NYSE Directors
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MONTHS IN REVIEW: February 2014

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of Attorney's Corner, we review one U.S. Supreme Court case which preserved a Circuit Court's decision that dis-enrolling a student with a disability, despite the student being excessively absent from school, may violate IDEA's stay-put provision. We also review two decisions from the Second Circuit Court of Appeals, one federal court decision and three SRO decisions discussing various issues including how an inadequate BIP can lead to a district being responsible for tuition reimbursement.

United States Supreme Court

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1. Charter School's Refusal to Re-Enroll Student Violated IDEA's Stay-Put Provision.

Mastery Charter School v. R.B., 2014 WL 684487 (Mem) (2014)

SALIENT FACTS:

A child with Down Syndrome had been attending a public school until it was taken over by a Charter School. Once that happened, the student automatically became a student of the Charter School. Her IEP reflected that the Charter School was her local education agency ("LEA"), and was therefore responsible for

implementing her IEP. At some point during the school year, the Parent stopped bringing the student to school. As a result of the student missing 10 consecutive days of school and per Pennsylvania State law, the Charter School dis-enrolled the student. Thereafter, the parent filed for due process against the Charter School alleging that it discriminated against her daughter on the basis of her disability and violated IDEA. Under IDEA's stay-put provision, the Parent requested that the court order the Charter School to re-enroll the student during the pendency of the proceedings. The lower court granted the Parent's request on the grounds that the Charter School's dis-enrollment of the student was an impermissible "change in placement" violating IDEA's stay-put provision. The Charter School appealed.

The Charter School argued that the dis-enrollment was consistent with the State's mandatory attendance law, which required it to dis-enroll any student who had been absent for 10 consecutive days. Further, the Charter School argued that it dis-enrolled the student before the Parent filed her Demand, as a result of which, the DOR, not the Charter School was automatically responsible for implementing the student's IEP. As such, the Charter School argued that its dis-enrollment of the student did not violate IDEA's stay-put provision. The Circuit Court disagreed (R.B. v. Mastery Charter School, 532 Fed.Appx. 136 [3d Cir., 2013]). The Circuit Court pointed out that during the pendency of the proceedings pursuant to IDEA, the student must remain in her then-current placement. The "then-current placement" is defined as "the IEP [placement] 'actually functioning when the stay-put is invoked.'" The IEP in effect at the time the Parent filed for Due Process indicated that the Charter School was the student's LEA, and that this Charter School would be responsible for implementing the IEP. Further, the Charter School admitted that the IEP was the "last agreed upon" IEP. Thus, the Circuit Court wrote, "any decision by the [Charter] School to remove [the student]...is contrary to her existing IEP, constitutes a change in placement, and thus, violates the stay-put provision." Regarding the Charter School's argument that the dis-enrollment automatically resulted in the DOR, not the Charter School being responsible for the IEP implementation, the Circuit Court explained that the "status quo" is determined by the existing IEP. Despite the student being dis-enrolled, her IEP reflected that her placement was at the Charter School, and as such, the student was entitled to re-enroll in the Charter School's program during the pendency of the proceedings.

COURT'S DECISION:

The U.S. Supreme Court denied the Charter School's petition to review the Third Circuit Court of Appeals' decision that the School's decision to dis-enroll the child violated IDEA's stay-put provision. In doing so, the Supreme Court effectively preserved the Circuit Court's decision.

WHY YOU SHOULD CARE:

During the pendency of any proceedings conducted pursuant to IDEA, the student must remain in his or her then-current educational placement, unless the

parties agree otherwise. In New York, Districts are authorized to drop any student (including a classified student), who is over compulsory attendance age, from enrollment, if that student has been absent from school for 20 consecutive school days or more. See Education Law 3202(1-a). Prior to dropping the student from enrollment, the following procedure must be followed:

1. The principal or superintendent must schedule and notify, in writing, both the parent and student of an informal conference. This notice must be sent to the last known address of the parent and student.

2. At the conference, the principal or superintendent must determine:

    a. The reasons for the student's absence; and
    b. Whether reasonable changes in the student's educational program would encourage and facilitate her regular attendance.

3. The student and parent must be informed orally and in writing of the student's right to re-enroll at any time in the District until the end of the school year in which the student turns 21.

4. If, after receiving reasonable notice of the date of the conference, the student and parent fail to participate in the meeting, the student may be dropped from enrollment provided that the student and parent are notified, in writing, of the right to re-enroll at any time until the end of the school year in which the student turns 21.

If the student and parent do not participate in the informal conference, the District may drop the student from its enrollment. Where state laws appear to interfere with or are contrary to federal laws, the state laws will automatically be rendered invalid. To this end, if a Demand for Due Process has been filed and the then-current IEP lists a District placement as the last-agreed upon placement where the IEP was implemented, even if the student was dropped for non-attendance prior to the Demand being filed, the student would be entitled to return during the pendency of the due process proceedings. The "status quo" is determined by the existing IEP. Thus, if an IEP has been implemented, then that placement will be the stay-put placement once a Parent files a Demand and the student will be entitled to attend that placement.

Second Circuit Court of Appeals

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1. One District's Vague BIP Resulted In It Being On The Hook For McCarton Tuition.

C.F. v. New York City Dept. of Educ., 2014 WL 814884 (2d Cir., 2014

SALIENT FACTS:

For 2007-08, Parents unilaterally placed their child with Autism and significant interfering behaviors at the McCarton School ("McCarton") in Manhattan, N.Y., where the student received 1:1 ABA therapy. The CSE convened to develop the student's IEP for 2008-09 and received a social history update, a District-conducted classroom observation at McCarton, and McCarton student progress reports. The CSE recommended a 6:1:1 class with related services of daily speech therapy ("speech") and occupational therapy ("OT"). Although the CSE acknowledged that the student had behavioral needs, it did not conduct an FBA, but developed a BIP based on the McCarton reports. The BIP randomly listed behaviors and supports to remediate behaviors without matching strategies with specific behaviors. The school psychologist who developed the BIP conceded that it was "vague," but testified that she would have developed a more specific plan once the student enrolled in the District's program. Aside from what was already included in the BIP, the CSE did not identify any strategies for addressing the student's behaviors. The Parents rejected the recommendation and unilaterally placed the student at McCarton for 2008-09, where he received 1:1 ABA instruction as well as daily speech and OT. The IHO held that the District denied FAPE because, among other things, the IEP did not take the severity of the student's behavior into account and the BIP was too vague to be useful. The SRO reversed the IHO's decision on the grounds that the FBA and BIP were appropriate, because the student would have received a more appropriate BIP once he enrolled in the District's program. The District Court affirmed the SRO's decision and the Circuit Court reversed.

COURT'S DECISION:

As a preliminary matter, the Circuit Court held that the production of an FBA is not always required by IDEA. Rather, IDEA requires districts to consider the use of positive behavioral intervention supports and other strategies when the student's behavior impedes learning. Therefore, the court held that the failure to conduct an FBA did not render the IEP legally inadequate as long as the IEP adequately identifies the student's behavioral impediments and strategies to address them. Here, the BIP failed to match strategies with specific behaviors. Testimony that a more specific BIP would have been developed had the student actually enrolled in the District was deemed impermissible retrospective testimony that the Circuit Court would not consider and that the SRO and District Court should not have considered.

There was unrebutted testimony from McCarton staff that, due to the student's behaviors, he required a 1:1 classroom. However, the District failed to consider a 1:1 classroom. Rather, it considered only the 6:1:1 program it ultimately

recommended. As a result of the District's failure to develop a BIP which addressed the student's behaviors, or to develop an IEP which identified the student's behaviors and strategies to address them, the District placed itself in a difficult position when it came time to recommend an appropriate placement. The Circuit Court held that in light of the "overwhelming" evidence that the student required a 1:1 placement because of his behaviors, the District was derelict in its duties to consider the student's needs when it made its placement recommendation of a 6:1:1 class. The Court concluded that had the District developed an appropriate BIP, or otherwise adequately identified the student's needs in the IEP, the CSE would have made a placement recommendation that was based on the student's behavioral needs and that was more restrictive than the 6:1:1. The Court also concluded that the recommendation of a 6:1:1 placement, combined with the District's failure to conduct an adequate FBA or develop a BIP that specifically indicated the student's behaviors and strategies to address them, denied the student FAPE.

Because neither the SRO nor the lower court addressed the issue of the appropriateness of McCarton, the Circuit Court turned to the IHO's analysis of this issue. The IHO's decision was "based on the testimony of the McCarton witnesses that the school was an appropriate placement,...on his assessment of the credibility of the witnesses testifying before him, and his own understanding of educational methodology,...[the IHO's decision] was entitled to deference...." The Circuit court found persuasive that the District relied almost exclusively on McCarton reports in formulating its IEP. Accordingly, the Circuit Court remanded the matter to the District Court with instructions to award the Parents reimbursement of tuition.

WHY YOU SHOULD CARE:

CSEs must conduct FBAs for students who engage in behaviors that impede learning. Such FBAs determine why the student engages in such behaviors and how the behaviors relate to the environment. The BIP must identify specific behaviors and match them with specific interventions and strategies. The BIP must also create a baseline and performance criteria to measure improvement in behavior and identify intervention strategies. Creating a vague BIP, which randomly lists behaviors and strategies without any correlation between the two, may lead to a denial of FAPE.

Generally, a District's failure to conduct an FBA prior to developing a BIP will be considered a procedural error that will not result in a finding that FAPE was denied as long as the IEP appropriately identifies the problem behaviors and includes strategies and interventions to address them. However, here, the District's failure to conduct an FBA prior to developing the BIP resulted in a FAPE denial because: (1) the BIP was vague and failed to match the student's behaviors with specific interventions and strategies, (2) the IEP failed to adequately identify the student's behavioral needs and strategies to address them, and (3) the deficient BIP had an adverse impact on the CSE's placement recommendation. Where there

are concerns about the student's behaviors, these concerns must be considered when making a placement recommendation. Depending on the severity of the student's behaviors, a BIP may be necessary in order to appropriately consider the student's needs and a make an appropriate placement recommendation.

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2. Composition of the CSE Meeting Did Not Result In Predetermination.

G.W. v. Rye City Sch. Dist., 2014 WL 519641 (2d Cir., 2014)

SALIENT FACTS:

The Parents of a child with a speech or language impairment and ADHD pursued due process following a CSE meeting convened to develop the student's 2009-10 IEP. During 2008-09, the student had been parentally-placed at the Windward School. During the 2009-10 annual review, Windward staff participated by telephone. The District Court determined that the Windward CSE liaison and the student's Windward science teacher actively participated in the CSE meeting; the science teacher participated in the development of the student's annual goals related to various needs including attention, classroom transitions, reading decoding and fluency, spelling, written expression, and mathematics; the CSE changed numerous recommendations based on reports from Windward staff, including, but not limited to recommending ESY services, increasing counseling and recommending numerous modifications, including refocusing and redirection, pre-teaching and re-teaching.

Regarding the Parents' charge that the District failed to incorporate information from their private evaluations into the child's IEP, the Circuit Court noted the District Court's holding that this allegation was particularly "ironic," given that the parents had furtively obtained private evaluations without notifying the District, failed to provide these evaluations to the CSE in time for the Spring CSE meeting, provided the evaluations only after they commenced litigation, cancelled the CSE meeting scheduled to review these evaluations, never rescheduled the CSE meeting as promised, "stone-walled" the District from observing the student at Windward and failed to apprise the District of the student's "deterioration" at Windward.

COURT'S DECISION:

Without much written analysis, the Circuit Court affirmed the District Court's ruling in favor of the District (2013 WL 1286154 [S.D.N.Y., 2013]).

WHY YOU SHOULD CARE:

When convening a CSE meeting for a parentally-placed student with a disability, it is imperative that the student's private school teachers participate in the meeting. At the student's annual review of a parentally placed student, it is likely that the District has not had the child in one of its programs for at least the current school year. As such, the private school staff will likely have the most recent information regarding the student's current functioning levels. Thus, in order for the CSE to accurately identify the student's current needs and abilities, it must include private school staff in the meeting. While it may not always be possible for the private school staff to participate in person, efforts should be made to ensure their participation by alternative means (e.g. teleconference or videoconferencing, if the District has these capabilities). If it is impossible for the private school staff working with the student to participate in the meeting by any means, the CSE should review any and all reports prepared by private school staff regarding the student's current functioning levels with particular care and attention. Additionally, District staff should speak with the student's private school teachers and service providers regarding the student's functioning. If possible, the district should observe the student at the private school placement in time for the CSE meeting. The observation should be conducted during various times and across environments during the school day. In addition to observing the student during times when he or she is more successful, District staff should try to observe during classes that are known to present more difficulty for the student. It is also imperative that the District staff observe the student during instructional periods when he or she is learning new skills and not only during unstructured periods of the day (e.g. lunch or recess), or times when he is practicing to maintain acquired skills.

Federal District Court

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1. Denial of Access Claim Fell Within Realm Of IDEA And Required Exhaustion.

M.A. v. New York City Dept. of Educ., 114 LRP 9466 (S.D.N.Y., 2014)

SALIENT FACTS:

The Parents of a child with a disability filed a lawsuit in the federal district court for the Southern District of New York, alleging that the School District violated Section 504 and ADA, when it discriminated against their child by excluding her from certain educational programs and removing her from the classroom to the hallway for separate instruction.

COURT'S DECISION:

In a September 2013 Decision, a Magistrate Judge recommended that the court dismiss the Parents' claims because they failed to exhaust their administrative remedies. Although the Parents cloaked their claims in 504 terms of "denial of access," the court held that the crux of their complaint challenged the contents of the student's IEP and her placement on the LRE continuum. The Magistrate Judge pointed out that "a plaintiff may not bypass [] IDEA's administrative exhaustion rule merely by claiming damages that are unavailable under [] IDEA." In the Parents' objection to the Magistrate Judge's recommendation, they argued that none of their claims related to the student's educational programs or accommodations, and therefore, did not require exhaustion. The court disagreed. Regarding the student's alleged exclusion from school activities, the Parents claimed that "'the denial of access to an appropriate educational program' is a Rehabilitation Act issue and not an IDEA issue." The court wrote:

> While reasonable accommodations must be offered to ensure meaningful access to the program, the Rehabilitation Act and the ADA do not require that substantial changes be made to the program itself. Therefore, under the disability discrimination statutes, a plaintiff may challenge access to, but not the content of, the programs at issue. Such is the distinction between claims made under the disability discrimination statutes and claims made under the IDEA. *Citing* Zahran v. New York Dept. of Educ., 306 F.Supp.2d 204, 213 (N.D.N.Y., 2004).

As such, the court held, that because the crux of the Parents' complaint was the nature of the student's program, how instruction was delivered to her and whether it was provided in the LRE, their claims fell squarely within IDEA and therefore required exhaustion. Since the parents did not exhaust their administrative remedies when they were required to do so, the Court adopted the Magistrate Judge's recommendation and dismissed the Parents' Section 504 claims.

WHY YOU SHOULD CARE:

IDEA mandates that a party exhaust all administrative remedies before bringing a civil action in federal or state court. Without doing so, the court will not have any authority to review the case (i.e. will lack subject matter jurisdiction). When determining whether it has authority to review a case, which has not been reviewed in the first instance, by an administrative review officer, the court will look to "the 'theory behind the grievance' to determine whether the IDEA exhaustion requirement is triggered." If the plaintiff alleges claims concerning the substance of the program, its implementation or its restrictiveness, the court will decline to review it because the Parent has not exhausted the administrative remedies.

1. Failure To Implement Claims Will Be Dismissed By The SRO If the Parents Have Not Given the District An Opportunity To Implement the IEP.

***Application of the NYC Board of Education*, Appeal No. 13-220 (2014)**

SALIENT FACTS:

The Parents of a child with a speech or language impairment challenged the CSE's recommendation for the initial provision of services, unilaterally placed the student at the Aaron School ("Aaron") and requested reimbursement of tuition. The Parents' claims were based on the appropriateness of the District's proposed school. Specifically, the Parents expressed concerns regarding, among other things, the functional peer grouping of the proposed class. As relief, the Parents requested reimbursement of tuition.

SRO'S DECISION:

By way of background – the IHO made no findings concerning the parents' claims that the recommended public school site to which the student was assigned and the proposed class were inappropriate, but determined that the district denied FAPE, and awarded reimbursement for Aaron. The District appealed the decision, and without addressing the Parents' claims regarding the assigned public school site, the SRO reversed the IHO's decision. The Parents appealed the SRO decision to federal court. With regard to the challenges to the assigned public school, the federal court for the Southern District of New York (J.F. v. New York City Dept. of Educ., 2012 WL 5984915 [S.D.N.Y., 2012]) remanded the matter to the IHO to determine whether the assigned school "would provide the student with 'an environment reasonably calculated to enable the student to receive educational benefits.'" On remand, the IHO determined that the proposed class was inappropriate, because the other students would not have had similar social/emotional and management needs, the chronological age range exceeded 36 months and two of the students had significant behavioral needs that would have interfered with the student's instruction.

The SRO pointed out that since R.E. v. New York City Dep't of Educ., 694 F.3d 167 (2d Cir., 2012), several district courts have wrestled with the issue of parental challenges to the implementation of an IEP that are made *before* the student begins attending school and receiving services under the IEP. Because district courts are split on this issue and the Second Circuit has held that "'the appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed"

(K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]), the SRO held, under the circumstances, that the Parents were foreclosed from challenging the District's implementation of the IEP. Once the Parents rejected the District's recommendation in their August 20th 10-day notice in which they stated their intention to enroll the student at Aaron and seek tuition reimbursement, the District was relieved of its obligation to establish that the assigned public school site would have been able to implement the student's IEP.

Nevertheless, the SRO considered the merits of the Parents' challenges to the proposed class. Regarding the functional grouping, the SRO pointed out that the proposed class included 11 students, who functioned from early emergent to early second grade in reading and early first grade in math. The student was at the end of the kindergarten instructional level. The students were placed into groups of one to four students according to their ability in reading and would instruct each group using texts appropriate to the group's ability. For math, the teacher used "mixed ability groups" because it was motivating and allowed for peer modeling. The teacher testified that the student's IEP included goals that were already being addressed with other students in her class. Regarding the social/emotional needs of the other students, the Parents argued that other students who may have been in the proposed class required 1:1 paraprofessionals based on their behavioral needs. However, the SRO held,

> [T]he fact that the management needs of students in a classroom are not identical does not violate State regulations so long as the environmental modifications, adaptations, or human or material resources required to meet the needs of any one student in the group do not consistently detract from the opportunities of other students in the group to benefit from instruction (at 13).

Here, there was no indication that the other students' paraprofessional services and behavioral needs would "consistently detract" from the opportunities of the rest of the class, including the student at issue, to benefit from instruction. Regarding the age range of the class, the SRO noted that the class exceeded the permissible 36 month age range. However, the SRO held that there was "nothing in the hearing record suggesting that this age range had a negative effect on the classroom." Turning next to the Parents' IEP implementation claim, the SRO noted that the Parents did not actually allege that the District could not have implemented the accommodations and modifications included in the student's IEP. Rather, they alleged that only some of the management needs, supports and services listed in the student's IEP were being implemented in the class. However, the SRO relied on the teacher's testimony that she already implemented many of the same accommodations and modifications included in the student's IEP for other students in her class (i.e. movement breaks, quiet breaks, use of sensory tools, redirection). Moreover, after reviewing the student's IEP during the hearing,

the teacher testified that she could accommodate the student's needs in her class. As such, the SRO dismissed the Parents' appeal.

WHY YOU SHOULD CARE:

Generally, challenges to an assigned school are relevant in deciding whether the district properly implemented a student's IEP. However, where the student never attended the recommended placement, the question of IEP implementation would be purely speculative. Therefore, courts have held that the sufficiency of the district's offered IEP program must be determined on the basis of the IEP itself. *See* R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2d Cir., 2012). The Second Circuit has explained that a parent's speculation that a district will inadequately adhere to an IEP is an inappropriate basis for an award of tuition reimbursement. Id, at 195. The federal courts have explained:

> The Second Circuit has been clear [] that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the *validity of the proposed placement is to be judged on the face of the IEP*, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been implemented (emphasis added) See A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 (S.D.N.Y., 2013).

The chronological age range within special classes of students with disabilities who are less than 16 years of age may not exceed 36 months. See 8 NYCRR 200.6(h)(5). As the SRO explained, an age range outside of 36 months does not necessarily rise to the level of a denial of FAPE where the students are appropriately grouped within the class for instructional purposes.

Given that the Parents appealed the first SRO decision to federal court, it is likely that they will appeal this decision regarding the appropriateness of the assigned school as well. We will keep you updated with any developments in this case.

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2. Correspondence Between The SPAMs And Goals Is Essential For A Defensible IEP.

***Application of a Student with a Disability*, Appeal No. 13-231 (2014)**

SALIENT FACTS:

The Parents of a student classified multiply disabled based on, among other things, her need to be fed with a G-tube, the need to use of a ventilator for most of

the day, severe muscle weakness and myoclonic seizures, rejected the District's recommended placement and placed her at the Standing Tall School, where she had been parentally-placed the preceding school year. The District recommended a 12:1+4 class with the services of a 1:1 full-time RN; related services of speech and language therapy, physical therapy, occupational therapy and vision services; as well as numerous modifications and accommodations and adapted physical education. The parents challenged the District's recommendation for many reasons, including that the IEP annual goals were inappropriate, vague, did not address the student's needs, and failed to include a "grade level baseline" or "appropriate grade level performance standards." The IHO held that the District offered FAPE and the Parents appealed.

SRO'S DECISION:

The SRO pointed out that the Regulations "do not require 'baseline' functioning levels to be included in annual goals." Rather, "annual goals must meet a simpler criterion – which is [that they] must be 'measurable.'" The SRO found persuasive that the goals were developed from verbal and written information provided by the student's then-current teachers at Standing Tall and family providers, that they were discussed at the meeting with the parents and Standing Tall staff, and that no one participating in the meeting disagreed with the goals that were discussed. Without providing specific examples of annual goals, the SRO discussed the general characteristics of the goals that made them appropriate. For example, the SRO explained,

> [T]he annual goal for the student to develop phonics knowledge, phonemic awareness, and listening comprehension skills targeted the student's ability to respond to her name, and the annual goals to improve the student's number and mathematics sense addressed [] her ability to count and complete one-to-one correspondence tasks (at 10).

Regarding the measurability of the goals, the SRO noted that the goals "provided criteria for measurement to determine if an annual goal had been achieved (i.e.: 80 percent accuracy, [or] 3 out of 4 trials), the method of how progress would be measured (i.e.: observation, homework, classroom participation, portfolio of collected work), and a schedule to measure progress toward the annual goals (i.e.: one time per week, every four weeks)."

Additionally, the SRO determined that the 12:1+4 placement recommendation with a 1:1 full-time RN, was appropriate to meet the student's highly specialized needs. This was supported by the testimony from the Standing Tall Executive Director that "if the staffing ratio was significant and the student had someone with her who was capable of helping to instruct her in a way that she was capable of understanding, and that she had the right support systems and the right equipment with her, a classroom with 12 students could possibly work for

her." Accordingly, the SRO affirmed the IHO's decision that the district offered the student FAPE.

WHY YOU SHOULD CARE:

This decision is yet another example of the importance of having correspondence between the SPAMs and annual goals. Each identified need must be addressed by a goal. While the SRO explained that goals do not need to contain baselines, if they are available, it is a good idea to include them to make progress measurement more meaningful. In addition, baseline data gives the new teacher an idea of where the student is currently performing and how much progress the student is expected to make to master the goal.

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3. IEE Entitlements are "One for One."

***Application of a Student with a Disability v. New York City Bd. Of Educ.*, Appeal No. 13-216 (2014)**

SALIENT FACTS:

A Parent of a child with a disability disagreed with the results of a District-conducted psychoeducational evaluation and requested a neuropsychological evaluation as an IEE at public expense. The District offered to conduct a neuropsychological evaluation of the student. The Parent rejected the offer. The IHO denied the Parent's request for an IEE and the Parent appealed.

SRO'S DECISION:

On four occasions throughout the Decision, the SRO explained that the Parent was not entitled to a neuropsychological evaluation at public expense because she had not disagreed with a neuropsychological evaluation conducted by the District. The SRO wrote:

> [I]n order to obtain an IEE at public expense, the district must have conducted an evaluation with which the parent disagrees (34 CFR §300.502[b][1], [2]). In the present case, the parent disagrees with the district's April 2013 ***psychoeducational*** evaluation; however, the parent did not request a ***psychoeducational*** IEE; rather, the parent is requesting a ***neuropsychological*** IEE at district expense. Because the district did not conduct a neuropsychological evaluation of the student with which the parent disagrees, the parent is unable to obtain a neuropsychological IEE at public expense on this basis (emphasis added) (at 8).

Thus, the SRO affirmed the IHO's decision and denied the Parent's request for a neuropsychological evaluation as an IEE at public expense based on her disagreement with the District's psychoeducational evaluation.

WHY YOU SHOULD CARE:

Many Districts receive requests from parents of children with disabilities for neuropsychological evaluations as IEEs at public expense based on their disagreement with a District-conducted psychological, psychoeducational or other non-neuropsychological evaluations. Districts have been approving such requests, rather than taking parents to due process to prove the validity of the District's evaluations. Previously, when a parent requested an IEE, the District had two options – (1) grant the request or (2) initiate due process to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria. This Decision has essentially provided a third option. When a parent requests an IEE of a different type of evaluation from the one the District has conducted and with which the Parent disagrees, this request may be denied. The SRO has clarified that when a Parent requests an IEE at public expense, the Parent is only entitled to the same type of evaluation as the one the District conducted with which the Parent disagrees.

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