NYSE Directors
Centris Group

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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this month's issue of the *Attorney's Corner*, we learn that Districts may draw criticism from the New York State Education Department if they use the Resolution Process as a subterfuge to avoid New York State's policy on the ability of districts to place students with disabilities in SED-approved schools. One district was found to have violated this policy by engaging in a practice of agreeing, at the Resolution Session, to place students with disabilities in bilingual Yeshivas - something that the CSE was otherwise precluded from doing.

Federal District Courts

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1. District's Pattern of Placing Students Out-of-District Per Resolution Agreements Deemed Inappropriate.

East Ramapo Central School Dist. v. DeLorenzo et al., 2013 WL 5508392 (S.D.N.Y., 2013)

SALIENT FACTS:

During 2012-13, the District developed IEPs for 2,131 special education students. Thirty CSE recommendations were challenged through due process and the District resolved 21 of these challenges during the Resolution Session. In 14 of these 21 cases, the District resolved the disputes by agreeing to place the children

in out-of-district, Yiddish, bilingual programs rather than in public schools. For reasons unrelated to the Resolution Session Agreements, SED conducted an on-site meeting with the District. Following this meeting, the Assistant Commissioner of Education informed the District that with respect to the 21 Resolution Session Agreements:

> [I]t had engaged in patterns and practices inconsistent with both federal and New York State law and regulations…by allowing one [d]istrict representative [to] unilaterally [] determine the placement for students with disabilities at resolution meetings, which NYSED found was inconsistent with laws requiring the CSE to recommend a placement in the LRE and evidenced a clear intent and pattern to circumvent IDEA and remove the IEP decision-making process from the CSE.

SED determined that, after a parent filed a demand for due process, the District would meet with the parent at the Resolution Session, during which time the District would agree to place the student in the out-of-district, Yiddish, bilingual special education program. This decision was made even though the student's IEP did not recommend bilingual services. In response to SED's findings, the District argued that the Resolution Session Agreements were bilateral agreements between the Parents and the District's authorized representatives, and therefore, the District was well within its authority to reach such agreements. Moreover, the District argued that SED lacked the authority to override a Board's discretion to resolve parental challenges to CSE recommendations. In his response, the Commissioner of Education informed the District that, "SED found 'no evidence that the District conducted resolution meetings, as [contemplated and permitted] under the federal law." The district filed a lawsuit against SED and the Commissioner requesting a declaration that, among other things, a district is permitted to settle a parent's challenge to a CSE's placement recommendation by agreeing to a different placement without the CSE's approval.

COURT'S DECISION:

As a preliminary matter, the court pointed out that the Eleventh Amendment generally deprives a federal court of jurisdiction over lawsuits brought by private parties against state entities, including SED, regardless of the remedy sought. Further, Congress did not create a private right of action in IDEA allowing districts to sue a state educational agency. As such, without SED agreeing to allow the District to bring an action against it, the court lacked jurisdiction to hear the case, and therefore, dismissed it without reaching the merits.

WHY YOU SHOULD CARE:

Once a parent files a complaint challenging the district's offer of FAPE to a child, IDEA requires the district and parent to attend a resolution session meeting unless the parties agree to waive the meeting. The purpose of the meeting is to

give the parties an opportunity to reach an agreement without the presence of a third party, which resolves the issues in the complaint, and thus obviates the need for a hearing. If the parties reach such an agreement, the parents and a representative of the district must sign a Written Settlement Agreement (8 NYCRR §200.5[j][2][iv]). Each party has 72 hours to rescind its agreement. If the parties do not reach an agreement, the matter proceeds to a hearing. It is important to note SED's criticisms of the district's resolution process:

- The meetings were not always convened after receiving a demand for due process. Rather, it was common for the District to convene a Resolution Session Meeting after receiving a letter from a parent stating his/her disagreement with the CSE's recommendations and without the District first appointing an IHO;

- The District's Representatives who participated in these meetings had not actually participated in the CSE meetings; and

- The District had conducted 12 Resolution Sessions in one day, thus suggesting that individual consideration had not been given to each case and that the meetings were merely *pro forma* exercises designed to change a CSE's placement recommendation to the parent's preference.

Although the court declined to consider the merits of the case because SED did not waive its immunity from liability, this case sheds some light on SED's position on Resolution Sessions. Because the district engaged in what SED determined was a pattern of recommending Yiddish bilingual programs upon the parents' filing Demands or merely expressing their intentions to file Demands, this factor clearly weighed heavily on SED's determination. SED clearly believed that the decisions to send children to the religious schools desired by the parents, was a systematic way to transfer public funds to support private schools. Had the decisions been made on a case-by-case basis with educational benefit to the child, rather than the preference of the parent, being the main consideration, one suspects that SED would not have opposed the Agreements.

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2. The Improper Composition of a CSE Resulted In A District Being Held Liable For a Denial of FAPE.

R.G. v. New York City Dept. Of Educ., 2013 WL 5818541 (E.D.N.Y., 2013)

SALIENT FACTS:

During a student's "Turning Five" CSE meeting convened to develop her 2010-11 IEP, the following individuals were present: a school district psychologist, who chaired the meeting; one of the student's SEITs from 2009-10; and the student's mother. Despite being required under both federal and state laws and regulations, a general education teacher did not participate. Prior to the CSE meeting, the psychologist reviewed reports from the student's teachers and service providers, conducted a brief observation of the student working with her SEIT outside of the classroom, and conducted a psychological evaluation. Based on her review of this information, the psychologist prepared a draft IEP prior to the CSE meeting. The only reports provided to the parent and SEIT during the CSE meeting were the psychological evaluation and the social history report prepared by the parent. The psychologist recommended that the student be classified as a student with a speech or language impairment and be placed in a 12:1:1 special class. The parent and SEIT disagreed and requested that the student be placed in a general education class with supports, a program which was similar to that in which the child was enrolled in 2009-10. Despite this disagreement, the psychologist, as chairperson, maintained her recommendation. The Parent unilaterally enrolled the student in a Yeshiva, where she received SEIT services, pursued due process, and requested reimbursement of tuition paid to the Yeshiva and the costs of providing the student with SEIT and related services. Although the IHO and SRO acknowledged that the District committed several procedural violations, both denied the parent's requests. The court disagreed.

COURT'S DECISION:

As a preliminary matter, the court noted that the composition of the CSE was flawed, because it failed to include a general education teacher of the child. Because the student had been participating in a general education pre-K program, the court concluded that the CSE should have included a general education teacher who was or might have been responsible for implementing her IEP during the upcoming school year. As such, the court held that the SRO correctly concluded that the District violated federal and state regulations regarding the composition of the CSE.

Next, the court considered whether this procedural violation impeded the student's right to FAPE. In order to prevail on such claim, "the parent must demonstrate how the procedural violation resulted in the IEP's substantive inadequacy or affected the decision-making process" (*citing* M.W. ex rel. S.W. v. New York City Dept. Of Educ., 725 F.3d 131, 139 [2d Cir., 2013]). The court agreed with the parents that the exclusion of a general education teacher from the CSE substantively affected the CSE's decision-making process. The court wrote, "the participation of a child's regular education teacher at a CSE is a critical procedural mechanism to realizing the mainstreaming objectives articulated in IDEA." The court reasoned that the general education teacher provides information about the general education curriculum, and helps ensure full consideration of a child's

ability to remain in a regular education classroom with the use of supplementary aids and services. The court acknowledged that, while "the presence of a regular education teacher at a CSE's meeting does not *guarantee* a child will receive a mainstream placement, it does help to ensure that this option receives fair consideration" (emphasis added) (*citing* J.G. ex rel. N.G. v. Kiryas Joel U.F.S.D., 777 F.Supp.2d 606, 653 [S.D.N.Y.., 2011]). Accordingly, the court held that the failure to include a general education teacher in the CSE "prevented a full assessment of the appropriate placement for [the student]." As a result, the court ordered the CSE to reconvene and develop a new IEP for the student.

WHY YOU SHOULD CARE:

When conducting a CSE meeting for a child who is or may be participating in the general education environment, the CSE must include a general education teacher of the child. In general, this teacher should be a regular education teacher who was or might be responsible for implementing a portion of the student's IEP, if the student were educated in a public school. Where the general education teacher was previously responsible for implementing the IEP, the CSE will have the benefit of a teacher who is familiar with the student, his functioning level, and needs. Where the general education teacher serving on the CSE may be the student's teacher in the upcoming school year, the CSE will have the benefit of a teacher who is capable of providing specific information concerning details about the proposed class. Failure to include a general education teacher in a CSE meeting for a child who may participate in the general education environment is a procedural violation, which may prove fatal. It is, however, important to remember that not all procedural violations will render an IEP legally inadequate. In order to prevail on a claim that a CSE's improper composition resulted in an inadequate IEP, the parent must prove that this procedural inadequacy: (1) impeded the student's right to FAPE, (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child, and (3) caused a deprivation of educational benefits. Where the general education teacher should have been included in the CSE and is not, the parent may prevail on a claim that the absence of the general education teacher prevented a full assessment of the appropriate placement for the student. This is especially the case where, as here, the district fails to even consider a general education environment for a student who participated in a general education environment the previous school year.

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Office of State Review

1. District Permitted to Evaluate Student Without Parental Consent.

Application of a Student Suspected of Having a Disability, Appeal No. 13-055 (2013)

SALIENT FACTS:

A student with difficulties in reading and writing was retained twice in first grade. The school implemented various interventions to help improve the student's academic performance, including computer guided reading instruction designed to address the student's needs in the areas of phonics, reading comprehension and reading fluency. However, the interventions were unsuccessful primarily due to the student's refusal to cooperate. The student's teacher referred the student to the CSE because of the frustration he was experiencing when presented with new reading and writing material. The teacher reported that when the student became frustrated, he began acting out in class, which interfered with his academic performance. The Parent refused consent to allow the District to conduct the initial evaluation. The IHO granted the District's request and the Parent appealed.

SRO'S DECISION:

On appeal from the IHO's decision, the Parent argued that the student required additional assistance in reading, but that his needs did not rise to the level of requiring special education. The Parent alleged that when she requested additional assistance in reading from the District, the school principal informed her that the District did not have funds available to provide these services and that the Parent should seek private tutoring. The Parent asserted that the student's academic difficulties stemmed from multiple in-school suspensions, which resulted in missed academic instruction. In contrast, the District asserted that the student's poor academic performance and behavioral difficulties provided sufficient reasons to suspect that the student had a disability. The SRO agreed with the District.

As an initial matter, the SRO pointed out that the procedure for an initial evaluation consists of a multi-disciplinary group conducting an initial review of the existing evaluation data. This data may include "information provided by the [] parents, current classroom-based assessments and observations by teachers and related service providers" (*citing* 8 NYCRR §200.4[b][5][i]). Such review may occur without a meeting. Id. Based on this review and input from the student's parents, the CSE must identify what additional information, if any, is necessary to determine whether the student is a student with a disability, the student's needs, SPAMs and whether the student needs special education or related services. 8 NYCRR §200.4(b)(5)(ii). If the District has established an "adequate basis" to suspect that the student has a disability requiring the provision of special education services, then the District will be permitted to override a Parent's refusal to consent to the initial evaluation. Based on its review of the IHO's decision, the SRO wrote:

> [T]he IHO, in a well-reasoned and well-supported decision, correctly held that the [D]istrict sustained its burden to establish that it had offered remedial services to the student without effect, thereby, providing an adequate basis to suspect a disability and justifying exercise of the consent override provision of the IDEA.

Although there was no evidence that the District provided the student with any services designed to address his social/emotional or behavioral needs prior to referring him, the SRO held that the District had a reasonable basis to conclude that the student's needs could not be remediated without special education services. Because an evaluation would provide the District and parent with useful information regarding the student's needs and enable the district to appropriately respond to these needs, the SRO agreed with the IHO that the District should be allowed to conduct an initial evaluation.

WHY YOU SHOULD CARE:

Subject to certain limited exceptions, a district must obtain informed parental consent prior to conducting an initial evaluation. IDEA permits districts to pursue due process to attempt to override a parent's refusal to consent or failure to provide consent for the district to conduct an initial evaluation. To be successful in the due process action, a district must have a detailed record of its reasonable attempts to obtain the parent's written informed consent (e.g. telephone calls, house visits, written correspondence sent to the parents, and the results of these attempts). 8 NYCRR §200.5(b)(1). During the due process hearing, the district must establish what remedial interventions were undertaken to address the student's difficulties prior to the referral to the CSE. In particular, when a student is in grades K-4 and the learning difficulties are in the area of reading (8 NYCRR 200.4[j][4]), the district must provide the results of academic intervention and its lack of success before seeking to override the lack of consent. CSEs must keep in mind that even if a district is given the proverbial "green light" to evaluate a student, the parent is under no obligation to consent to the *initial provision of services* and the district may not pursue due process to override this refusal. See 8 NYCRR §200.5(b)(4). When seeking to evaluate a student not yet classified, the district should take the following steps:

- Provide the parents with PWN describing the evaluation procedures the district seeks to use to assess the student's needs and abilities and enclose a Parental Consent form with this PWN.
- If the parents are resistant to the initial evaluation, notify them of their right to request an informal conference with the professionals familiar with the proposed evaluations, the person who referred the student for evaluation, and counsel or an advisor of the parents' choice to provide them with an opportunity to ask questions regarding the proposed evaluation.

- Document all attempts to obtain parental consent to conduct the initial evaluation (e.g. letters, additional requests for consent, phone calls, house visits).

- If all else fails, and the parents have failed or refused to consent to the initial evaluation, consider pursuing due process to override the parents' refusal to consent. *See generally* 8 N.Y.C.R.R. §200.5(b)(1)(i)(c).

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2. IEP Goals Must Address The Child's Specific Needs Rather Than The Services Provided.

Application of the Board of Education, SRO Appeal No. 12-228 (Aug. 9, 2013)

SALIENT FACTS:

The CSE convened to develop a 2011-12 IEP for a nonverbal student classified as a student with multiple disabilities. Among other things, the CSE recommended a 12-month program in a 6:1:1 class; related services of PT, OT and speech therapy; and the services of a full-time 1:1 aide. Because the student was deemed eligible to participate in the Alternate Assessment, in addition to the 14 annual goals, the CSE also developed 44 objectives targeting the student's deficits in reading readiness; expressive, receptive and pragmatic language skills; oral motor; comprehension; mathematical sorting; visual perception; self-care; and motor skills. The Parents rejected the District's recommendation and placed the student at the Imagine Academy ("Imagine"). Imagine is an autism school that integrates ABA and DIR/Floortime methodologies.

The Parents challenged the CSE's recommendation on numerous grounds, including, but not limited to: the lack of measurable goals in the IEP, the lack of goals related to the services of the 1:1 aide, the inappropriateness of the assigned school, and the lack of ABA methodology used in the assigned school. The IHO held that the District denied FAPE because it failed to present evidence regarding the actual classroom in which the student would have been placed. Specifically, there was no evidence regarding the effectiveness of the teaching methodology that would have been employed in the District's class.

SRO'S DECISION:

Turning first to the annual goals, the SRO pointed out that the goals were targeted to the student's deficit areas and were sufficiently measurable for the following reasons:

- The majority of the annual goals and short-term objectives set forth evaluation criteria (e.g. 80%, 4 out of 5 criteria);
- The annual goals and short-term objectives identified the evaluation schedule (e.g. over 10 sessions) with which the goals would be achieved;
- Many of the annual goals and short-term objectives identified the supports provided to the student (e.g. hand over hand assistance, moderate or maximal assistance, verbal commands, modeling, prompting or pictures);

Overall, the SRO held that the goals, read together with the short-term objectives, targeted the student's identified areas of need and provided sufficient information to guide a teacher in instructing the student and measuring her progress. While the Parents argued that there were no goals addressing the services of the 1:1 aide, the SRO pointed out that goals must relate to a student's *needs*, not to a specific *service*. As a result, the SRO held that it was not necessary to develop annual goals specific to the 1:1 aide.

Regarding the IHO's holding that the District failed to present evidence about the actual classroom where the student would have been placed, the District argued that no legal basis existed for this reasoning. The SRO noted that challenges to the actual classroom usually concern the District's implementation of the IEP and that a District's failure to implement an IEP may only form a basis for a denial of FAPE when the student is actually being educated under the District's IEP. Analyzing whether the district would have offered FAPE had the student actually attended the assigned school would have required the SRO to engage in an analysis of what the District would have done had the student actually enrolled in the recommended program. By the time the Parents rejected the District's offer, prior to the start of the school year, the District's duty to implement the student's IEP had not yet arisen. Thus, the SRO rejected the Parents' argument that the District denied FAPE because it *would have* failed to implement the student's IEP had he actually attended the school. As such, the Parents' argument that the District would have been unable to implement the IEP was speculative, at best. As a result of the IHO basing his finding that the district denied FAPE solely on the grounds that the district failed to present evidence concerning the classroom where the student would have been placed, the SRO reversed the IHO's holding.

WHY YOU SHOULD CARE:

Neither federal, nor state laws or regulations concerning IDEA require that the duties of district staff should be detailed in a student's IEP. In a rare case, an IHO or SRO may use their equitable authority to grant relief, which requires a CSE to identify staff duties in an IEP in a manner that is beyond that normally required by IDEA, federal or State regulations. See J.K. v. Springville-Griffith Inst. Cent. Sch. Dist. Bd. of Educ., 2005 WL 711886, at *9 (W.D.N.Y. 2005) (The court noted the SRO's directive that the CSE consider including in the IEP the duties of the 1:1 aide. However, the court also noted that the District's failure to include the aide's duties in the IEP did not constitute a denial of FAPE). Although the SRO pointed out in a footnote that, "districts are not prohibited by law from developing annual goals related to the services of a paraprofessional," districts should use caution when considering doing so. Annual goals are intended to meet the *student's* special education needs with the purpose of enabling the student to make progress in the general education curriculum. See 34 CFR §300.320(a)(2). Annual goals that are geared toward the services of an aide, rather than to the specific skills the child is expected to achieve, may lose sight of the bigger picture. While annual goals focusing on the services of the aide may have the incidental effect of enabling the child to achieve certain skills, the IEP as a whole is a document developed for the child, not the aide or any other District-staff member. Thus, an IEP with goals for staff may result in an IEP developed to improve the skills of the staff rather than those of the student.

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3. A School for Autism Where The Student Was Placed in a 7:1:7 Class Deemed Appropriate Under The Circumstances.

Application of a Student with a Disability, Appeal No. 13-159 (2013)

SALIENT FACTS:

The CSE determined that a student with behavioral difficulties was eligible as a student with autism and recommended that he be placed in a 12:1:1 special class with individual and group counseling. After receiving the Final Notice of Recommendation ("FNR"), and visiting the assigned school, the Parent rejected the CSE's recommendation on the ground that the assigned school would not provide individualized instruction and attention for the child. In February of 2012, the Parent unilaterally placed the student at the Yaldeinu School for Autism (Yaldeinu) and sought reimbursement of tuition for February - June, 2012, the period during which the student was placed at Yaldeinu. Although the District conceded that it failed to provide FAPE, the IHO denied the Parent's claim on the grounds that Yaldeinu was inappropriate. Specifically, the IHO held that the instruction was not designed to meet the student's needs; the school failed to

provide counseling services for the first two months the student was enrolled; and despite the individual attention and Yaldeinu's implementation of a BIP, neither the student's academics (which were not deficient) nor his behaviors improved. The Parent appealed this decision and the District cross-appealed the IHO's failure to consider whether equitable considerations weighed against the parent's claim.

SRO'S DECISION:

Because the District conceded that it failed to provide FAPE, the SRO proceeded to the second inquiry - whether Yaldeinu was appropriate. The SRO pointed out that Yaldeinu offered a 1:1 ABA program, group instruction, and related services. Although the provision of counseling services was delayed for two months, the court found that Yaldeinu provided necessary make-up services to the student. With regard to the student's progress at Yaldeinu, the SRO noted that the student had strong academic skills and progressed while at Yaldeinu. Specifically, the student learned to subtract facts up to 10, learned to tell time on an analogue clock, and compare and contrast information he read without teacher prompts.

As to the student's behavioral progress, when he first enrolled in Yaldeinu, the student displayed "autistic like behaviors" (e.g. extreme withdrawal, inappropriately relating to people, obsessing to maintain "sameness" and displaying extreme resistance to controls). To address these behaviors, Yaldeinu conducted an FBA and developed a BIP that addressed the student's needs and provided support and strategies for addressing his behaviors. For example, if the student responded with problematic behavior when a demand was placed on him, the staff continued to place the demand on him to teach him that the behavior would not result in the removal of the demand. If the behaviors continued, and the safety of the other students became a concern, the other students were removed from the class and the demand would be maintained. The SRO concluded that during his time at Yaldeinu, the student's behavior improved. At the end of 2011-12, the student was able to function for longer periods of time in 1:1 and group settings without behavioral outbursts, began verbalizing his wants and needs instead of aggressing, and was able to express his frustration more appropriately.

The District argued that Yaldeinu was overly restrictive because the student was placed in a 7:1:7 class without any opportunities to interact with nondisabled peers. The SRO pointed out that the hearing record did not offer any support for the position that it would have been appropriate or even necessary to educate him with his nondisabled peers. The SRO wrote, "although Yaldeinu may not have maximized the student's interaction with nondisabled peers, [this factor] d[id] not weigh so heavily as to preclude the determination that the [] unilateral placement…was appropriate." As such, the SRO held that Yaldeinu was appropriate.

Finally, the SRO considered the equities. The SRO noted that the Parent attended the CSE meeting, provided the CSE with the student's IEP from his previous schools and participated in discussions regarding the student's program. Additionally, the Parent expressed her concerns about the recommended 12:1:1 special class verbally and in writing, visited the proposed class and requested additional information about the school before she rejected the district's offer. Under these circumstances, the SRO held that the Parent acted properly, cooperated with the district in good faith, and did not hinder the district in developing an appropriate IEP for the student. As such, the SRO concluded that the equities did not weigh against the Parent's claim.

WHY YOU SHOULD CARE:

Evidence of progress at a private school is not required for a determination that the student's private placement is adequate. See Scarsdale U.F.S.D. v. R.C., 2013 WL 563377, at *9-*10 (SDNY., 2013). However, progress is certainly a relevant factor to be considered. See Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 115 (2d Cir. 2007). While districts must group students placed in special classes according to the similarity of their needs (8 NYCRR §200.1[ww][3][ii]; §200.6[a][3], [h][2]), in general, unilateral placements do not need to meet the same standards or requirements to be considered appropriate to address the student's needs (*citing* Frank G v. Board of Education of Hyde Park, 459 F.3d 356 [2d Cir., 2006]). Rather, ultimately, the inquiry turns on whether the placement is *reasonably calculated* to enable the student to receive educational benefits.

According to the SRO, the practice of visiting an assigned school has value for purposes of equitable considerations, especially if it prompts the parents to exercise their right to request another CSE meeting to make specific modifications to the IEP. In this case, the SRO provided districts with an important tip to improve its chances of satisfactorily addressing a parent's concerns about an IEP - when a parent has provided a district with a 10-day notice. The district should convene a CSE meeting to address the parent's concerns. In this case, the District did not convene a CSE meeting after receiving the Parent's 10-day notice and did not otherwise take steps to address the parent's concerns about the IEP. To be clear, after receiving a 10-day notice, a district has no legal obligation to convene a CSE meeting. However, the SRO cautioned, where a district makes no attempt at all to address the parent's concerns through a CSE meeting (or an offer to modify the IEP without a meeting, where appropriate), such inaction does nothing to enhance a district's position in the weighing of equitable factors. Thus, where a parent has provided a district with a 10-day notice of her rejection of the CSE's recommendation and her intent to unilaterally enroll the student in a private school at the district's expense, the district should consider re-convening the CSE to address the parent's concerns (and clean up the IEP, if necessary). If, however, the district has already conducted CSE meetings to address the same issues the parent is still raising about the IEP, re-convening a CSE may be futile. If the IEP is defensible, proceeding with the hearing may not be in vain.

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4. A District Held Responsible For Providing Transportation For A Student to An After-School Extracurricular Program.

Application of the Board of Education, Appeal No. 13-152 (2013)

SALIENT FACTS:

During 2010-11, the Parents of a student with an intellectual disability enrolled him in an extracurricular program ("Respite") at their expense. Respite provided socialization and daily life skill activities for students with developmental disabilities between the ages of 10 and 21, Monday through Friday from 2pm-6pm. Although Respite was located out-of-district, the District provided the student with transportation between November 2010 and August 2011. When the Parent requested transportation to Respite for 2011-12, the District informed her that it was prohibited from transporting the student to or from a point other than his home. At the Parent's request, the CSE convened and determined not to recommend that the student participate in Respite or any after school extracurricular programs offering services similar to those offered at Respite. The IHO found that the District did not violate IDEA or State law by refusing to provide the requested transportation. However, exercising "equitable authority," the IHO ordered the district to drop the student off at Respite.

SRO'S DECISION:

On appeal, the District argued that the IHO erroneously ordered relief in the absence of a finding of a violation of IDEA or State law, and that the IHO's order forced the District to violate Education Law §3635. The crux of the Parent's arguments was that the student was denied an equal opportunity to participate in extracurricular activities. The Federal Regulations implementing Section 504 of the Rehabilitation Act require districts to take steps to provide non-academic and extracurricular activities in a manner necessary to afford children with disabilities opportunities equal to those available to typical children for participation in those services and activities. See 34 CFR §300.107. The SRO noted that, generally, "this requires districts to provide the same degree of access to nonacademic and extracurricular services and activities that similarly situated students in the district possess."

The SRO concluded that the District failed to afford the student an equal opportunity to participate in extracurricular activities. The SRO reasoned that because the District was already transporting one student to Respite, where that student had been placed by the District during the school day, the District should have also provided the student at issue with transportation to Respite. The SRO pointed out that the student at issue rode on the same bus that was used to pick up

the other student from the Respite program at the end of the school day. The SRO wrote, "[a]ll that [was] required to allow the student [at issue] to participate [in Respite] [was] for the District to allow [her] to exit the bus" when it arrived at Respite to pick up the other student who attended the program during the school day. However, the SRO continued, "the district's steadfast refusal to allow the student to access [Respite] has, under these facts, denied the student an equal opportunity to participate in extracurricular activities." Thus, although the SRO concluded that the IHO erred in awarding relief in the absence of a violation of IDEA or the Education Law, the SRO affirmed the IHO's award in order to preclude the District from depriving the student of access to extracurricular activities.

WHY YOU SHOULD CARE:

The federal regulations implementing Section 504 of the Rehabilitation Act provide that, "'supplementary aids and services' must be provided to students participating in extracurricular activities." See 34 CFR §300.117. As noted by the SRO, the purpose of this provision was to "clarify that each child with a disability has supplementary aids and services determined by the child's IEP to be appropriate and necessary for the child to participate with nondisabled children in extracurricular services and activities" (at 8) (*citing* 71 Fed. Reg. 46541 [Aug. 14, 2006]).

The SRO explained that in order to comply with the regulations concerning extracurricular activities, the district must first consider the student's request to participate in particular extracurricular activities. Second, the district must take steps to provide the student with an equal opportunity to participate in extracurricular activities which are available to all other students enrolled in the district. If the district determines that extracurricular activities are a necessary part of the student's program and recommends same on the IEP, the District must place the student in an appropriate extracurricular program and provide the student with transportation to and from the program (if the district does not already have an appropriate extracurricular program to meet the student's needs).

Based on a review of Education Law §3635, the IHO felt that he was constrained from ordering the District to facilitate transportation to a program operated by a third party. The SRO declined to review the matter on these merits because the SRO's decision was based on the equal access provision of IDEA. Nevertheless, the SRO pointed out that IDEA and the Education Law contain no such restriction on transportation to third-party programs. However, the SRO pointed out that district may have discretion when refusing to provide the requested transportation *if* it is not providing transportation for other students to the out-of-district program in question (at 11) (*citing* Letter to Miller, 211 EHLR 468 [OSEP, 1987] [districts have "some discretion when making decisions on the extracurricular activities to which it provides transportation"]). In light of this decision, it follows that the converse is also true - when the district is currently

providing transportation services for one student to an extracurricular program, the district may be obligated to provide transportation for another student to attend the same program, if requested by the parent.

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