal FBA, the court pointed out that the Regulations do not require a formal assessment of the child's behaviors. Rather, the Regulations provide that an FBA shall "'be based on multiple sources of data,' including, but not limited to information obtained from direct observation, information from the child, information from teachers and service providers, a review of the child's record, and other sources including information provided by the student's parents." 8 N.Y.C.R.R. 200.22(a)(2). The court held that the CSE's reliance on a classroom observation of the student by the district psychologist, the input from his classroom teacher about the nature and cause of his disruptive behaviors and information from the Parent was consistent with the requirements of the Regulations governing FBAs. Holding the Parent accountable for working with the District in developing an appropriate IEP that addressed the student's needs, the Court held:

> If the Parent later felt that the February [] IEP was no longer adequate to meet the Student's needs by July 2011, she should have sought a remedy within the IDEIA instead of unilaterally placing the child in private school.

On the grounds that the District did not deny the student FAPE, the court denied the Parent's request for reimbursement of tuition.

WHY YOU SHOULD CARE:

A functional behavioral assessment is the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. 8 NYCRR 200.1(r). The FBA must be "based on multiple sources of data including, but not limited to information obtained from direct observation of the student, information from the student, the student's teacher(s) and or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent." 8 NYCRR 200.22(a)(2). Despite this court holding that districts need not conduct a formal FBA prior to developing a BIP, it is best practice for the District to conduct a formal FBA of the child, supported by data collection, to develop a thorough BIP.

This decision also emphasizes the importance of providing parents with the IEP for the upcoming school year before the start of the school year. Where the District has provided the parents with the IEP and PWN letter prior to the start of the school year, the parents will have an adequate opportunity to review the IEP prior to its implementation date. If the parents feel that the IEP inadequately addressed the student's needs and elect to unilaterally enroll the student in a

private school on these grounds alone, based on this decision, the District may argue that the parents have a responsibility to work with the District in developing an appropriate IEP. If, upon receiving the IEP and PWN prior to the start of the school year, the parents feel that the IEP is inappropriate, the Parents have a responsibility to communicate their concerns to the school district rather than remaining silent, unilaterally enrolling the student and suing the district for tuition reimbursement after the fact. Otherwise, the parents leave themselves open to claims of bad faith and perhaps predetermination.

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3. Too Little, Too Late: Testimony Regarding Actual Placement Leaves One District Vulnerable To Liability.

Scott v. New York City Department of Education, 2014 WL 1225529 (S.D.N.Y., 2014)

SALIENT FACTS:

A student with Autism was parentally placed at the Cooke Center Academy ("CCA") for two years preceding the CSE's annual review. The CSE relied on a progress report from CCA; a District-observation at CCA; and input from the CCA staff and Parent as the bases for its placement recommendation. The CSE recommended that the student be placed in a 12-month 12:1:1 special class with related services of speech and counseling. On the parent's third visit to the proposed school, for the first time, she was shown a class which was identified by the assistant principal ("AP") and classroom teacher as the class in which her child would be placed. The class was a 6:1:1 special class. According to the Parent, the students in the class were significantly lower functioning than her child (i.e. two students were nonverbal and two students were asleep or almost asleep due to medication). The Parent was never shown a 12:1:1 class. The Parent rejected the CSE's recommendations, maintained the student at CCA for 2010-11 and sought tuition reimbursement.

The IHO determined that, while the IEP included appropriate recommendations, the District denied FAPE because the recommended placement was inappropriate. The IHO relied on testimony from District staff that the 6:1:1 class the parent observed was inappropriate. The IHO surmised that the proposed school was incapable of providing FAPE, because as of September, when the Parent visited, the school did not have a 12:1:1 class in which to place the student. Although the AP testified that the student would have been placed in a 12:1:1 class, the IHO relied on the testimony of the 12:1:1 class teacher that as of September, the class was full and comprised exclusively of ninth and tenth graders (the student was then in the eleventh grade). Thus, the IHO concluded that there was no 12:1:1 slot for the student. Crediting the AP's testimony that the student would

have been placed in the 12:1:1 class, the SRO reversed the IHO's decision that the District's placement recommendation was inappropriate.

COURT'S DECISION:

As a preliminary matter, the Court noted that where the IHO and SRO reach conflicting conclusions, the Court may not adopt one position over the other according to the Court's preferences. Rather, the Court must defer to the SRO "as the final state administrative decision." However, if the court determines that the SRO has rejected a more thorough and carefully considered IHO decision, it is appropriate for the court to defer to the IHO's analysis. Such was the case here.

The Court rejected the SRO's decision and affirmed that of the IHO, because the IHO's decision was more thoroughly reasoned and was supported by the hearing record. Regarding the substantive adequacy of the IEP, the Court pointed out that the crux of the Parent's complaint was that the District offered the student a 6:1:1 placement instead of a 12:1:1 class mandated by the student's IEP. Although at first glance, the Parent's claim may seem speculative, since she is essentially challenging the District's failure to implement the IEP prior to allowing the District an opportunity to do so, the court wrote:

> A parent may challenge the adequacy of a placement classroom – even if the child never enrolled in the school – ***if*** the alleged defects were ***reasonably apparent*** to either the parent or the school district when the parent rejected the placement (emphasis added) (at *14).

The Court determined that the SRO made impermissible credibility assessments when it rejected the testimony of the special education teacher that the 12:1:1 class was full and credited the AP's testimony that the student would have been placed in a 12:1:1 class. The court also determined that the SRO erred in finding that the Parent's visit to the proposed school was irrelevant to whether the District offered FAPE. Contrary to the SRO's holding, the court ruled that the information the parent obtained during her visits was highly relevant. This was especially true given that she was never shown a 12:1:1 class and visited the class in September at the time the District would have been obligated to implement the IEP. The Court found persuasive that the District never presented evidence to rebut the Parent's argument that the District would not have placed the student in a 12:1:1 class. The Court also found persuasive that the AP represented to the Parent during her September visit that the 6:1:1 class was the class in which the student would have been placed. Thus, the Court held that the AP's testimony that she would have placed the student in the 12:1:1 class was "too little, too late."

WHY YOU SHOULD CARE:

When a child's IEP includes a specific placement recommendation, it is the District's responsibility to ensure that this placement is available to the child. The

District must ensure that a program exists that meets the IEP description and that there is an available seat in the program somewhere in the District. It is essential that the CSE Chairperson be fully aware of the programs offered in the District and the availability of these programs. The Chairperson should be fully aware of the seat availability of the District's programs, so that the CSE will recommend a program in which the District actually has space available. Otherwise, the CSE will recommend a program that the District cannot offer, and the District will likely be held liable for denial of FAPE.

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4. Once The CSE Has Determined The Least Restrictive Option On The Continuum, It's Analysis Of More Restrictive Options Is Unnecessary.

B.K. and Y.K. v. New York City Dept. of Educ., 2014 WL 1330891 (E.D.N.Y., 2014)

SALIENT FACTS:

A student with Autism and significant cognitive delays was parentally placed at Reach of the Stars Learning Center ("RFTS") for the 2009-10 and 2010-11 school years, where he was placed in a class with four other students, each of whom had a 1:1 teaching assistant. During the annual review to develop the student's IEP for 2011-12, the District psychologist expressed concerns about the restrictiveness of the 1:1 RFTS program and suggested that the student be placed in a 6:1:1 therapeutic program. The RFTS behavioral analyst suggested that the student remain in a 6:1:1 program due to his maladaptive behaviors. The parent and RFTS staff believed that the 1:1 environment was an essential component for the student's continued educational, social, and behavioral development. Ultimately, the CSE recommended a 6:1:1 12-month program with speech, OT and PT on an individual basis and a 1:1 aide. Recognizing the student's behavioral needs that interfered with his learning, the CSE conducted an FBA at the meeting, based on classroom observations and reports from the student's teachers. Thereafter, a BIP was developed which detailed his behaviors and included specific strategies and supports to be employed by his teachers. The parents challenged the District's recommendation and requested tuition reimbursement for RFTS for 2011-12 and direct funding for 10 hours of after-school ABA.

The IHO determined that the District's 6:1:1 recommendation was appropriate because the student demonstrated the capacity to "begin academic instruction [in a small group]" and make his needs known. The IHO also determined that the student's behavioral issues were not a basis for continuing a program as isolating and controlled as the RFTS program. The SRO agreed.

COURT'S DECISION:

On appeal, the Parents argued that by failing to consider a 1:1 placement with at-home ABA, the CSE failed to consider the full continuum of programs that may have been appropriate for the student. The court held that the District's psychologist's testimony that the 6:1:1 program was the most restrictive program available in-District did not mean that the CSE did not or would not have considered a 1:1 program, "had it deemed a more restrictive setting appropriate for the student." The court held, "once the CSE determined that a 6:1:1 placement was appropriate [], it was under no obligation to consider more restrictive programs." Moreover, the fact that the CSE ultimately recommended a program that deviated from the parents' express request that the student remain at RFTS "did not render the parents 'passive observers' or evidence any predetermination on the part of the district."

While the court "'sympathize[d] with the parents' desire to see their son educated in the environment they feel best suits his needs, the court nonetheless concluded that, based on the hearing record [] the [recommended] 6:1:1 program…was substantively adequate to provide FAPE." Despite the "stark disagreement" between the district-staff and the parents' experts about the appropriateness of the 6:1:1 class, the court held that the IHO and SRO reasonably concluded that the 6:1:1 program would be a substantively appropriate placement. While the student may require 1:1 instruction for certain related services, the court relied on the District's psychologist's testimony that a full-time 1:1 program would be "hurtful," because it deprived the student of an opportunity to develop essential socialization skills through direct observation and interaction with other students. Regarding the parents' argument that a 1:1 placement was necessary due to the student's behavioral needs, the court deferred to the SRO's decision, which was consistent with that of the IHO that the recommended 6:1:1 program was capable of producing progress rather than regression and afforded the student educational benefits in academic instruction and socialization. Once this determination was made, it was immaterial whether a 1:1 program may have also been appropriate for the student, because it did not satisfy the LRE requirement.

The SRO acknowledged that the IEP included some academic goals that lacked evaluative criteria or schedules, but held that these omissions did not result in a denial of FAPE. According to the court, "the [parents] and SRO overstate the magnitude of [these] deficiencies." Regarding the evaluation schedule, the court point out that the notation in the goals section of the IEP that, "there would be 4 progress reports per year," was sufficient under IDEA. All except for two PT goals included the method by which the progress would be measured (e.g. teacher made materials, class activities, and teacher/provider observations). The evaluative criteria for the two PT goals indicated that the student's progress "will be measured 'as seen' through the student's 'improved ball plan and balance skills' and his 'improved jumping skills.'" The court determined that this evaluative

procedure was also sufficient as it was tantamount to teacher observation. Finally, while the majority of the goals included express and quantifiable evaluative criteria (e.g. "80% accuracy" or in "3 consecutive sessions"), the other goals provided evaluative criteria in the form of specific tasks (e.g. "comparing 3 pairs of equal sets of 0 to 10 objects" or "matching lower case letters"). According to the court, "the component tasks [were] sufficiently specific so as to allow them to be [used] to demonstrate [the student's] progress over the four reporting periods." While recognizing that the goals were "not perfect," the court deferred to the SRO's determination that the parents failed to establish that the goals were not inappropriate or procedurally deficient as to amount to a denial of FAPE.

The parents premised their claim for reimbursement on their argument that the BIP was inappropriate, as it was vague, not based on any data, failed to include baselines, or any expected behavioral changes, and the CSE failed to discuss the proposed BIP. The court rejected the parents' argument that the BIP was not based on any data. The court wrote:

> [The student's] FBA (and thus his BIP) was predicated on verbal and written assessments by the RFTS staff, progress reports from [the student's] therapists, and the on-site observations [by District staff]. Even if information on how [the student's] behavior manifested in a 6:1:1 environment versus a 1:1 environment would have been the ideal data set on which to generate his FBA in light of the CSE's program recommendation, such information was not available to the CSE and the court finds no fault with the SRO's conclusion that "the results of the FBA were commensurate with the information about the student's behaviors provided to the CSE."

The Court, in its independent review of the evidence, concluded that the parents' claim for reimbursement based on the inappropriateness of the BIP was without merit.

WHY YOU SHOULD CARE:

Predetermination is a procedural violation if it deprives the parents of meaningful participation in the IEP process. However, a district's consideration of potential educational programs in anticipation of a CSE meeting does not itself amount to predetermination provided the district maintains the requisite open mind during the meeting. Simply because the CSE may ultimately recommend a program that is different from the program the parents requested, does not render the parents passive observers, or require that the IHO find a violation of IDEA. To avoid claims of predetermination, the District members of the CSE must come to the CSE meeting with open minds and the understanding that changes to the draft IEP may, and likely will, occur during the meeting.

While parents may request that the CSE change its recommendation to reflect a more restrictive setting, the District must recommend an appropriate program in the LRE. Once the CSE has determined that the student is capable of making progress in a setting less restrictive than the one the parents have requested, the CSE is under no obligation to continue its assessment of the appropriateness of the more restrictive options on the continuum. Rather, once the CSE determines that a particular option is the least restrictive option on the continuum, the CSE's considerations of more restrictive options is unnecessary. Nevertheless, the CSE should consider the parents' concerns and any alternative placements they may propose. The PWN letter must reflect the reasons why the CSE rejected the parents' request for an alternative placement.

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5. A District's Failure to Delineate PC&T Denied FAPE But Did Not Warrant Reimbursement.

S.A. v. New York City Dept. of Educ., 2014 WL 1311761 (E.D.N.Y., 2014)

SALIENT FACTS:

Prior to the 2010-11 annual review, the Parents requested that the CSE convene to review the results of private evaluations obtained from the McCarton School. Two months later, the CSE convened, but did not review the results of the evaluations. Rather, the CSE reviewed the District-provided evaluations and observation reports. During the CSE meeting, the parents participated by telephone and expressed their interest in participating in parent counseling and training ("PC&T"), but explained that they were unable to attend the sessions held during the week because of work and child care obligations. The CSE did not recommend that PC&T be provided at home. After considering its evaluations and other information before it, with the exception of the private reports, the CSE recommended that the student be placed in a 12-month 6:1:1 class in a special school along with related services of speech, OT and PT. In their 10-day notice, the Parent indicated their intent to unilaterally enroll the student at McCarton, but never actually enrolled him. As relief, the parents requested, among other things, compensatory education, prospective funding for McCarton and PC&T.

The IHO determined that the district's failure to provide the parents with PC&T over an extended period of time was a substantive violation of IDEA. The IHO held that the district's "extended failure to provide [PC&T] has likely exacerbated the parents' difficulties." As relief, the IHO ordered the District to provide the parents with five weekly hours of at-home PC&T for fifty-two weeks. However, the IHO determined that this violation did not require invalidating the entire IEP. The IHO held that, on the whole, the District offered the student FAPE during 2010-11. Rather than considering the substantive violations resulting from

the failure to provide PC&T, the SRO considered only whether this failure violated the student's right to FAPE. The SRO determined that it did not.

COURT'S DECISION:

On appeal, the parents claimed that the District's procedural violation of failing to consider the private evaluations and include PC&T in the IEP denied the student FAPE. As to the private evaluations, the court pointed out that the McCarton staff assessed the student's skills similarly to the manner in which the District did. The court wrote, "[a]lthough the private evaluators opined that the student could not learn in a classroom, they had limited contact with the student, particularly in a classroom setting." Ultimately, the court agreed with the SRO that the CSE's failure to consider the private evaluations did not deny FAPE.

Regarding the failure to delineate PC&T in the IEP, while the Regulations mandate that the IEPs of children classified with Autism include PC&T, the court pointed out that the "presence or absence of a [PC&T] provision in the IEP [] 'does not necessarily have a direct effect on the substantive adequacy of the plan'" (*citing* R.E. v. New York City Dept. of Educ., 694 F.3d 167, 191 [2d Cir., 2012]). Moreover, because PC&T is a Regulatory mandate, parents can file a complaint, on their own behalf, if they feel they have been deprived this service. The court noted that the IHO credited the Parents' testimony that they were unable to participate in the PC&T sessions offered during the week because of work and childcare obligations, and were therefore unable to appropriately address the student's personal care issues (e.g.: toileting and feeding), reinforce speech gains made in school, communicate with the student or encourage socialization. The court found that the failure to delineate the PC&T services in the IEP was a procedural violation. which denied FAPE. The court also deferred to the IHO's well-reasoned decision that the District's failure to provide PC&T during times when the parents were available was a substantive violation of IDEA, which deprived FAPE. However, as the IHO held, the court agreed that this violation did not rise to the level of a denial of FAPE, which would warrant reimbursement of tuition. Thus, contrary to the parents' assertion, they were not entitled to retroactive reimbursement for private school tuition because they never actually enrolled the student in private school and the District's violations of FAPE did not rise to the level of deprivation of FAPE which warranted reimbursement.

Finally, the court determined that none of the claims of substantive inadequacies in the IEP alone or in combination deprived the student of a FAPE. Regarding the parents' argument that the speech recommendation was inappropriate, the court agreed with the IHO that this recommendation was consistent with the recommendations of the student's then-current service providers. Regarding the goals, the court pointed out that the 12 annual goals and 35 objectives were developed with input from the student's teachers and service providers who worked with the student over an extended period of time. Despite the parents' conclusory argument that the goals were "few and rudimentary," the

court determined that the goals and objective were clearly linked to the student's needs and abilities, and "contained sufficient specificity to guide instruction, evaluate the student's progress, and gauge his need for any continuation or revision."

WHY YOU SHOULD CARE:

The court noted: when developing an IEP, a CSE may reasonably credit the District's professionals, who have worked with the student in a classroom setting over an extended period of time, over those opinions of private evaluators who have had limited contact with the student, particularly in a classroom setting. However, CSEs must remember that, while its failure to consider a private evaluation, without more, may not be a denial of FAPE in and of itself, it is a procedural violation, which taken together with other procedural violations, may bolster a parent's argument that they were denied a meaningful opportunity to participate in the development of the IEP.

IEPs of students classified with Autism must include PC&T. 8 NYCRR 200.13(d). PC&T is intended to assist parents in understanding the special needs of their children, providing them with information about child development, and helping them acquire the necessary skills that will allow them to support the implementation of their child's IEP in the home. A District's failure to include PC&T in an IEP of a student with Autism is a procedural violation and may constitute a substantive violation if the parents have been denied the services for an extended period of time and have suffered difficulties managing the student at home. Although this substantive violation may result in a denial of FAPE, it is a question of fact whether it results in the invalidation of the IEP, which might result in an award of tuition reimbursement for an appropriate private school.

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