

# ATTORNEY'S CORNER

By Jack Feldman

**MONTH IN REVIEW: October 2012**

**Read All About It!**

***A Monthly Synopsis of Salient Cases in Special Education***

## **INTRODUCTION**

This month, we review several decisions, which run the gamut, from districts who denied FAPE by recommending overly restrictive placements, to a parent's unsuccessful attempt to convince a federal district court that a violation of the Regulatory age-range guidelines for special classes resulted in a denial of FAPE.

### ***Second Circuit Court of Appeals***

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#### **1. Student's Tendency to Model Behavior of Typical Peers Weighs Against District's Special Class Placement Recommendation.**

**G.B. and L.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist., 2012 WL 4946429 (2d Cir., 2012)**

#### **SALIENT FACTS:**

The parents of a student with autism challenged the district's decision to remove her from her mainstream preschool placement and place her in a special

class comprised of students with severe disabilities. The parents unilaterally placed the student in a mainstream private school at their own expense and sought tuition reimbursement. The school district appealed.

The Circuit Court noted its obligation to conduct an independent review of the administrative record in these cases. Nevertheless, the court affirmed the district court's decision (see 751 F.Supp.2d 552 [S.D.N.Y., 2010]) granting tuition reimbursement in the amount of \$71,041.25 “for substantially the reasons stated by the district court in its thorough opinion.” The Court relied upon the District Court's decision for “the underlying facts, the procedural history of the case, and the issues presented for review.”

### **COURT'S DECISION:**

The student had poor speech intelligibility and significant language delay; displayed a short attention span, limited eye contact, distractibility and a high activity level. However, she demonstrated good memory and the ability to model behaviors she observed. During the prior year, the CPSE declined to place her in a special education class because it determined that her needs could be met in a mainstream preschool. During the student's time in the mainstream class, she developed her expressive skills, but continued to need to improve her language skills, social interaction with peers and with adults, cooperative play skills and frustration tolerance. Despite this progress, for the following year, the CPSE recommended that she be placed in a 6:1:2 special class program. However, there was no indication in any of the documents presented in evidence that a mainstream placement was inappropriate, or explained why that was the case. The parents removed the student from the District's program and unilaterally placed her in a mainstream program where she reportedly flourished. Despite this progress, during the annual review, the CSE recommended an 8:1:2 special class.

The lower court found that the evidence convincingly demonstrated that placing the student in a special class violated IDEA's preference for mainstreaming. There was no evidence that the school district considered accommodations that would have allowed the student to remain in the mainstream program. Because of the student's tendency to model the behaviors of her peers and others, the court reasoned that placing her in a special class with all severely disabled students would be a detriment to her education, and therefore, be inappropriate. Accordingly, the court overturned the decisions of the IHO and SRO stating that the “overwhelming evidence demonstrated that [the student] was capable of attending an integrated class if provided with sufficient accommodations.” Because the private placements remedied the district's IDEA violations, and the student progressed there, the court granted the parents' request for reimbursement.

## **WHY YOU SHOULD CARE:**

In order to determine whether an IEP provides the least restrictive environment, the reviewing authority determines whether the student can be satisfactorily educated in a regular classroom with the benefits of supplemental aids and services. In making this determination, the reviewing authority will consider: (1) whether reasonable efforts were made to accommodate the student in a regular classroom; (2) the educational benefits available to the child in a regular class with appropriate supplementary aids and services, compared with the benefits provided in a special class; and (3) the potential negative effects on the education of the other students in the class. If the district is justified in removing the student from the mainstream class, the reviewing authority will determine whether the school has included the student in school programs with nondisabled children “to the maximum extent appropriate.”

Here, the lower court noted that under “Other Options Considered” in the IEP, there was a notation that, “[t]he Committee considered a general education setting with support services but rejected it ‘because [the student’s] current academic functioning, social needs, physical needs and language processing needs indicate [] that a more intensive setting with support is needed to address [the student’s] needs.’” The lower court held, “this boilerplate, conclusory language cannot satisfy the requirement that the CSE ‘seriously consider including the child in a regular class with such supplementary aids and services as appropriate.’” As you know, the “Other Options Considered” section has been removed from the SED-mandated IEP Form, the SED-mandated PWN Form is now the place that the CSE should explain why it made the recommendations it made and why it rejected other options. When preparing PWNs, districts would be living dangerously if they ignored the court’s ruling here. Because CSEs continue to be obligated to consider other placement options in determining LRE, this ruling applies the reasons included in the PWN letters. Districts should err on the side of caution by refraining from using boilerplate language in IEP or PWNs. Both documents are intended to be *individualized* based upon the student’s *specific* needs and the CSE’s particular discussions regarding these needs. If less restrictive programs were considered and rejected by the CSE, it would be wise to indicate which programs were rejected and detail the reasons why.

### ***Federal District Courts***

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#### **1. A District Had No Obligation to Create A Mainstream ESY Program For a Student Recommended to be Placed in a 10-Month Mainstream Program.**

**T.M. by A.M. and R.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796 (S.D.N.Y., 2012).**

### **SALIENT FACTS:**

For the student's 2010-11 school year, the CSE made recommendations for his ESY program that were different from his 10-month program. Specifically, for the ESY program, the CSE recommended that the student be placed in a 12:1+1 special class with related services of OT, PT and speech-language therapy. For the student's 10-month program, the CSE recommended that the student be placed in a 12:1+1 special class for ELA and math; general education for all other classes; receive related services of OT, PT, speech-language therapy; and a 1:1 teaching assistant throughout the day. The Parents contended that the District failed the LRE requirement because the CSE recommended that the student be placed in a special class during the summer, while simultaneously recommending a general education program for the 10-month school year. The District argued that because it did not offer students a general education program during the summer, it had no obligation to create such a program for this student. The IHO ruled the District denied FAPE. In her thirty-one page, single-spaced decision, the SRO overruled the IHO's decision. The SRO concluded that the district had no obligation to create a mainstream program for the student.

### **COURT'S DECISION:**

The court agreed with the SRO that the IHO erred in her application of IDEA's LRE requirements to the facts of the case. The district argued that the LRE provisions presumed the existence of a "regular education environment." However, the district did not offer a regular education environment during the summer. Accordingly, the district argued that the recommended summer program was in the LRE. The court agreed that a "regular education environment in which the student could have been placed [during the summer]" was unavailable to the student. Consistent with the holdings of courts in other circuits, the court held that the district had no obligation to create a mainstream ESY program where none existed.

### **WHY YOU SHOULD CARE:**

In order to satisfy its obligation to offer an eligible student FAPE in the LRE, the district must:

- (1) Make reasonable efforts to accommodate the child in a regular classroom;
- (2) Ensure that educational benefits are available to the child in the regular class; and
- (3) Consider the possible negative effects of the inclusion of the student on the education of the other students in the regular education class.

When a district does not operate a mainstream educational program during the summer, it has no obligation to create one for a classified student who is capable of progressing in the general education environment. Thus, despite the

CSE determining that a student is capable of functioning in a general education environment during the 10-month school year, the district has no obligation to create a general education program for the student's summer.

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## **2. A District's Violation of the Regulatory Maximum Age Range in Special Classes Overlooked Where Students Appropriately Grouped.**

**E.A.M. v. New York City Dept. Of Educ., 2012 WL 4571794 (S.D.N.Y., 2012)**

### **SALIENT FACTS:**

The CSE recommended a 12:1:1 class at a community school for a 13 year old LD student. The IEP included annual goals and short-term objectives for the student to address her reading, decoding, expressive and receptive language, language processing and math deficits. The recommended class included two 11 year old students while the other students ranged between 12 and 15. The student was functioning between a fifth and sixth grade level in reading and at a sixth grade level in math. The other students' functional levels in reading and math ranged from first through sixth grade. All of the students were classified as LD or ED. The teacher testified that she would have been able to meet the student's needs and would have been able to structure the program to allow the student to meet her IEP goals. The parents rejected the recommended program, unilaterally placed her in a private school and sought tuition reimbursement.

### **COURT'S DECISION:**

As a preliminary matter, the court addressed the parents' allegations of procedural violations. Most notably, the parents alleged that the district erred in failing to include a general education teacher of the student in the CSE membership. The district argued that because the student would not be mainstreamed, the CSE did not need to include a general education teacher of the student. However, the evidence demonstrated that the student would be mainstreamed for gym, lunch and talent class. Thus, the court held that the CSE should have included a general education teacher. However, the court concluded it was unclear what type of general education teacher would have been responsible for implementing the student's IEP or what this teacher would have added to the CSE's discussion. As such, the court found that the participation of a general education teacher, who may not have been responsible for the implementation of the student's IEP, did not rise to the level of a FAPE denial.

The Parents' principal substantive objection concerned the composition of the recommended placement's classroom rather than the IEP itself. The Parents

argued that the age range of the children was too large and the educational needs insufficiently similar to those of their child. The court noted that State regulations provide that the age range of students with disabilities in a special class “shall not exceed 36 months...[and that] the students be suitably grouped with other students having similar levels of academic achievement, social and physical development, and management needs” (emphasis added). Because the classroom included two eleven year olds and nearly half of the students were the same grade level as the student, the court concluded that the preponderance of the evidence did not show that the mix of age ranges, by itself denied the student FAPE.

The court held that a district’s failure to adhere to the age-related guidelines is not always fatal if the students are grouped appropriately for functional abilities. However, uniformity of needs is not required. The parents alleged that the presence of students with serious behavioral issues would distract the student and therefore hinder her progress. However, the court held,

[W]hether a student is properly grouped with other students who have behavioral needs is a question of educational policy, and, in any event, the relevant inquiry is not whether the [p]lacement classroom provided all possible support[s] to ensure that the student did not lose focus, but rather whether objective evidence indicated that she was likely to progress, not regress, under the proposed plan.

To this end, the court noted that nothing in the student’s IEP or recent teacher reports suggested that she would regress if grouped with emotionally disturbed students. Rather, the students in the classroom had needs similar to those of the student’s. Because the SRO’s conclusion that the student would have been appropriately grouped in the proposed classroom, the court concluded that this decision was entitled to deference, and therefore, held that the district offered the student FAPE.

#### **WHY YOU SHOULD CARE:**

The Regulations of the Commissioner of Education provide, “[t]he chronological age range within special classes of students with disabilities who are less than 16 years of age shall not exceed 36 months.” See 8 NYCRR §200.6(h)(5). However, upon submission of an application and documentation of educational justification to the Commissioner, approval may be granted for a variance from this chronological age range restriction. 8 NYCRR §200.6(h)(6). The Regulations also require that the size and composition of the class must be based on the similarity of individual needs of the students according to: (1) levels of academic or educational achievement and learning characteristics, (2) levels of social development, (3) levels of physical development, and (4) the management needs of the students in the classroom. 8 NYCRR §200.6(h)(2). Districts should make every effort to adhere to the Regulatory age range guidelines. However, when a

district is incapable of adhering to the guidelines, all is not lost. As illustrated in this case, the age range restriction may be overlooked where the special class students are appropriately grouped for functional purposes.

## **Office of State Review**

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### **1. A Goal for Every Need, A Need for Every Goal.**

#### **Application of the Board of Education, Appeal No. 12-135 (2012)**

##### **SALIENT FACTS:**

For three school years, the CSE maintained its recommendation of a 6:1+1 special class and related services for a nonverbal student with autism who was dependent on others to complete activities of daily living. The parents unilaterally placed the student at the Rebecca School for 2011-12. The parents argued, among other things, that “the CSE’s recommendation of the same program that it had recommended for the prior two years ‘strongly suggested’ [that] the district predetermined the recommendation.”

The IHO credited the parent’s testimony that the CSE meeting lasted no more than 15 minutes. Consequently, the IHO concluded that this brief meeting provided insufficient time for the CSE to adequately discuss each of the students’ needs and consider the parents’ concerns. According to the IHO, this abbreviated CSE meeting also led to the failure to properly identify SPAMs, goals and services aimed at addressing the student’s deficits in the areas of toileting and sensory processing. As to the unilateral placement, the IHO found that the Rebecca School met the student’s needs “by providing her with a small class, significant adult support (including individualized attention) and an environment in which her social, sensory, communication and academic deficits [were] addressed.” Accordingly, the IHO found that the district denied FAPE and granted the parents’ request for compensatory education services for the denial of FAPE during 2010-11 and tuition reimbursement during 2011-12.

##### **SRO’S OPINION:**

With regard to the length of the CSE meeting, the SRO pointed out that there was no legal authority to hold that the length of the meeting alone was sufficient to support a finding that the parents were precluded from participating in developing the student’s IEP. Further, there was no evidence that the parents attempted to discuss topics and were precluded from doing so or that the district refused to listen to their concerns due to district-imposed time constraints. Accordingly, the SRO declined to affirm the IHO’s decision on this matter.

Next, the SRO addressed the IHO’s finding that the absence of a district representative denied FAPE. The district argued that the student’s special

education teacher had the knowledge and experience to qualify her to serve as the district representative. The SRO disagreed. The SRO pointed out that the special education teacher was not knowledgeable about the district's available resources and therefore, she did not qualify as a district representative. However, the SRO held the absence of a district representative from the CSE meeting did not result in a deficient IEP. The SRO reasoned that the special education teacher was clearly aware of the student's needs and present levels of performance; the parents, special education teacher, and all of the related service providers were present; and there was no evidence that the special education teacher's lack of knowledge about district resources resulted in a denial of FAPE.

The SRO held that the FAPE denial resulted from the district's failure to properly address the student's identified needs. For example, although the SPAMs noted that the student had "significant delays in the areas of visual motor, self-care and sensory processing skills," the SPAMs provided no further descriptions or information about the specific needs the student exhibited in each of these areas. As such, the SPAMs insufficiently identified the student's need areas. The SRO ruled that specificity is required if SPAMs are to be considered reliable.

Because the SPAMs were insufficient and the goals were based upon the needs identified in the SPAMs, the SRO held that the goals were also insufficient. The SRO pointed out that, although if read broadly, some of the annual goals and short-term objectives could have been construed to relate to the student's needs, without the additional information in the SPAMs, it was difficult to determine whether the goals adequately addressed these needs. Moreover, the IEP failed to include strategies in the student's management needs to address her identified deficit areas. Accordingly, the SRO found that the district denied FAPE for 2010-11 because it failed to sufficiently identify the student's present levels of functional performance or include corresponding goals required to address the student's identified needs.

The SRO concluded that, although the 2011-12 IEP identified the student's needs in broad terms, the lack of specificity in the SPAMs resulted in a denial of FAPE. Specifically, the IEP indicated that the student's sensory processing skills were "significantly delayed." However, the SPAMs did not provide any additional information which provided any insight into her sensory delays or how they impacted her performance. Rather, the IEP provided general statements about the student including that "she benefitted from various types of prompting throughout activities, she required a structured environment, [and] small group instruction..." The SRO concluded that these general statements did not contain the necessary level of specificity required under IDEA.

As the 2011-12 goals were based upon insufficient SPAMs, the SRO concluded that they failed to address specific needs. While finding that the goals could have been broadly construed to relate to identified needs, the SRO found it



difficult to determine whether these goals, standing on their own, addressed needs identified in the IEP. Specifically, the IEP indicated that the student was “dependent in caring for her personal hygiene, buttoning, shoe lacing and zipping.” However, the IEP included only one goal and corresponding short-term objective relating to self-care skills. The testimony indicated that this goal was designed to help the student put on and remove her outerwear. However, because the goals lacked details or examples of the skills they were designed to address, the SRO ruled they were too vague. A goal should be written in a format that would allow anyone picking up the IEP to understand the skill it was intended to address. The SRO agreed with the IHO that the IEP SPAMs were inadequate in describing the student’s self-care needs and the IEP failed to provide sufficiently specific goals tailored to address those needs. Accordingly, the SRO held that the District failed to offer the student FAPE for 2011-12.

Regarding the unilateral placement, the SRO upheld the IHO’s holding that Rebecca was appropriate. The SRO noted that, while at Rebecca, the student was placed in a 6:1:3 class where the curriculum was adapted to meet her needs. Despite the District’s argument that the student would not have been appropriately grouped at Rebecca, the District failed to present any legal authority for the proposition that functional grouping requirements applied to unilateral placements. Regarding the student’s need for a 12-month program, the SRO concluded that Rebecca’s 10-month program was sufficient to afford the student educational benefit. The SRO declined to attach a high degree of significance to the fact that the parents elected not to avail themselves of the District’s ESY program. The SRO agreed with the IHO that 105 hours of compensatory educational services were warranted as a result of the 2010-11 FAPE denial. Similarly, the SRO agreed with the IHO that no equitable considerations weighed against tuition reimbursement for 2011-12.

#### **WHY YOU SHOULD CARE:**

The CSE must include a district representative (i.e. CSE Chairperson) at each meeting. A district representative is described as a representative of the district who:

- (1) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- (2) Is knowledgeable about the general education curriculum;  
**and**
- (3) Is knowledgeable about the availability of resources of the district. See 20 USC 1414(d)(1)(B)(iv); 34 CFR 300.32(a)(4); 8 NYCRR 200.3(a)(1)(v).

As illustrated here, while the student's special education teacher may have been knowledgeable about special education and the student, where he or she is not familiar with all of the district's programs, out-of-district programs or available resources, he or she will not be qualified to serve as a CSE Chairperson.

As illustrated by the SED-mandated IEP form, the CSE is required to develop a student's present levels of performance, including abilities, strengths and needs, and then develop corresponding goals and short-term objectives, if applicable. The SPAMs section of each IEP should be sufficiently specific to accurately identify the child's deficiencies. It is insufficient if the SPAMs merely provide general statements regarding the student's functioning. Rather, they must provide detailed insight into the student's delays and how they impact his or her performance. This is important because the SPAMs form the bases for the annual goals.

Annual goals must also be specific and measurable. To ensure that the goals are specifically tailored to address specific needs, it is a good idea to include examples of what the child is expected to accomplish. Anyone who picks up an IEP must be able to identify the student's particular needs by reading the SPAMs and be able to identify which needs are addressed by each annual goal. Prior to finalizing an IEP, it is a good idea to first determine that the needs are accurate. Then make sure that each identified need is addressed by at least one goal. Finally, each goal should be reviewed to make sure that it addresses at least one of the identified needs. This will ensure that there is a goal for each identified need and a need for each goal.

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