NYSE Directors
Centris Group

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MONTHS IN REVIEW: May – June, 2012

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

This month, we review federal court and SRO decisions as well as an OSEP letter, which provides guidance on procedural missteps in the IEP development process. Specifically, for the first time, the SRO noted the Commissioner's requirement that districts use the State-mandated form when developing IEPs. Similarly, OSEP provided its opinion of the importance of providing PWN, a reasonable time prior to the district's provision of FAPE.

Federal District Court

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1. Failure to Conduct an FBA is Harmless if The CSE Considers PBIS.

M.W. v. New York City Dept. Of Educ., 2012 WL 2149549 (EDNY., 2012)

SALIENT FACTS:

The SRO overruled an IHO decision, which granted parents full funding for special education in a religious school for their autistic child. For the year at issue, the CSE recommended a co-teaching integrated ("CTI") program in the district's

school with a 1:1 behavior management professional and related services. Without having conducted an FBA, the CSE developed a BIP. The special education teacher in the proposed CTI class testified that she communicated daily with the students' parents. Further, the district's school provided numerous parent counseling and training ("PC&T") workshops. The parents rejected the recommendation, maintained the student in the religious school, and sought tuition reimbursement. In overruling the IHO's determinations of procedural and substantive flaws in the CSE's recommendations, the SRO held, among other things, (1) the CSE's lack of discussion of goals, without more, did not deny FAPE, as the goals were aligned to the student's needs based upon the data reviewed at the time of the CSE meeting; (2) the CSE's failure to conduct an FBA did not automatically render the BIP deficient; and (3) the absence of PC&T in the IEP did not deny FAPE.

COURT'S DECISION:

The court noted the Second Circuit's position that the failure to conduct an FBA for a student whose behavior impedes his or her learning or that of others, "'does not compel the conclusion' that the IEP was 'legally inadequate,' so long as the [District] complies with its obligation…to 'consider the use of [PBIs] to address that behavior.'" (*citing* A.C., 553 F.3d 165, 172 [2d Cir., 2009]). The IEP noted that positive reinforcement was needed to deal with the student's behavior and that a BIP was required. The BIP, which was attached to the IEP, included strategies that were to be used to encourage the student's positive behavior.

As to the alleged substantive inadequacy of the district's recommended program, the court first addressed the district's refusal to recommend a 12-month program. The court noted that there was no evidence suggesting that the student would have experienced substantial regression during the summer months. Further, the parents' argument was belied by their own voluntary enrollment of the student in a 10-month, rather than 12-month program. Second, although the district was legally obligated to recommend PC&T as the student is classified with autism (8 NYCRR §200.13[d]), the Second Circuit has ruled that this failure does not necessarily render an IEP deficient. The student's IEP stated that "the teacher, paraprofessional, and parents will collaborate to implement and reinforce the desired behaviors." Further, the court noted that the school at which the student was offered placement provided numerous programmatic PC&T workshops. Given these opportunities and the parents' "professional ability to evaluate and take advantage of them, deference [was] appropriate to the SRO's conclusion…that [this] failure…did not render [the IEP] substantively inadequate."

WHY YOU SHOULD CARE:

For a student whose behavior impedes his or her learning or that of others, the district should conduct an FBA and develop a BIP to address these behaviors. Further, because the FBA serves as the basis from which the BIP is developed (8 NYCRR §200.1[mmm]), it is counterintuitive to develop a BIP without having first conducted an FBA. A District may avoid liability for denial of FAPE when it does

not conduct an FBA prior to developing a BIP where the CSE has considered the use of positive behavioral interventions to address that behavior. However, we strongly recommend that an FBA be conducted whenever the CSE is considering use of a formal BIP.

Although the IEP must note when a student requires a BIP, there is no legal requirement that it be attached to or otherwise included in the IEP. See SED, "IEP Questions and Answers," FAQ No. E-5 (last updated Apr. 2011). However, when a BIP is developed, it should be maintained in the student's education file along with the IEP.

Provision of PC&T is required for parents of children with autism to: (1) assist them in understanding the special needs of their children, (2) provide them with information about child development, (3) and help them acquire the necessary skills that will allow them to support the implementation of their child's IEP. 8 NYCRR 200.1(kk). However, as illustrated here, the CSE's failure to recommend PC&T, where a student will be placed in a program in which PC&T is built into the curriculum, may not result in a denial of FAPE. Nevertheless, as a rule of thumb, PC&T should be a recommended related service on all IEPs for students with autism.

Office of State Review

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1. A District's Failure to Consider Home-Based ABA Services for a Student Who Had Traditionally Received Them Landed It In Hot Water.

Application of the New York City Board of Educ., Appeal No. 12-048 (2012)

SALIENT FACTS:

For 2011-12, the CSE recommended a 12-month program in a 12:1+2 special class, at an SED-approved nonpublic school, with a 1:1 crisis paraprofessional and related services. The Parents contended that the district failed to provide FAPE by refusing to also recommend home-based 1:1 ABA, provider team meetings, and parent counseling and training ("PC&T"). The parents reasoned that although this program had always been provided to the student, for 2011-12, the CSE refused to consider it, even after the parents requested that it do so. The parents privately provided home services to the student and sought reimbursement. The IHO determined that the CSE's *failure to consider* the parents' concerns for home ABA services denied them of a meaningful opportunity to participate in the development of the IEP. Even if the Parents did not request that the CSE consider recommending home-based ABA, the IHO determined that the CSE should have done so because of the district's provision of such services in the past.

SRO'S DECISION:

For the first time, the SRO noted the mandate of the Commissioner's Regulations that school districts use the SED form when developing IEPs for 2011-12 and thereafter. However, the SRO did not attach any liability to the district for its failure to do so.

The SRO concluded that the District conducted the CSE meeting in such a manner that significantly impeded the parent's participation in the development of the IEP, and therefore, denied FAPE. Specifically, the SRO noted the un-rebutted testimony from the parents that he CSE refused to respond to the parents' request for home-based ABA services. Further, the IEP did not include any indication that home-based ABA services were considered by the CSE.

Next, the SRO addressed the District's argument that the home-based ABA services were overly restrictive. The SRO noted that "the student did not exhibit appropriate leisure play skills in unstructured settings and needed to be taught those skills." Further, the student's special education teacher testified that "the student needed a high number of repetitions to master new skills, repetition that the home-based ABA services provided." As such, the SRO rejected the District's argument that the 16 hours per week of home-based ABA inappropriately intruded on the student's available downtime. Further, the SRO rejected the district's argument that the home-based ABA services were designed to maximize the student's potential. The SRO ruled that discontinuation of the home-based ABA services would have negative effects on the student both at school and home, because he would not be receiving the repetition and reinforcement he required to make progress. In essence, the SRO found that the student could not benefit from his educational program without the extended school day services.

The SRO affirmed the IHO's award of PC&T, the SRO concluded that, PC&T was not recommended on the IEP. Although the CSE chairperson testified that she understood that the school offered PC&T, and thus that it was programmatic, she was unaware of what was included in the training. As such, the SRO ruled that the CSE erred in failing to recommend PC&T on the IEP. Accordingly, the SRO affirmed the IHO's Order to reimburse the parents for privately provided at-home ABA and PC&T.

WHY YOU SHOULD CARE:

Where a CSE has determined not to recommend services a student has traditionally received, it should always consider updated evaluations to support its position that the student no longer requires these services. Even if the Parents do not object to the CSE's refusal to provide certain services traditionally provided to the student, the CSE should engage in a thorough discussion with the parents of why the student no longer requires these services. Further, many schools which provide a therapeutic environment offer programmatic PC&T. As such, where the CSE may see the need to recommend a student's placement in such a program, the

CSE may be inclined not to recommend PC&T on the IEP. Resist that temptation. Always include PC&T on IEPs of those children for whom it is mandated by the Regulations.

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2. IHO Exceeded Authority by Remanding Determination to MDT to Consider Conners-3.

Application of the Board of Education, Appeal No. 12-060 (May 3, 2012)

SALIENT FACTS:

As a result of his involvement in a physical altercation with another student, a student classified with a learning disability was immediately suspended for five days and the district sent the parent a "Notice of Superintendent's Disciplinary Hearing." The same day, the District sent the parents a Meeting Notice for a manifestation determination review ("MDR"). Four school days later, the manifestation determination team ("MDT") convened. Immediately following the meeting, the parents were sent a letter indicating that the MDT determined that the student's behavior was not caused by his disability or the failure of the district to implement his IEP. The letter also indicated that the matter would be sent to a superintendent's hearing. The IHO determined that the MDT failed to consider sufficient evaluative information and failed to fully consider the parents' concerns regarding the student's ADD. According to the IHO, the MDT did not consider the results of a Conners-3 completed by the parent and teacher. As such, the IHO remanded the matter to the MDT to consider the results of the Conners-3, the parents' concerns and the teacher's concerns about the student's behavior.

SRO'S DECISION:

Rather than comply with the IHO's Order, the district appealed the decision to the SRO, who reversed the IHO's decision and dismissed the parents' challenge. The only issue raised in the parent's complaint was whether the misconduct had a direct and substantial relationship to the student's disability. Therefore, the district argued that the IHO improperly raised and determined the issue of whether the MDT improperly considered sufficient evaluative information in making its determination. The SRO agreed. The SRO concluded that the IHO's determination that the MDT failed to review sufficient evaluative data and Order directing the MDT to reconvene to consider the Conners-3 and other information was beyond the scope of issues presented at the hearing.

As to the determination of the MDT, the SRO noted that the MDT was adequately comprised of individuals who had specific knowledge of the student and his disability (i.e. the parent, the student, the director of pupil personnel services, a district psychologist, the building administrator, the student's special

education teacher, one of the student's regular education teacher, the guidance counselor and the special education department chairperson).

The MDT reviewed the student's most recent IEP, disciplinary reports, a two-year-old psycho-educational evaluation, his FBA and BIP, a classroom observation, and heard teacher and parent input. The SRO noted the MDT's detailed review procedure, which included: (1) review of the incident, (2) the MDT's discussion of the student's special education needs, (3) the MDT's review of the latest assessments and evaluations, (4) the MDT's review of any disciplinary records, (5) the MDT's discussion of whether the student's needs based on the evaluations supported a finding that the behavior had a direct and substantial relationship to the disability. The student's disciplinary report from the past five years revealed that the student was disciplined 11 times, all for nonviolent or nonaggressive behaviors. Although the parent reported to the MDT that the student had stopped taking his ADD medication, because it was discontinued, the MDT concluded that this did not change its determination. Further, the SRO noted that the Conners-3 showed that neither the parent nor teachers believed that the student demonstrated violent or aggressive behavior. Taking into consideration the totality of the circumstances, the SRO concluded that the CSE properly considered sufficient evaluative data in making its determination.

WHY YOU SHOULD CARE:

The MDT must consist of, at a minimum, a representative of the school district knowledgeable about the student and interpretation of information about the child's behavior, the parent, and relevant members of the CSE as determined by both the parent and district. 8 NYCRR §201.4(b). A finding of a manifestation may be based upon an affirmative response to either one of the following questions: (1) the conduct in question was caused by or had a *direct and substantial* relationship to the student's disability; or (2) the conduct in question was the *direct* result of the school district's failure to implement the IEP. 8 NYCRR §201.4(c). In order to answer either one of these questions, the MDT must first review all relevant information in the student's special education file including the IEP, any teacher observations, and any relevant information provided by the parents.

Relevant information should include the student's anecdotal disciplinary record, if any. A review of the disciplinary record may reveal whether the student has repeatedly demonstrated behaviors, which form a pattern (e.g. aggressive or violent behaviors). If these behaviors have not previously been identified in an FBA, an FBA should be conducted. If one has been conducted, it should be updated. Where the student has repeatedly been disciplined for the same pattern of behavior, a finding of a manifestation is likely. However, if the behavior, which has subjected the student to discipline is different from behaviors previously identified by the CSE, the MDT may conclude that there is no manifestation.

Because tensions may run high during an MDR, it is good practice for the chairperson of the MDT to have an organized and detailed review procedure for the MDT to follow. At the minimum, this procedure should include: (1) a review of the incident, which may be conducted by the chairperson, a District-staff witness to the incident, or another appropriate member of the MDT, with parent and/or student input; (2) discussion of the student's special education needs based upon the IEP; (3) review of the student's most recent assessments, evaluations, or reports; (4) review of any disciplinary records; (5) consideration of the parent's and teacher's concerns about the student's behaviors; and (6) the determination.

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3. CSE's Recommended Program Fails to Meet the LRE Requirement.

Application of the Board of Education, Appeal No. 12-056 (2012)

SALIENT FACTS:

The student who was diagnosed with Down Syndrome was classified with a speech or language impairment. During the student's "Turning 5 Review," the CSE considered the student's "Graduate Preschool Report" along with the recommendation of the student's preschool providers that the student be placed in a special class. The CSE recommended an 8:1+1 placement in a neighboring school district. The PWN indicated that the CSE considered the student's placement in the district's 15:1 special class, and rejected this placement as inappropriate to meet the student's more severe needs. Ultimately, the neighboring district rejected the application for placement in its 8:1+1 class, but recommended the student's placement in its 12:1+4 special class. The CSE convened, recommended the neighboring school's 12:1+4 special class, and the parents consented.

After observing the special class, the parents rejected this recommendation and filed for due process. According to the parents, "the district's refusal to place the student in an environment less restrictive than the recommended class was based on the district's unwillingness to make needed modifications to the general education curriculum and/or otherwise facilitate the student's inclusion in the general education classroom." The IHO agreed. Specifically, the IHO determined that the district never tried to place the student in a general education environment with supplementary aids and services, because it had concluded that the student was too low functioning to be able to learn in a general education classroom. Consistent with his findings, the IHO ordered the CSE to reconvene to develop an IEP that placed the student in a general education setting with supplementary aids and services.

SRO'S DECISION:

Although the SRO agreed with the IHO that the CSE failed to consider the student's ability to function in the general education environment with aids and services, he disagreed that immediate placement in the general education setting was the appropriate solution. The SRO noted that, "[w]hen at issue at an impartial hearing, a district must establish that it considered the full range of supplementary aids and services that could be provided to facilitate the student's placement in a general education classroom to enable students with disabilities to be educated with nondisabled children to the maximum extent appropriate." While IDEA does not require modification of the curriculum beyond recognition, the need for modification is not a legitimate basis upon which to justify excluding a child from the regular classroom unless the education of other students is significantly impaired. District staff testified that the CSE discussed whether it would be possible to have the student in a general education class with modifications. However, the SRO noted that any discussions of this nature were not memorialized in the meeting minutes or in the PWN as an option considered and rejected. The SRO agreed with the IHO that it did not appear that the student had behavior problems, which would disrupt other students in the general education Kindergarten class. The district was concerned with the amount of time the regular education teacher would need to devote exclusively to the student. However, the SRO held that it was difficult to establish the validity of this concern absent evidence regarding what supplementary aids and services could be offered to the student. Accordingly, the SRO remanded the matter to the CSE to discuss whether placement in a general education class could be satisfactorily achieved with supplementary aids and services, and to *consider* whether the general education curriculum could be modified to accommodate the student.

WHY YOU SHOULD CARE:

Based upon the IHO's determination, the perception may be that the LRE requirement mandates that districts must actually place the student in each less restrictive alternative along the continuum prior to recommending a more restrictive option. However, based upon the SRO's holding, this may not always be the case. Rather, the CSE must *consider* whether with the use of supplementary aids and services and curriculum modification, the student can progress toward his or her annual IEP goals. Consideration does not necessarily mean implementation. It is up to the CSE in the first instance to consider whether a child can be educated in a less restrictive placement with supplementary aids and services before moving on to the next, more restrictive placement on the continuum.

OSEP Letter of Interest

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1. Timing is Everything with PWN.

***Letter to Chandler*, 112 LRP 27623 (OSEP, 2012)**

OSEP's OPINION:

OSEP responded to an inquiry regarding when PWN is required to be provided. First, OSEP clarified that PWN must be provided a reasonable time before the district proposes or refuses to initiate or change the identification, evaluation or educational placement of the child. IDEA does not set a specific time limit on when PWN must be provided. As long as PWN is provided a "reasonable time before the [district' actually implements an action], OSEP advised that the district would be in good shape. The "reasonable time" period should afford the parents an opportunity to fully consider the decision and respond to the action before it is implemented.

WHY YOU SHOULD CARE:

There is no set time frame for providing PWN after a CSE meeting. However, the purpose of the PWN is to afford parents an opportunity to contemplate the CSE's recommendations prior to the implementation of the IEP. Thus, the PWN should be provided within a reasonable time after the CSE meeting while the parents' memory of what transpired at the CSE meeting is fresh. Further, the PWN should be provided a reasonable time before the implementation of the IEP. To accomplish both of these goals, providing PWN after a CSE meeting with a copy of the IEP is the better course of action. Doing so acknowledges that the District cannot take the proposed action until the parents have had a reasonable time to respond to the PWN and the enclosed proposed IEP before it is implemented. Further, enclosing the PWN with the IEP will afford the parents an opportunity to refer to both documents when contemplating the district's recommendation. The district must have an IEP in place at the beginning of the school year (8 NYCRR §200.4[e][1[ii]). As such, it is good practice to send the parents the packet including the IEP and PWN together a reasonable time after the CSE meeting and prior to the start of the school year in which the IEP will be implemented.

Although OSEP also took the position that PWN is not required for a student who advances from elementary school to middle school due to the ordinary course of progression, in New York, this is not the case. In New York, a classified child with a disability does not advance from grade to grade, or elementary school to middle school without the development of a new IEP. Therefore, a PWN would be required on each of such occasions.

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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.

