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MONTHS IN REVIEW: November-December, 2011

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

This month has been a particularly evenly weighted month for both districts and parents. Specifically, for parents, the Southern District and SRO have concluded that the DOR retains certain child find obligations even after a student has been parentally placed out-of-district. On the other hand, the Southern District and SRO have rejected parents' claims for tuition reimbursement where the district has appropriately met the student's needs in in-district placements.

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New York State Federal District Court

1. Child Find Obligations Survive Out-of-District Placement.

J.S. ex rel J.G. v. Scarsdale Union Free School District, 2011 WL 5925309 (S.D.N.Y., 2011)

SALIENT FACTS:

Parents of a student with a history of emotional difficulties withdrew their daughter from the district and unilaterally placed her in a program ("Program A") located out of state. Program A was a prerequisite to her attending a particular out-of-state residential program. Shortly after her enrollment into Program A, the

parents made their first referral to the District's CSE. Thereafter, the parents paid the first and last month's tuition and a $1,000 deposit to the residential school. Although the parents signed consent for the evaluations, they failed to make the student available for these evaluations. Rather, the parents advised the district that the student could be evaluated at Program A or the residential school. Nevertheless, based upon reports provided by Program A and the residential school staff, the DOR's CSE held a meeting, found the student eligible as a student with an emotional disturbance and recommended an in-state residential school. The parents sought reimbursement for their out-of-state residential school placement.

COURT'S DECISION:

The court determined that the District owed no legal obligations to the student prior to her referral, because there was insufficient information to suggest that the student had a disability. Specifically, the court agreed with the IHO that, given the student's level of academic achievement and the intervention of her Parents and the District during her periods of decline, the District did not have sufficient reason to believe she had a disability prior to her parental referral. The court, in an extensive review of child find standards applied to school districts, wrote, "[t]o have failed its obligation to identify students with disabilities, the District must have 'overlooked clear signs of disability,' been 'negligent in failing to order testing,' or there must have been 'no rational justification for not deciding to evaluate.'" Here, none of these circumstances existed.

However, the court concluded that the CSE owed child find obligations to the student after the student was withdrawn from the district and when the parents referred her to the CSE. In relying upon sister-circuit court decisions, the court noted, "a [DOR's] obligations do not simply end because a child had been privately placed elsewhere…rather, IDEA's obligations may be shared." Thus, the court concluded, "[IDEA's] child find provisions did not divest the DOR of its responsibility to classify [the student] and provide her with services after she was unilaterally withdrawn from the District." Once the parents, who were still residence of the DOR, requested that the DOR evaluate the student and recommend a program, the DOR was obligated to do so, even where the student attended a private school in the DOL.

WHY YOU SHOULD CARE:

First, to avoid being found to have violated child find obligations, districts must: (1) be observant of clear signs of disability, (2) order testing as appropriate, and (3) have a rational justification for deciding not to evaluate. Second, parents' unilateral placement of their child out-of-district does not completely divest the DOR of its child find obligations. Under these circumstances, where the parent has requested that the DOR convene a CSE meeting to either evaluate the student or make a placement recommendation, the DOR's CSE has a legal obligation to

make a determination of eligibility, and if the student is eligible, recommend FAPE.

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2. Student's Social and Academic Progress Contradict Need for Residential Placement.

S.H. v. Eastchester Union Free School District, 2011 WL 6108523 (S.D.N.Y., 2011)

SALIENT FACTS:

A student classified as ED based upon his reactive attachment disorder ("RAD"), was court placed in Children's Village after threatening to stab the district's assistant principal. After his discharge in March of 2008, the CSE recommended that he be placed in an alternative high school program ("alternative school"), through the end of 2007-08. The alternative school was designed for students with emotional and social disabilities that impact the students' academic performance in a regular high school environment. Based upon the student's academic and social progress, the CSE recommended that for 2008-09, the student remain in the alternative high school. The parents disagreed and unilaterally placed the student in a Utah wilderness program. Prior to the student's discharge from the wilderness program in the summer of 2008, the CSE convened and reaffirmed its recommendations for 2008-09. The parents rejected the program, in part because they believed their son was doing drugs with peers, and the alternative school lacked staff members trained to treat RAD, placed the student in a Missouri residential program, and sought reimbursement. Both the IHO and SRO denied the parent's request on the grounds that the district provided FAPE.

COURT'S DECISION:

The court declined to review the appropriateness of the Missouri program based upon its finding that the district offered FAPE. On appeal, the parents first argued that the following procedural violations denied FAPE: (1) improper composition of the CSE, (2) failure to include spelling and reading goals despite identifying deficits in these areas, and (3) failure to conduct an FBA and develop a BIP.

The court found that the failure of the CSE to include staff from the Missouri residential school did not deny FAPE because the CSE considered, among other things, written reports from the residential school staff. Further, the CSE included individuals who were familiar with the student including the student's special education teacher from the alternative school.

Second, the IEP contained one goal related to writing, which the district purported addressed the student's spelling and reading deficits. The writing goal

provided, "[the student] will submit a written assignment on a topic requested by the teacher consisting of at least four paragraphs with complete sentences." The court found persuasive district testimony that, the goal "is a good intervention for someone who has some difficulty in the area of reading and writing." As such, the court declined to find that the annual goals inappropriately addressed the identified need areas.

Third, the court acknowledged that the IEP noted that the FBA would be conducted and a BIP would be implemented at the beginning of the 2008-09 school year. Therefore, the District's failure to conduct an FBA between March and June of 2008, while the student attended the alternative school did not deny FAPE. Further, the court found persuasive District testimony that "an [FBA] was not prepared for [the student] in the three months that he attended [the alternative school] in the spring of 2008 because the CSE [] 'wanted to give [him] an opportunity to be there and to acclimate to the program.'" Moreover, the court noted that during the first three months, the alternative school had its own positive behavioral interventions in place.

Finally, the court agreed with the IHO and SRO that the IEP was substantively appropriate. While the student attended the alternative school, he made social progress. Specifically, by June, he began interacting with his teachers more than he had in March. Further, the court noted that academically, he was performing satisfactorily. The 2008-09 IEP was based upon the March IEP, which was implemented for the balance of 2007-08, and under which the student made progress. The court wrote, "past progress…does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (citations omitted). Therefore, because the student was making progress in the alternative school, there was no need for the CSE to consider a more restrictive, residential setting. Regarding the parents' concerns that the alternative school lacked staff members trained in RAD, the court wrote, "the proper inquiry is whether the staff is able to implement the IEP" not whether the staff are trained in the student's specific disorder.

Therefore, the court affirmed the SRO's decision that the district provided FAPE and thus denied tuition reimbursement for the out-of-state, private residential school.

WHY YOU SHOULD CARE:

CSEs have an obligation to recommend an appropriate placement in the LRE. There are times when based upon the date of the student's classification, a District will have only a limited period of time to implement an IEP prior to the expiration of the school year. Thus, for the subsequent year, CSEs may be inclined to recommend very similar programs and services. Where the student has progressed under the IEP, which was in place for only a short period of time, recommending a similar program for the subsequent school year may be

appropriate. Notwithstanding a parent's preferences, a CSE has a legal obligation to recommend a program in the LRE. As a residential placement is one of the most restrictive placements, a district may place a student in a residential facility only if the student needs the placement to receive FAPE. To demonstrate that the student does not require such a restrictive setting, the CSE may point to progress the student has achieved in other, less restrictive placements.

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New York State Review Officer

1. Child Find Obligations Survive Clear Intent to Parentally Place.

Application of a Student Suspected of Having a Disability, SRO Appeal. No. 11-092 & 11-094 (2011)

SALIENT FACTS:

After finding that a student with ADHD was no longer eligible for accommodations under Section 504, the students' parents obtained private speech/language, neuropsychological, and binocular/oculomotor evaluations. The private evaluators opined that the student exhibited difficulties that affected her academic achievement. After reviewing the results of the private evaluations, the 504 team concluded that the student remained ineligible. Thereafter, the parents wrote numerous letters to the district, which the district alleged did not satisfy IDEA's referral requirement. Specifically, one letter indicated that "[the student] needs at a minimum a 504 Plan and, more likely, classification under IDEA." Nevertheless, the district refused to evaluate the student for eligibility under IDEA. The IHO agreed with the parents that the district neglected its child find obligations.

SRO'S DECISION:

The SRO affirmed the IHO's order. Specifically, the SRO held that by failing to convene a CSE meeting to review the private evaluations, the District denied FAPE. The SRO concluded that "the failure to evaluate the student upon parent request; combined with the failure to convene a CSE to review the relevant information and data, determine if additional evaluations were necessary and complete the procedures to identify students with learning disabilities, resulted in a denial of FAPE."

The district argued that the parents' enrollment of the student in Kildonan, a private, non-SED approved school, placed the obligation to develop an IEP on the district of location ("DOL"). In rejecting this argument, the SRO reasoned that there was no evidence that the DOL's CSE reviewed a request for services,

developed an IESP, or that the parents had filed a request for services in the DOL on or before June 1st. In contrast, the parents requested that the DOR review the student's eligibility and develop an IEP. The DOR failed to do so. In support of his reasoning, the SRO cited a previous decision in which he concluded, without any legal support that:

> [There exists a] necessary condition precedent in order to displace [a District's] obligation to evaluate [a] student, determine the student's eligibility to receive special education programs and related services, and develop an IEP for the student: namely, that the district of location has already determined "through the child find process . . . that the child needs special education and related services." See Application of a Student with a Disability, SRO Appeal No. 11-011 (Apr. 1, 2011).

WHY YOU SHOULD CARE:

When determining whether child find obligations have been violated, inquiry will be made into whether the district has overlooked clear signs of disability or been negligent by failing to order testing, or had no rational justification for deciding not to evaluate the student. Therefore, where a parent has submitted a private evaluation, which raises suspicions about whether a child is classifiable, the district should refer the child to the CSE. Further, where it is not clear whether a parent is referring a child to the CSE, districts should communicate with the parents to determine their intentions in providing the evaluations to the district. What you should not do is demand precision from parents when they make referrals or when they inquire about the CSE or 504 standards.

The SRO has seemingly ignored legal precedent and long-standing federal and State policy that where parents have made clear their intention to unilaterally enroll their child in a private school in a DOL, the DOR is no longer obligated to develop an IEP for the child. See Education Law §3602-c; *Letter to Mendelson*, 108 LRP 2255 (OSEP, 2007); see also SED, Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to IDEA 2004 and New York State (NYS) Education Law Section 3602-c (Sept. 2007). While CSE's have a strong argument that once a parent has expressed clear intent to unilaterally enroll her child in the DOL, it's child find obligations are eliminated, this SRO decision is controlling. We anticipate that the District will pursue an appeal in this matter and will provide updates if and when they do.

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2. Parents' Claim for Reimbursement Unsupported by the Equities

Application of a Student with a Disability, SRO Decision 11-103 (2011)

SALIENT FACTS:

A student classified as OHI was parentally placed in the parents' privately owned nonpublic school ("NPS") for 2009-10. At that time, the NPS was located in a yeshiva in a neighboring district. However, in May of 2010, the parents were in communication with the DOR about their plans to relocate the NPS to a yeshiva located in the district. Specifically, during these conversations, the parents sought to ensure that the NPS students would be provided services by the DOR. Ultimately, the parents never relocated the NPS into the DOR. At the end of July, the parents requested transportation for their son to the NPS, which was still located in the DOL. In August, the parents signed an enrollment contract for their son to attend the NPS for 2010-11. Thereafter, the father requested a CSE meeting to develop an IEP for his son for 2010-11. After conducting the necessary evaluations, the CSE convened in October and recommended an 8:1+2 special class placement with related services. At the meeting, the parents indicated their intention to unilaterally place the student in the NPS, and the district developed an IESP. It was not until the due process complaint, filed four months after the CSE meeting, that the parents indicated their intention to seek reimbursement.

SRO'S DECISION:

Because the district failed to cross-appeal that portion of the IHO's decision, which held that: (1) it failed to provide FAPE for 2010-11, (2) it was required to provide related services at the NPS per the IESP, (3) the district had to reimburse the parents for the costs of related services provided at the NPS, and (4) the NPS was appropriate, these conclusions were final and binding on the parties. Therefore, the only issue on appeal was whether the equities supported the parents' claim for tuition reimbursement.

Although *prior to* the start of the school year, the parents were in contact with the district regarding the relocation of the NPS and provision of services to NPS students, the SRO found persuasive that the parents *never* requested that the CSE convene until *after* the start of the school year. Moreover, the parents requested transportation to the NPS *prior to* requesting a CSE meeting. Testimony from the district revealed that the district was under the impression that the most important part of the student's IEP was that the student receive related services at the NPS. Further, the NPS's psychologist testified that she assumed that the student would return to the NPS for 2010-11. Moreover, at the CSE meeting, the parents never indicated their intention to unilaterally enroll the student *at public expense*. Rather, they merely informed the district of their intention to continue the student in the NPS. Accordingly, the SRO affirmed the

IHO's decision that the equities weighed against the parents' claim for tuition reimbursement.

WHY YOU SHOULD CARE:

Oftentimes, parents will feign a receptive attitude to in-district placements by making the student available for evaluations and attending subsequent CSE meetings. However, simultaneously, the parents may be pursuing steps to unilaterally enroll their child in a NPS. Under these circumstances, although a district may fail to provide FAPE and a NPS may be appropriate, the equities may weigh against the parents' claim for tuition reimbursement. Where, prior to the CSE meeting, (1) the parents have requested transportation to the NPS, (2) signed a contract with the NPS for the upcoming school year, and (3) placed a deposit with the NPS, the district may have persuasive arguments that the parents predetermined their child's placement. Under these circumstances, the equities may weigh against the parents' claim for reimbursement.

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3. Quality vs. Quantity

Application of the New York City Board of Education, SRO Appeal No. 11-105 (2011)

SALIENT FACTS:

In January of 2010, the CPSE recommended that, a student with an S/L impairment be placed in an 8:1+2 special class and receive OT and counseling for the balance of 2009-10. The following month, the student was accepted into the Churchill Kindergarten program for 2010-11. Thereafter, the parents paid a non-refundable deposit to Churchill to secure their son's seat, and attended a March CSE meeting to develop his IEP for 2010-11. The March 2010 CSE recommended a 12:1+1 program with counseling, OT, and S/L services in an in-district placement. After visiting the assigned school, the parents rejected the District's recommended program, and enrolled the student in Churchill's 12:1+1 Kindergarten class for 2010-11. In finding that the District denied FAPE, the IHO concluded that there was no evidence that the student could make meaningful progress in the general education environment.

SRO'S DECISION:

The SRO found persuasive testimony from the student's Pre-K special education teacher that in the in-district program, the student showed increased interest in other students, he was responsive to his peers, and he took pleasure in his interactions with other children. Although the IEP identified that the student struggled with peer interactions, the recommended counseling services were designed to address his deficits in building social interactions. Further, the SRO noted that the levels of services recommended by the CSE were based upon reports

provided by the student's Pre-K providers and special education teachers. Thus, the SRO concluded that, "the district offered the student a program designed to provide him with access to his nondisabled peers while at the same time tailoring the recommended program to the student's unique needs." Because the SRO found that the district offered FAPE, he declined to determine whether the Churchill school was appropriate.

WHY YOU SHOULD CARE:

The period of time within which a student has progressed may be of less importance than the quality of the student's progress. Thus, where a student has made progress in a CSE-placement, what is important is the quality of progress, not how long he was in the program.

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4. Disagreement With "Stale" Evaluation Triggers IEE Obligations.

Application of a Student with a Disability, SRO Appeal No. 11-122 (2011)

SALIENT FACTS:

In response to a parental referral, in August of 2008, the district completed a psychoeducational evaluation of a student with dyslexia and dysgraphia. Thereafter, the parents obtained a private neuropsychological evaluation. Both evaluations were reviewed at a December 2008 CSE meeting where the student was found ineligible. In December of 2009, the district referred the student to the CSE. The parents declined consent for initial evaluations pending the results of another private neuropsychological evaluation they had obtained for their son in November of 2009. After the private evaluator recommended that the student be classified as learning disabled, the parents provided consent for the district to evaluate. As a component of the initial evaluations, the district conducted a psychoeducational evaluation. Although the May 2010 CSE found the student ineligible, the 504 team found him eligible. However, prior to the hearing, the CSE found the student eligible. Against the parents' request, the CSE refused to specify the Wilson Reading program on his IEP. On appeal, the IDEA issues were: (1) the parents' entitlement to reimbursement for the November 2009 neuropsychological evaluation, and (2) the CSE's refusal to indicate the Wilson Reading program on the IEP.

SRO'S DECISION:

The SRO disagreed with the IHO that the CSE was obligated to include a particular methodology on the IEP. Specifically, the SRO wrote, "...while there is nothing in the IDEA that requires an IEP to include specific instructional methodologies, whether to include an instructional methodology in a student's IEP is a CSE decision and therefore, if a CSE determines that specific instructional

methods are necessary for the student to receive a FAPE, the instructional methods *may* be addressed in the IEP" (emphasis added).

However, the SRO agreed with the IHO that the District was obligated to reimburse the parents for the cost of the 2009 private evaluation. The District argued the contrary because the parents did not disagree with an evaluation performed by the district. The district argued further that the parents failed to afford the district an opportunity to ask why the parents wanted the IEE. When a parent requests an IEE at public expense, the district has two options: (1) provide the IEE, or (2) initiate an impartial hearing to show that its evaluation is appropriate or that the private evaluation does not meet the district's criteria. Contrary to the district's assertions, the SRO concluded that the parents disagreed with the district's August 2008 psychoeducational evaluation. The SRO also concluded that the parents disagreed with a November 2008 spelling reassessment and communicated this disagreement to the district. Further, the SRO concluded that a district may not require the parent to provide an explanation for the IEE request. Therefore, the SRO affirmed the IHO's order directing the district to reimburse the parents for the cost of the private neuropsychological evaluation as an IEE at public expense.

WHY YOU SHOULD CARE:

It is well settled law that, generally, teaching methodology is a matter left to the discretion of the teacher or service provider. However, where the CSE determines that a specific teaching methodology is necessary for a student to receive FAPE, it may be indicated on the IEP. However, under these circumstances, there was no requirement that the methodology be indicated on the IEP. In fact, it is still a good rule of thumb not to include methodology on an IEP. Doing so may unreasonably hinder a teacher or service provider from employing other methodologies, which may prove effective, or may prevent abandoning a methodology that is ineffective until the parents agree to amend the IEP.

For IEE obligations to be triggered, the district must have conducted an evaluation, and the parent must express disagreement with the evaluation. See 8 NYCRR 200.5(g)(1). However, the law is silent as to whether the evaluation with which the parent disagrees must be the most recent evaluation conducted by the district. As the SRO has suggested in this decision, even where the evaluation with which the parent disagrees is arguably "stale," because the district has conducted a subsequent evaluation, the district's IEE obligations are triggered.

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5. Student's Severe Food Allergy Does Not Warrant Reimbursement for Parental Placement Where District Appropriately Accommodated Student.

Application of a Student with a Disability, SRO Appeal No. 11-098 (Oct. 28, 2011)

SALIENT FACTS:

For 2009-10, a student with autism was parentally placed in the Rebecca School ("Rebecca"). For 2010-11, the CSE maintained the student's classification, recommended a 12-month program in a 6:1+1 special class within a special school, and related services of OT and SL. The IEP noted that the student was severely allergic to seafood and fish. Specifically, he could not have seafood or fish in his environment, as he could have an anaphylactic reaction to exposure. To address the student's severe asthma, the IEP included program accessibility options for climbing stairs and limited travel time on a bus with air conditioning. After receiving the district's final recommendation, the parents notified the district that they had unilaterally placed the student at Rebecca for 2010-11 and would be seeking reimbursement. The parents' main concern was the inability of the school to accommodate the student's severe food allergy.

SRO'S DECISION:

First, the SRO held that the recommended 6:1+1 placement was appropriate as it was based on adequate evaluative information the CSE had before it. The district completed a classroom observation of the student at Rebecca and obtained interdisciplinary update reports from Rebecca staff, which were reviewed by the CSE. The SRO concluded that the SPAMs (i.e.: PLEPs) were all consistent with the information provided by the student's then-current teachers at Rebecca and his related service providers. Similarly, the goals appropriately addressed his needs. Moreover, the SRO found persuasive that many of the goals were "extrapolated from the Rebecca School report."

Second, the SRO concluded that the CSE did not fail, as the parents alleged, to consider the student's severe food allergies. Specifically, the SRO pointed to the CSE meeting minutes, which "indicated that the CSE discussed the parents' primary concerns about the student's asthma and seafood/fish allergies." Additionally, the SRO found persuasive that the IEP highlighted the student's food allergy as a medical alert on the first page of the IEP and in the health and physical development sections of the IEP. Moreover, the school had "universal protocols," which included conversations between the nurses, dieticians, parent, and teachers with respect to how to properly accommodate the student's allergies. Further, the cafeteria did not serve seafood or shellfish. Additionally, staff were trained in the use of the Epi-Pen, and if the student's teachers and paraprofessionals were not trained, the school nurse would train them. If a student's allergies are severe, the school allows the student to eat in the classroom with either his teacher or paraprofessional. Further, the school nurse inspects the menu each month, circles each item any student would be allergic to, and then distributes the menu to the teachers.

Third, the parents alleged that because the DIR/Floortime methodology was the only appropriate methodology to use with the student, and the assigned class used TEACCH and ABA methodologies, the placement was inappropriate. The SRO concluded that the record did not support the conclusion that the student could only use a specific methodology. The SRO determined that the CSE was not required to specify methodology on the IEP and that the precise methodology was left to the discretion of the teacher. Further, the SRO noted testimony from district staff that the district teacher may use TEACCH, ABA, or DIR.

WHY YOU SHOULD CARE:

While the new IEP form does not contain a "special alerts" section, it would be appropriate for CSEs to document information traditionally included in this section on the Student Information Summary ("SIS") as well as under the physical development and/or management needs sections of the IEP. Just because "special alerts" has been removed from the new IEP form does not mean the CSE can ignore the issue, rather, it should note such concerns on the SIS and in the IEP.

ABA has traditionally been thought to be the primary teaching methodology for students with autism. However, where there is no evidence that ABA is the only effective methodology for a particular student. The CSE has no obligation to indicate this specific methodology in the IEP. Rather, under these circumstances, the teaching methodology for all students, including those with autism, is left to the discretion of the teacher.

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