NYSE Directors
Centris Group

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MONTHS IN REVIEW: April-May 2014

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of Attorney's Corner, we review several federal district court and SRO decisions. One federal district court reminded CSEs that diagnoses do not drive IEPs. Rather, the way the student's disability presents in school academically and behaviorally drives the IEP, including the annual goals that are developed to address the student's special education needs. In an SRO decision, we are reminded that a program includes the services a student receives rather than the bricks and mortar of a specific school (i.e. the location of services). However, where a change in the location of services results in placing a student in a different setting on the continuum, this may constitute a change in placement, which for the purposes of pendency, a District may be foreclosed from implementing.

Federal District Courts

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1. Annual Goals Do Not Need To Explicitly Reference Diagnoses.

W.W. v. New York City Dept. of Education, 2014 WL 1330113 (S.D.N.Y., 2014)

SALIENT FACTS:

A Parent unilaterally placed her child with learning disabilities in The Child School for 2011-12 and sought direct payment of tuition from the District. For 2010-11, the CSE recommended an integrated co-teaching ("ICT") program and counseling. After visiting the proposed school, the Parent expressed concerns that it was very large and seemed to be a stressful environment. The Parent rejected the CSE's recommendation as being inappropriate because, according to her, the proposed class was "'very crowded,' and the teachers u[sed] teaching methods that 'had failed [her child in the past]...." In her Complaint, the Parent alleged, among other things, that the goals were inadequate. The IHO determined that the District denied FAPE because, among other things, the goals and ICT recommendation were inappropriate. The SRO reversed the IHO's decision.

COURT'S DECISION:

On appeal to federal district court, the Parent argued that the goals were inappropriate because they did not target the student's dyslexia. The Court pointed out that the sufficiency of goals is precisely the type of issue upon which IDEA requires deference to the expertise of administrative officers. The Court reasoned that although the IHO and SRO reached conflicting decisions regarding the sufficiency of the goals, the SRO's decision was thoroughly reasoned and based on the hearing record. Contrary to the Parent's suggestions that the goals were inappropriate because they neglected to reference the student's dyslexia diagnosis, the Court wrote:

> The absence of an explicit mention of dyslexia in the goals is not fatal to the IEP because, as explained by the SRO and the [District] psychologist[], the goals were adequately designed to address [the student's] learning challenges, which include not only dyslexia but also dyscalculia and dysgraphia.

The Court determined that the goals included a multi-sensory approach in reading and properly accounted for the additional information provided by the Parent regarding the student's dyslexia diagnosis.

The Court deferred to the SRO's conclusion that the ICT recommendation was appropriate based on the student's previous success in a Special Education Teacher Support Services ("SETSS") program. The Parent argued that the ICT special education teacher's testimony of methods he would have employed with the student had he actually enrolled in the District was impermissible retrospective testimony that the SRO should not have relied upon. Specifically, the teacher testified that he would have employed small reading groups, phonics instruction, positive reinforcement and tapping out sounds. The Court held that this testimony was not retrospective, but rather, was "appropriate to the extent it explains how the goals and services in the IEP would be realized." As such, the court affirmed the SRO's decision that the District offered FAPE.

WHY YOU SHOULD CARE:

Goals must be adequately designed to address the student's learning challenges and need not explicitly reference diagnoses. Indeed, the CSE does not address diagnoses, it addresses the needs identified in how the child presents in class and on standardized tests. Developing goals specifically to address diagnoses may mislead parents into believing that diagnoses drive IEPs. They do not. How the student's disability presents itself in school drives classification, programs and services.

Testimony offered to prove what services, not listed in the IEP, would have been provided had the student actually been enrolled in the District's program is impermissible retrospective testimony. However, in this case, the court provided another example of testimony that is permissible. When the special education teacher of the proposed ICT class was asked how he would meet the student's need for a multi-sensory approach, when presenting directions as indicated in the student's annual goals, he explained that the teachers will verbally explain the directions, write down the instructions on the SMART board, and will have another student repeat the directions for the kids so that they know that somebody else heard the instructions. The SRO concluded that "[t]his testimony is permissible under R.E. because it *explains* how the [District] would meet the need listed in the IEP" (emphasis added).

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2. Parents Were Unsuccessful In Proving The Inappropriateness of The District's Recommendation of 6:1:1 Special Class With 1:1 Support.

M.L. and B.L. v. New York City Dept. of Education, 2014 WL 1301957 (S.D.N.Y., 2014)

SALIENT FACTS:

The parents of a student with Autism and severe global developmental delays challenged the District's 2011-12 recommendation, placed their child at the Manhattan Children's Center ("MCC") and sought reimbursement. Because the student had been placed at MCC the previous year, during the student's annual review to develop the student's 2011-12 IEP, the CSE relied on written and verbal reports from MCC staff. Although at MCC the student received 1:1 instruction, the CSE recommended that the student be placed in a 12-month 6:1:1 special class with various related services. The CSE also recommended that the student be provided with a 1:1 crisis paraprofessional to assist her with, among other things, navigating the stairs in the school building. According to the Parents, the IEP was inappropriate because, among other things, it did not include 1:1 teaching

instruction as the student received at MCC. The Parents also alleged that the IEP was defective because it did not indicate that staff was to use the methodology with which the student was familiar. Declining to find any of the District's witnesses credible, the IHO found in favor of the Parents and the SRO reversed.

COURT'S DECISION:

On appeal, the Parents argued that the SRO's decision was flawed because, among other things, the SRO improperly ignored the cumulative effect of the District's multiple procedural violations, and ignored the severity of the student's need for 1:1 instruction. The Court rejected each of these challenges.

Regarding the alleged procedural violations, the Court noted that in order to determine whether the cumulative effect of procedural violations denied FAPE, it must first examine each violation individually. The alleged procedural violations included, among other things, the failure of the CSE to include a detailed PC&T plan in the IEP and its failure to conduct an FBA prior to developing the BIP. Generally, a District's failure to include PC&T in an IEP does not result in a FAPE denial, especially where, as here, "the Parents have 'received extensive parent training in the past and have been actively involved in their child's education, communicating regularly with teachers and service providers.'" The Parent's assertion was not that the IEP did not indicate PC&T, but rather that the IEP did not include a detailed plan for PC&T. The Court held that the absence of a detailed PC&T plan in the IEP did not amount to a procedural violation at all, and therefore, could not have denied FAPE. Regarding the District's failure to conduct an FBA prior to developing the BIP, the Court rejected the Parents' assertion that this violation denied FAPE. The Court reasoned that the CSE relied on the FBA conducted by MCC, listed the student's interfering behaviors in the IEP and included many of the strategies and goals MCC used to address the student's behaviors. Finally, the Court determined that the only procedural violation was the failure to conduct an FBA, and this alone did not deny FAPE.

The Court then determined that the IEP was substantively adequate. Contrary to the Parents' assertion that anything less than a 1:1 environment would result in regression for the student. The Court held that the 6:1:1 class recommended for the student was "specially picked because it was designed for students with Autism who exhibited significantly delayed speech-language skills and behavioral difficulties [similar to the student]." Despite the McCarton staff recommendation of a 1:1 program, the Court pointed out that McCarton staff did not testify or suggest that the student would not learn, or would regress in anything less restrictive than a 1:1 program. Further, the Court pointed out that the Parents did not offer any evidence that the student would not be responsive to methodologies that were different from the ones with which she was familiar. The Court noted the SRO's reasoning that "the differences [between the opinions of the Parents' and Districts' witnesses] 'amount to conflicting viewpoints among educators over the best manner in which to deliver special education instruction

and services to a student.'" Ultimately, the Court deferred to the "well-reasoned" decision of the SRO that the District's recommendation was appropriate.

WHY YOU SHOULD CARE:

In so many words, the court reiterated the Second Circuit's position that the presence or absence of PC&T does not necessarily have a *direct* effect on the substantive adequacy of the IEP. See R.E. v. NYC Board of Ed., 694 F.3d 167, 191 (2d Cir., 2012). This is especially the case because PC&T is a Regulatory mandate. Therefore, parents of students with Autism (as well as parents of students placed in 6:1:1, 8:1:1 or 12:1:4 special classes) may file a complaint on their own behalf if PC&T is not included in the IEP or if they feel they have been deprived of these services. Further, there is no obligation in law or regulation that a recommendation of PC&T requires the IEP to contain a detailed PC&T plan. While State Regulations mandate the CSE to recommend PC&T in IEPs for certain students, it does not require the CSE to take the next step and develop the plan or program for the delivery of PC&T. However, Districts should define the scope of the PC&T based on the parents' needs.

Another important point of this case concerns the absence of evidence that the student is incapable of making progress *without* the services the parents demand. Although the MCC staff and Parents felt that the student would benefit from 1:1 instruction and a particular methodology, there was no evidence that the student would not make progress without either. If the program is more restrictive than the student requires in order to make progress, the district may decline to recommend it. As a rule of thumb, CSEs should use caution when recommending a program that is more restrictive than the student requires simply to appease the parents. The district will have a difficult time arguing, at some future point, that the student no longer requires such a restrictive setting when the CSE has recommended same for years simply to keep the parents happy.

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3. A School's Refusal To Force A Student To Eat Does Not Render A District's Recommended Placement Inappropriate.

L.M. and A.M. v. East Meadow School District, 2014 WL 1315185 (E.D.N.Y., 2014)

SALIENT FACTS:

The CSE recommended that a Kindergarten student with Autism and feeding needs be placed in a BOCES 6:1+2 special class with a 1:1 aide and related services including, but not limited to feeding therapy and speech. The Parents were dissatisfied with BOCES's feeding plan. Once the student refused food,

BOCES staff would immediately stop attempting to feed him. One day, the mother demonstrated to the BOCES teachers and aide how she fed the student. According to one teacher, during the demonstration, the student was "crying and protesting" and "forced to eat food." The teacher reportedly informed the mother that BOCES was not permitted to force students to eat. Rather, their goal was to work with the student so that he would become more comfortable with his lunch and eat without protest. Eventually, the mother began removing the student from school at noon to feed him lunch herself.

For the student's first grade year, the CSE recommended that he remain at BOCES in its 6:1+2 program with the same related services. Based on their dissatisfaction with BOCES's implementation of the student's feeding plan, the parents rejected the recommendation, unilaterally enrolled the student at the Gersh Academy ("Gersh") and sued the district for tuition reimbursement. The IHO determined that the District offered the student FAPE and the SRO affirmed this decision. The Parents appealed.

COURT'S DECISION:

The Parents claimed that, as a result of BOCES's inappropriate feeding plan, the student did not eat, became dysregulated and unavailable for learning. Therefore, the Parents claimed that the BOCES placement was inappropriate. The court pointed out that by the end of his Kindergarten year, the student was "independently putting food in his mouth 88% of the time, and swallowing, and remaining in his seat 100% of the time." This was progress from the beginning of the student's Kindergarten year when he could hardly tolerate any food being in his mouth. The student's home feeding therapist, who worked with the student for a few hours a week noted that the student was "making progress in using proper bite and chew[ing] patterns, and [] appeared to be gaining weight." Because the student demonstrated progress under the Kindergarten IEP, and because the Kindergarten IEP served the basis for the first grade IEP, the court determined that first grade IEP was appropriate. As such, the court dismissed the Parents' appeal.

WHY YOU SHOULD CARE:

Feeding services may be required to assist students with feeding themselves, tolerating food or certain textures, or consuming their food in general. The SRO has acknowledged that feeding therapy services may be provided by a speech-language therapist. See *Application of the NYC Board of Education*, Appeal No. 11-164 (2012) (The SRO pointed out that the student's feeding needs "were addressed by his speech-language related service provider during the school day"). While districts should certainly be open to the Parents' successful strategies and techniques for addressing behaviors at home, districts should not employ techniques or strategies that may be harmful to the child. To this end, a Parent's dissatisfaction with the successful techniques and strategies employed at a particular placement will not automatically render the CSE's recommendation

inappropriate. This is especially so where the student is making progress with the techniques and strategies the District implements.

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Office of State Review

1. Under Certain Circumstances, A Change In Location May Result In A Change In Placement.

***Application of the Board of* Education, Appeal No. 14-035 (2014)**

SALIENT FACTS:

During 2012-13, the student was placed in a 12-month 9:1+3 BOCES special class with OT, PT and S/L. For 2013-14, the CSE continued to recommend that the student participate in a 12-month program along with OT, PT and S/L. Although the CSE recommended that he remain in a 9:1+3 special class, it recommended that he return to his home school district for the 10-month school year and receive his summer services at BOCES. In the PWN following the CSE meeting, the District explained that it had "developed [10-month] programs and services 'comparable to those offered' by BOCES, and that it was obligated to provide special education services in the [LRE]." According to the Parents, the District's newly developed 9:1+3 class was inappropriate to meet the student's needs. The Parents demanded that the student remain in the BOCES program during the pendency of the hearing, but the District disagreed. In his pendency decision, the IHO held, "while a change in location is not '*per se* a change in program [], moving a child to a less restrictive setting is a change of placement for purposes of the pendency provisions of federal and state law.'" As such, the IHO ordered that the student remain in the 9:1+3 BOCES placement during the pendency of the proceedings. The District appealed this interim ruling.

SRO'S DECISION:

On appeal, the District argued that the CSE's decision to offer the special education services in-District rather than at BOCES did not constitute a change in placement. The District reasoned that its class was specifically created to parallel the BOCES special class. In addition, the District argued that there was no evidence to support the Parents' position that the student needed to remain in a specific school site.

The SRO pointed out that "the pendency provision does not mean that a student must remain in a particular site or location." Further, the term "educational placement" refers to the educational program (e.g. the classes, individualized attention and additional services the child will receive) rather than the bricks and mortar of the specific school. See T.Y. v. New York City Dept. of

Education, 584 F.3d 412, 419 (2d Cir., 2009). However, the Regulations define a "change in placement" as "a transfer of a student to or from a public school, BOCES…or graduation from high school with a local high school or Regents Diploma" See 8 NYCRR §200.1(h). Thus, a BOCES placement is a different placement from an in-District placement on the continuum of placement options. While the District had a legitimate interest in returning students to their in-District programs, the SRO held that a transfer of the student from a BOCES-operated classroom in a public school to a district-operated classroom in a public school was a change in placement. As such, regardless of how similar the newly developed in-District program was to the BOCES class, the SRO determined that the student's pendency placement was the BOCES class.

WHY YOU SHOULD CARE:

A student's placement refers to the program, not the specific school location. To this end, it has been held that a change in location of services, without more, does not constitute a change in educational placement. See Concerned Parents, et al. v. New York City Bd. Of Educ., 629 F.2d 751, 753-54 (2d Cir., 1980). However, where, as here, the change in location results in a change in the restrictiveness of the program as per the continuum of services, the change in location may constitute a change in placement. Where the District has recommended that during the pendency of a hearing, a student receive the same services offered in the last agreed upon IEP, but in a different location, the District should ensure that the new location does not result in a change in placement as per the continuum.

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2. A District's 11-Day Delay In Implementing An IEP Did Not Deny FAPE.

***Application of the NYC Board of Education*, Appeal No. 14-021 (2014)**

SALIENT FACTS:

The student's 12-month IEP for 2011-12 was implemented on September 8, 2011 and expired on September 24, 2012. Nevertheless, the CSE scheduled the student's 2012-13 annual review for October 9, 2012, eleven days after the 2011-12 IEP expired. On September 24th, the Parent notified the District that she would be placing the student at the Rebecca School for 2012-13 and seeking reimbursement from the District. On October 9, 2012, the CSE convened and developed the 2012-13 IEP to be implemented from October 9, 2012 through October 7, 2013. The CSE recommended that the student continue to be placed in a 6:1+2 special class along with PT, OT and S/L. The IHO found that the District

denied FAPE, in part, because of its failure to conduct a timely annual review and failure to explain the reasons for the delay. The SRO reversed.

SRO'S DECISION:

As a preliminary matter, the SRO noted that each district must have an IEP in effect at the beginning of the school year. Further, the SRO pointed out that, "as a matter of State law, the school year runs from July 1 through June 30; therefore, a 12-month school year program effectively begins on July 1" (*citing* Education Law §2[15]). Regarding the District's alleged failure to have an IEP in place by the start of 2012-13, the SRO held:

> [B]ecause the September 2011 IEP remained in effect from July 2012—the beginning of the 2012-13 academic school year—through approximately September 24, 2012, the IHO erred in finding that the district did not have an IEP in place at the start of the 2012-13 school year (at 11).

Further, the SRO pointed out that the student continued to receive services under the 2011-12 IEP "through a portion of October 2012."

Regarding the 11-day delay between the expiration of the 2011-12 IEP on September 24, 2012 and the commencement of the 2012-13 IEP on October 9, 2012, the SRO determined that there was no evidence that the delay was a procedural violation that denied FAPE, impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. The SRO pointed out that the Parents did not object to the timing of the October 9th CSE meeting or request that the CSE convene earlier.

Next, the SRO turned to the Parents' substantive challenges to the 2012-13 IEP. First, the SRO held that the IEP, which was based on reports from the Rebecca School, accurately and thoroughly identified the student's special education abilities and needs. After comparing the goals with Rebecca reports, the SRO reasoned that the goals were developed with input from Rebecca staff. The SRO noted that some of the goals from 2011-12 were carried over to the October 2012 IEP. However, those goals that were carried over were not without modification. Rather, they either had increased criteria or increased complexity of the task. For example, the 2011-12 annual goal relating to improving the student's ability to understand concepts of "more" and "use his fingers to understand number counting" with "60 percent accuracy" had increased in mastery and complexity to target the student's ability to count up to five objects with "75 percent success with moderate assistance over 12 months." Because the 2011-12 goals served the basis of the 2012-13 goals, which had increased in complexity, the SRO reasoned that it was clear by this increase that the student had made progress under the 2011-12 IEP and would continue making progress during 2012-13. As such, the SRO reversed the IHO's decision.

WHY YOU SHOULD CARE:

IDEA requires a CSE to review and, if necessary, revise a student's IEP annually. Although most school districts hold annual reviews in the Spring, neither federal nor state law prescribes when a CSE meeting should occur. However, each district must have an IEP in effect by the beginning of each school year. While the SRO held that the District complied with this requirement by having the 2011-12 IEP in effect at the start of the 2012-13 school year, we caution CSEs to tread carefully in these waters. The nature of an IEP is that it covers one school year at a time, not multiple school years. Even if the student in this case were initially classified in September of 2011, it would have been more sensible if the District had convened an annual review before the expiration of 2011-12, to develop the student's 12-month IEP, to commence in July 2012 and expire in June 2013.

Another alarming point of this decision is that while the SRO acknowledged that the 12-month school year runs from July 1st – June 30th, the SRO seemingly declined to apply this rule here. Specifically, the Summer program occurs the summer before the 10-month school year begins. For example, for a 12-month IEP developed for 2014-15, the Summer program will occur between July and August 2014 and the 10-month program will commence in September 2014. As applied here, the SRO essentially held that it was acceptable that the 12-month IEP developed in the Spring of 2011 and effective in September 2011, cover the Summer of 2012, rather than the Summer of 2011. Even if the student in this case had been classified in September 2011, the ESY decision for the Summer of 2012 should have been deferred until the Spring of 2012 (when the CSE should have convened to develop the 2012-13 IEP), to ensure that the CSE addressed the student's then-current needs, rather than his needs as determined the previous September.

While the SRO held that the 11-day delay between the expiration of the 2011-12 IEP and the commencement of the 2012-13 IEP was a procedural violation that did not deny FAPE, we caution districts not to allow such lapses to occur. Curiously, the SRO seemingly ignored the implications of prior written notice ("PWN") in this decision. The implementation date of the 2012-13 IEP was the same day as the CSE meeting, October 9, 2013. Even if the District provided the Parents with the PWN letter and IEP on the same day as the CSE meeting, the Regulations contemplate the Parents being given an opportunity to review the PWN letter and the District's recommendations **before** the IEP may be implemented. See 8 NYCRR §200.5(a)(1) ("[PWN]…must be given to the parents…a reasonable time **before** the school district proposes to…initiate…the…educational placement of the student…."). While there are no guidelines for what constitutes a "reasonable time," SED has advised that:

> Such time frame must allow the parent time to fully consider the change and determine if he/she has additional suggestions, concerns,

questions, etc., and/or if he/she is going to challenge the recommendations of the CSE or CPSE. See SED Guidance, "*Questions and Answers on [PWN], The State's Model [PWN] Form and Related Requirements*" FAQ B-1 (updated April 2011).

Thus, because the IEP was scheduled to be implemented the same day as the CSE meeting, even if the PWN were provided on the same day, the District would have committed another procedural violation. Under these circumstances, providing the PWN letter the same day as the CSE meeting arguably would not have provided the Parents with sufficient time to fully consider the recommendations.

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3. Strong Disagreement Between The Parents and The District Does Not Equate To District Predetermination.

***Application of the NYC Board of Education*, Appeal No. 14-030 (2014)**

SALIENT FACTS:

The District appealed an IHO's decision that it denied FAPE because the CSE improperly predetermined the student's program based on "administrative convenience" and denied the Parents an opportunity to meaningfully participate in the development of the IEP. The student had been parentally-placed at the Rebecca School ("Rebecca") the previous year. The Parents argued that the recommended 12-month 6:1:1 special class program with a full-time 1:1 health professional, when they specifically requested a more restrictive program similar to the 1:1 Rebecca program, was predetermined and denied them a meaningful opportunity to participate in the IEP development. The IHO concluded that the "district's 'sole witness' failed to explain or establish why the [] CSE recommended a 6:1+1 special class [] and why the 6:1:+1 special class [] was reasonably calculated to offer the student FAPE." According to the IHO, none of the Rebecca reports relied upon by the CSE nor reports from Rebecca staff who "knew and worked with the student directly" supported the CSE's recommendation, thus the CSE failed to offer FAPE. The SRO disagreed.

SRO'S DECISION:

Conducting a detailed review of the CSE meeting, the SRO held that the CSE's recommendation was "reached upon a consideration of the student's needs and how the 6:1+1 special class [] could meet the [his] needs." The SRO noted the following sequence of events during the CSE meeting:

- The CSE meeting began with an introduction of the participants.

- The CSE then reviewed "materials and reports" provided by Rebecca staff as well as the last IEP developed by the District.
- With respect to the reports, the Chairperson/Psychologist asked the Rebecca teacher whether the reports accurately reflected the student's then-current functioning.
- The CSE engaged in a collaborative conversation, reminding the Parents that they were "active participants" and encouraging their participation.
- The Chairperson/Psychologist read each goal and corresponding objectives included in the last IEP aloud and asked the Rebecca teacher whether the student achieved the goal and objectives.
- The CSE discussed whether specific annual goals and objectives should be carried over to the next school year.
- The CSE discussed related services.
- The CSE discussed program options.

The CSE considered and rejected a special class in a community school because it did not offer a 12-month program or the support the student required. The CSE also considered and rejected an 8:1+2 and a 12:1+4 special class, both in special schools, because both options served students "with functional levels 'too discrepant' from the student's own functional levels." The CSE settled on the 6:1+1 special class because "the student required 'more support than would be provided [] within a typical community school setting,' and the student would benefit from a 'more intensive program with a more supportive student teacher ratio.'" The Parents and Rebecca staff disagreed with the CSE's recommendation and indicated the student should remain at Rebecca the following year where she would be provided with 1:1 instruction. The SRO concluded that the CSE's decision to recommend the 6:1:1 class was not predetermined or selected based on administrative convenience, but rather, was reached upon consideration of the student's needs. The Parents' disagreement with the CSE's recommendation did not mean that the decision was based on predetermination or that the Parents' participation in IEP development was significantly impeded, especially given the Parents were active participants in the CSE's discussion.

WHY YOU SHOULD CARE:

It is well-settled that districts are permitted to develop draft IEPs prior to the CSE meeting, "so long as they do not deprive the parents of the opportunity to meaningfully participate in the IEP development process" (at 10) (additional citations omitted). As the SRO noted, a key factor in determining whether a district predetermined a placement is whether the district has an "open mind" as to the content of the student's IEP. The SRO also noted that "[d]istricts may [] 'prepare reports and come with pre-formed opinions regarding the best course of action for the student as long as they are willing to listen to parents and [the] parents have the opportunity to make objections and suggestions." (at 10). Districts must remember that IDEA does not require them to provide the *best*

possible placement, but one that allows the student to receive *meaningful educational benefit*. Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir.1998).

This SRO decision offers CSEs a unique perspective on the SRO's interpretation of the appropriate process by which CSEs should develop IEPs. Essentially, the SRO has provided CSEs with a roadmap for IEP development. Following this map, and the format of the SED-developed IEP will ensure that CSEs are addressing all of the required elements of IEP development.

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4. A 12:1+1 Special Class Recommendation Deemed Inappropriate Given Student's Progress with ICT Services.

***Application of a Student with a Disability*, Appeal No. 14-020 (2014)**

SALIENT FACTS:

The Parents of a child with various diagnoses including microcephaly, arterial septal defect and bilateral hearing loss, challenged the CSE's recommendation that she be placed in a 12:1+1 special class during 2013-14. During 2012-13, the student was placed in an integrated co-teaching ("ICT") class. The ICT class was described as a general education class with a general education teacher, a special education teacher for half of the day, a special education aide for the other half of the day, a full-time classroom aide, and an "additional staffing person" (the certifications and duties of this individual were not delineated in the SRO decision). As a result, there was always 1:1 support available to the student when she needed it. The Parents argued that by recommending a 12:1+1 special class for 2013-14 rather than an ICT program, the District failed to make reasonable efforts to accommodate the student in a less restrictive environment.

SRO'S DECISION:

The SRO acknowledged the Second Circuit's position that ICT is a *service* rather than a *class* (M.W. v. New York City Dept. of Educ., 725 F.3d 131, 145 [2d Cir., 2013]). However because the district's recommendation would move the student into a setting with less access to nondisabled peers, the SRO treated ICT as a "regular class" for purposes of the LRE analysis. The CSE reportedly recommended a 12:1+1 class because the student made "minimal" progress in her ICT class, it was the best fit for her cognitively, and she would be with peers at a similar academic level. However, the SRO held:

> [W]hile it is understandable that the CSE was concerned with the student's academic functioning and what the special education teacher described as a widening gap between the student and her typically developing peers [], a student with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications to the general education curriculum (at 11).

Perhaps most importantly, the SRO noted that a district must establish that it "considered the full range of supplementary aids and services that could be provided to facilitate the student's placement in a regular classroom [in order] to enable [the] student[] to be educated with nondisabled students to the maximum extent appropriate" (at 11). Here, despite the District being aware that the student exhibited behaviors in the ICT class, which interfered with her learning and that of others (e.g. engaging in task avoidant behaviors such as requesting a nap but then socializing with friends, indicating that she was sick or requesting her mother, and "flat out refusing" to use her walker or wheelchair independently), it failed to conduct an FBA to determine the reasons and causes for the behaviors or develop a BIP to address these behaviors. The SRO deemed this failure to be significant, based in large part, on the fact that the student's behaviors impacted her ability to attend in the ICT program and the CSE recommended that she be removed from the ICT program. Further, despite knowing that the student successfully used communication devices in the ICT class, which enabled her to be more independent, the CSE failed to recommend the use of a communication device. Coupling these findings with a determination that, with appropriate behavioral supports, the student demonstrated the ability to progress toward IEP goals in the ICT setting, the SRO determined that there was "a real possibility that she could continue making progress toward her goals in the ICT setting.

WHY YOU SHOULD CARE:

In order to accommodate students with disabilities in the general education environment to the maximum extent appropriate, districts are not required to modify the general education curriculum beyond recognition. However, the need for modification is "'not a legitimate basis upon which to justify excluding a child' from the regular classroom unless the education of others is significantly impaired [as a result of the student's inclusion]." See Oberti v. Board of Educ. of Borough of Clementon School Dist., 995 F.2d 1204, 1222 (3d Cir., 1993). Districts are required to consider the full range of supplementary aids and services that could be provided to facilitate the student's placement in a regular classroom to enable the student to be educated with nondisabled students to the maximum extent appropriate. Foreclosing a student from the opportunity to participate in a less restrictive environment simply because the student requires certain modifications and accommodations will violate IDEIA and may rise to the level of discrimination against the student on the basis of her disability pursuant to Section 504.

A CSE's failure to at least consider conducting an FBA and the need for a BIP for a student whose behavioral difficulties are impacting her academic program is unreasonable when the District is considering placement in a more restrictive program based on these behaviors and their impact on the student's academic success. This is especially so where, as here, there is evidence that the student's cognitive and academic levels may have been underestimated so as to support a more restrictive setting. If you are contemplating a more restrictive setting based in any way on a child's behavior, an FBA should be one of the first considerations. If the resulting BIP is unsuccessful, the decision to go more restrictive will be more easily justified.

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*This publication is intended to provide general information and is not meant to be relied upon as legal advice. If you have questions about anything discussed we urge you to contact your school attorney.

