NYSE Directors
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MONTHS IN REVIEW: December, 2011 – January, 2012

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

This month we summarize cases where parents have been unsuccessful in convincing the SRO or federal courts that districts denied FAPE as a result of procedural deficiencies in IEP development. In other cases the courts and SRO's position on reduction of claims for reimbursement where the parents have failed to cooperate with districts' efforts to provide FAPE has been unwavering.

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U.S. Supreme Court

1. A Can of Worms - Revisited.

Compton Unified School Dist. v. Addison, --- S.Ct. ----, 2012 WL 33286 (Jan. 9, 2012)

SALIENT FACTS:

In the March 2011 issue of the *Attorney's Corner*, we reviewed a Ninth Circuit Court of Appeals decision which found that the parents' claims, grounded in negligence, were actionable under IDEA. Despite a student continually receiving failing grades, scoring below the first percentile on standardized tests, producing work that her teachers described as "gibberish and incomprehensible,"

coloring with crayons at her desk, playing with dolls, and urinating on herself in class, a California school district refused to classify the student until the 11th grade. The District argued that, because it affirmatively refused to act, IDEA's child find requirements did not apply. The 9th circuit disagreed and held, that "a party may present a complaint 'with respect to any matter relating to the identification, evaluation, or educational placement of the child.'"

The question presented in the District's petition for *writ of certiorari* to the U.S. Supreme Court was, whether the due process hearing procedures under IDEA allow a parent to bring a claim of negligence against a district, or whether due process hearing claims are limited to disputes regarding *intentional* decisions made by the school district.

COURT'S DECISION:

In denying the District's *writ of certiorari*, the Supreme Court preserved the 9th circuit ruling that the district violated IDEA. The matter goes back to a hearing on the question of negligence.

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9th Circuit Court

1. Landmark Ruling for Reimbursement Ends With the Ninth Circuit.

Forest Grove Sch. Dist. v. T.A., 2012 WL 171251 (2012)

SALIENT FACTS:

The U.S. Supreme Court denied the parents' petition for *certiorari*. In declining to hear the case, the Supreme Court finally ended a lengthy history in the federal court system. The Supreme Court effectively preserved the 9th Circuit Court of Appeals' decision (Forest Grove, 638 F.3d 1234 [9th Cir., 2011]) that the parents were not entitled to reimbursement for tuition because they had placed their son in a therapeutic boarding school for reasons unrelated to his ADHD and depression. Forest Grove began as a seemingly straightforward tuition reimbursement case, but snowballed into a landmark case finally landing in the High Court. In June of 2009, the Supreme Court held, for the first time, that the prior receipt of special education services is not a prerequisite for reimbursement under IDEA. See Forest Grove, 557 U.S. 230 (2009).

COURT'S DECISION:

Upon remand to the Oregon district court, the parents were unable to recover tuition expenses related to their unilateral placement. The lower court held that the parents were not entitled to reimbursement because the placement was primarily intended to address the student's drug abuse and behavior problems not his ADHD or depression. On April 23, 2011, the 9th Circuit affirmed the lower court's decision. See Forest Grove, 638 F.3d 1234 (9th Cir., 2011). The "smoking gun" was found in the parent's responses in the private school's enrollment application. Specifically, in response to the inquiry of what "specific events precipitated" the student's enrollment, the parent wrote, "inappropriate behavior, depression, opposition, drug use, runaway." Although the parent purported that other sections of the application supported his position that he hoped that the student would progress academically, the 9th Circuit concluded that these statements alone did not substantiate the position that the student's enrollment was academic in nature.

WHY YOU SHOULD CARE:

The U.S. Supreme Court has made it clear that parents are entitled to reimbursement for tuition expenses under IDEA even though the student has never previously received special education services from the district. Although the 9th Circuit Court of Appeals decision is not binding upon school districts in New York, it is persuasive authority. The 9th Circuit decision is especially persuasive given the Supreme Court's refusal to review the decision. Although parents may place their drug involved students in rehabilitation centers, they will not likely be successful if they seek reimbursement for costs associated with this placement. The district's liability will be limited to expenses related to the student's education (i.e. tuition).

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New York Federal District Court

1. Procedural Deficiencies in IEP Development Did Not Result in Denial of FAPE.

B.P. v. New York City Department of Education, 2012 WL 33984 (E.D.N.Y., 2012)

SALIENT FACTS:

From 2005 through the 2009-10 school year, the student's fourth grade year, the student attended the Mary McDowell Center for Learning ("McDowell"), a private school for children with learning disabilities. The CSE convened to develop an IEP for 2009-10 included a NYS certified social worker, district

psychologist, a parent member, a general education teacher who was not teaching the fourth or fifth grade, the parent, and the student's McDowell teacher who participated by teleconference. Although the CSE considered a number of evaluations, reports, and observations, the McDowell teacher did not have copies of the documents. Although the CSE recommended a 12:1:1 program and related services, the class consisted of only 8 students - one ED, one speech and language impaired, five LD, and one borderline mentally retarded.

COURT'S DECISION:

The court determined that the procedural errors had not denied the parents an opportunity to meaningfully participate in the IEP development process. First, the court noted that because the student was not participating in the general education environment, and was not anticipated to do so, the CSE was not required to include a general education teacher. Second, the court concluded that, because the private school teacher reviewed all of the information presented to the CSE before the meeting, neither the parents nor the teacher's participation was significantly compromised.

WHY YOU SHOULD CARE:

CSEs must include a general education teacher where the student is or is anticipated to participate in the general education environment. However, where there is no indication that the student will participate in the general education environment, there is no obligation that a CSE include a general education teacher. While the district may provide alternative modes of participation in CSE meetings (e.g. teleconference), the SRO has long held that the CSEs should ensure that telephone participants have copies of all the documents to be reviewed by the CSE at the meeting. Where, before the meeting, a teleconference participant had an opportunity to review documents which would be reviewed at a CSE meeting, the failure of the district to provide copies of the documents for the teleconference participant may not result in a denial of FAPE. Nevertheless, the rule of thumb remains to ensure that all meeting participants have copies of all of the information to be reviewed at the CSE meeting.

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2. New York's 4-Month SOL For SRO Appeals Does Not Apply to Attorney's Fees.

P.M. v. Evans-Brant Cent. School Dist., 2012 WL 42248 (W.D.N.Y., 2012).

SALIENT FACTS:

In an August 25, 2008 decision, the SRO found that the district denied the student FAPE. After the district rejected the parent's request for $57,872.82 in legal fees and costs, the parents filed a suit in federal court on July 30, 2009. The

district immediately moved to dismiss the action on the grounds of the claim being barred by New York's 4-month statute of limitations for appealing SRO decisions to federal court.

COURT'S DECISION:

The court refused to follow the 6th circuit's view that IDEA's statute of limitations applies to actions for attorney's fees. See King v. Floyd County Board of Education, 228 F.3d 622 (6th Cir., 2000). The court noted that the limitations period applies to "aggrieved parties," who are those who lost at the administrative level. Moreover, the court noted that the 4-month limitation refers to an action to "review" the SRO's decision. However, an action for attorney's fees does not seek review, instead, it seeks a separate form of relief available at the administrative level. Additionally, the court reasoned that the state's policy interest in a speedy resolution for the sake of the children needing special education does not apply to attorney's fees cases. The court noted that neither party was able to point to a Second Circuit decision applying the 4-month limitation on attorney's fees.

WHY YOU SHOULD CARE:

Although IDEA applies a 90-day limitation for appealing administrative decisions to federal court, New York law explicitly extends this limitation by one month, therefore providing aggrieved parties with 4 months to appeal SRO decisions to federal court. See Education Law §4404(3)(a). However, this 4-month limitation does not apply to claims for attorney's fees. Rather New York's 3-year statute of limitations applies.

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3. Requiring Staff to Heat Student's Homemade Lunch In The Microwave is Not a Reasonable Accommodation Under Section 504.

A.M. v. New York City Dept. Of Educ., et al., 2012 WL 120052 (E.D.N.Y., 2012)

SALIENT FACTS:

An 11-year old student was recently diagnosed with Type I Diabetes Mellitus. Per the advice of his nutritionist, the parent prepared homemade lunches. The purpose of preparing these homemade lunches was to monitor the student's diet, specifically his caloric/carbohydrate intake until the student became more self-dependent. Although the student's pediatrician submitted a request form for "504 Accommodations" to the district, no meeting was held, nor was a formal "504 Plan" developed. Nevertheless, the parents informally requested by email to the student's teacher that the teacher heat up the student's lunches every day. The teacher complied inconsistently. When the Superintendent of Schools learned of the teacher's actions, the Superintendent informed the parent by

telephone that the district would not be honoring her request in an effort to avoid potential liability (e.g. overheating). However, the Superintendent explored alternative options (e.g. training the student to make appropriate menu choices, and counting carbohydrates).

The crux of the parents' claims were that the district failed to accommodate the student's specialized dietary needs by unreasonably refusing to (1) heat up his homemade food using the school microwave, and (2) supervise his food intake during school lunch. In doing so, the parents alleged that the district denied FAPE and violated the student and parents' substantive and procedural rights.

COURT'S DECISION:

While the court acknowledged that as a student with diabetes, the student was covered under section 504, it declined to find that the DOE discriminated against the student on the basis of his disability. The principal purpose of Section 504 is to enable qualified disabled individuals to be provided with meaningful access to benefits. However, the court wrote, "'meaningful access' [] does not mean 'equal access' or preferential treatment." In fact, the Second Circuit has distinguished between "'reasonable accommodations' and requested 'optimal' accommodations not authorized by disability statutes" (*citing* Felix v. New York City Transit Authority, 324 F.3d 102 [2d Cir., 2003]). Moreover, the court wrote, "where alternative reasonable accommodations to allow for 'meaningful access' are offered or already in place, a Section 504 reasonable accommodations claim must fail."

The court noted that the parent asked the district to heat the student's meals in the microwave, not because it was medically necessary for him to have a hot lunch, but because he was more likely to eat food that he found appetizing. The court wrote, "though it is understandable that [the student] – like others with or without diabetes – would prefer to eat food intended to be eaten hot while hot, or eat lunches other than 'cold sandwiches' (not to mention any other available cold lunch, salads as but one healthy example), this does not mean the school district was obligated under the applicable disability statutes to accommodate this preference." Additionally, the court concluded, the parent's "request to supervise [the student's] lunch intake to ensure that he ate all of his food – whether his lunch was provided from home or at school – similarly represents a preferential, as opposed to a necessary, accommodation." The court also noted that the school had healthy food options available, and made calorie and carbohydrate counts available to students and parents. Specifically, on the district's website, the DOE posts a table of product descriptions, brands, portion size, calories, cholesterol, and total carbohydrates concerning the lunches served at school.

The court dismissed the Parents claims arising from the District's failure to develop a 504 Plan. The court noted that the primary purpose of a 504 eligibility meeting would have been to "'decide whether the student is a qualified individual

with a disability....and determine 'what, if any, accommodations are needed to enable the student to attend school and participate in school activities on an equal basis with his/her non-disabled peers.'" However, the court concluded that any defects arising from the district's failure to convene a 504 meeting were cured by its maintaining "an open exchange between the parent and the school, [and] determin[ing] that only glucose monitoring with an emergency plan would be necessary." Moreover, any defects arising from the district's failure to develop a 504 plan were cured by its maintaining and complying with the student's Glucose Monitoring Forms, along with their detailed instructions and emergency plan.

WHY YOU SHOULD CARE:

Parents may request that their child be provided with certain accommodations. However, you may not be required under Section 504 to provide the accommodations they want, where they are not necessary to enable the student to receive meaningful access to educational programs. Unless there is clear evidence of medical necessity for the accommodation or service, a district may not be required to provide it. Although, as a courtesy, teachers or other district staff may voluntarily provide accommodations, which are not mandated by a student's 504 Plan, we caution them from doing so. Under these circumstances, it will be difficult for the district to defend its position that the preferential accommodations are unnecessary.

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4. Attorney's Fees Awarded Where IHO Ordered Relief in Addition to Pendency.

P.P. v. Evans-Brant Cent. School Dist., 2012 WL 125274 (W.D.N.Y., 2012).

SALIENT FACTS:

The IHO issued a Pendency Decision in the parents' favor. In the IHO's final decision, he determined that the district denied FAPE. The parents, believing they were prevailing parties, sought attorney's fees and costs. In opposing the parents' motion, the district argued that the parents were not entitled to recover fees for work related to the pendency decision. In support of this position, the district argued that the parents were not the "prevailing party" in the first instance because in the final decision, the IHO merely ordered the district to continue providing those services, which it was already providing pursuant to pendency, and thus pursuant to the student's existing IEP.

COURT'S DECISION:

The court rejected the District's argument that the parents were not the "prevailing party" and therefore were not entitled to seek attorney's fees for services relating to the IHO's pendency order. Among other things, the court concluded that IDEA does not bar a plaintiff from recovering fees associated with a pendency decision when they are also granted relief at the final decision stage. The SRO noted that the IHO ordered *additional* services of OT and S/L therapy in his final decision. The court wrote, "even if it was inadequate in itself, the Pendency Decision was simply one step in the final resolution of Plaintiff's claims which resulted in a ruling in their favor." The court agreed with the district that, where the IHO fails to order any *new* relief, the parent cannot be said to have prevailed. However, because here, the IHO ultimately ordered the district to provide services beyond those provided in pendency, the parents were the prevailing party.

WHY YOU SHOULD CARE:

Attorney's fees may be are awarded to the prevailing party. Where an IHO has issued an interim decision regarding pendency, attorney's fees may be awarded to the parents for services rendered by their attorney, which were associated with the pendency order. Under these circumstances, to be entitled to attorney's fees, the parent must be the prevailing party in the final decision on the merits of the case. To be considered the "prevailing party," the IHO must award the parent services beyond those provided in pendency. Consistent with this decision, if the parents win on pendency, but lose on the underlying issues, and are therefore not the prevailing party on the final decision on the merits of the case, they will have no entitlement to fees.

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5. Parent's Failure to Cooperate with the District's Efforts to Provide FAPE Cut Against Claim for Compensatory Services.

M.R. v. South Orangetown Central Sch. Dist., 2011 WL 6307563 (S.D.N.Y., 2011)

SALIENT FACTS:

The CSE determined to send application packets to out-of-district placements for a student whose OHI classification was based upon his co-morbid features of epilepsy; learning difficulties in reading, math, writing; Asperger's Disorder; and emotional and attentional difficulties. Although shortly after the CSE meeting, BOCES contacted the parent in an attempt to schedule an intake interview, and the District sent the parent follow-up letters regarding the intake process, the parent failed to make the student available for interviews until six

months after the CSE meeting. Although the student participated in intake interviews at three other placements, the parent refused to make the student available for interviews at several placements, which she determined were inappropriate. Without notifying the district, the parent unilaterally applied to an out-of-state program, to which the student was accepted for the remaining two months of 2007-08. For 2008-09, the CSE recommended placement in a BOCES program. The parent rejected this recommendation on the grounds that the program was geared toward ED and chemically-dependent children. Although the IHO and SRO determined that the recommended placement was inappropriate, both declined to grant compensatory educational services to the parents on the grounds that her failure to cooperate weighed against her claim.

COURT'S DECISION:

Initially, the court concluded that the claims relevant to 2008-09 were moot because the year had ended and a 2009-10 out-of-district placement had been secured. Nevertheless, the court considered the merits of the case and concluded that it would have upheld the determinations of the SRO. The court wrote, "just as the district had to meet its responsibility to find an appropriate out-of-district placement for [the student], the district alerted [the parent] that she had a concurrent responsibility to go to the schools [with the student] to participate in the intake process." However, the parent failed to "display a sense of urgency nor did she always bring [the student] with her - a necessary component of the intake process." The court agreed with the IHO's finding that the parent erroneously attempted to exert "veto-decision making power" over the recommended programs. The IHO determined that "'because of delay, objections, and [the parent's] fixation on the [out-of-state] school, [the parent] effectively defeated most of the possibilities, leaving limited choice and [the recommended school] ultimately to be recommended by default,' and thus, [the parents] were not entitled to compensatory services." Accordingly, the court determined that the district's denial of FAPE was due, at least in large part, to the parents' conduct.

WHY YOU SHOULD CARE:

Where a CSE has determined to explore out-of-district placements, it must advise the parents of their responsibility to cooperate with the intake interview process. This may be accomplished by explaining to the parents at the CSE meeting that they have an obligation to make the student available for intake interviews at the placements to which the district has applied. In an effort to develop an evidentiary record in preparation for a possible impartial hearing, the district should follow-up with the parents in writing about their obligations. Where a parent is aware of her obligations to cooperate with the intake interview process, and refuses to do so, the equities may weigh against her claims against the district.

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New York State Review Officer

1. Interim Decision Ordering Former School As Pendency Reversed.

Application of the NYC Board of Education, SRO Appeal No. 11-158 (Dec. 23, 2011)

SALIENT FACTS:

From 2005-06 through the 2010-11 school year, the student attended school district B as a resident. Although the parent moved to district A at the end of the 2010-11 school year, for reasons that were unclear at the time of the hearing, the student continued to receive services from district B during the summer of 2011 pursuant to the district B IEP. District B's IEP recommended a 6:1+3 program. Once the student transferred to district A, district A's CSE developed an IEP recommending a 6:1:1 program.

In challenging district A's IEP recommendation, the parents requested that the IHO issue a decision ordering pendency pursuant to the District B IEP. The IHO agreed and found that the student's last agreed upon placement for purposes of pendency was the special education program at district B, including its ESD program. The IHO determined, among other things, that the district A IEP was not pendency because this program was contested. Accordingly, the IHO ordered district A to fund the student's tuition at district B including related services, the ESD, and appropriate transportation.

SRO'S DECISION:

The SRO found that the IHO incorrectly interpreted the concept of the "last agreed upon IEP." The SRO wrote, "although the purpose of pendency is to preserve the status quo, 'when a student transfers educational jurisdictions, the status quo no longer exists.'" As such, the IEP recommended by district B is no longer the last agreed upon IEP.

Turning next to whether district A offered the student a comparable service plan for the pendency of the proceedings, the SRO concluded that district A had not done so. The SRO wrote, "where a student with a disability has an IEP in effect in a [district], transfers to another [district] in the same state, and enrolls in the new school within the same school year, the new [district] must provide 'comparable services' to those services described in the student's IEP from the prior [district]." The SRO conducted an extensive review of district B's program in comparison to district A's program. District A considered the appropriateness of a 6:1+3 class and determined that the student's needs did not warrant more than one paraprofessional in the room. Nevertheless, the SRO concluded that district A's 6:1+1 special class was not similar or equivalent to district B's 6:1+3 class. The

SRO reasoned that district B's IEP offered additional supports in the classroom. Nevertheless, the SRO held that for the purposes of pendency, the 6:1+1 class would be comparable to the 6:1+3 class with the addition of a 2:1 paraprofessional.

WHY YOU SHOULD CARE:

When in the same school year, a student transfers into a district with an IEP developed from another New York State school district, the receiving district must provide the student with FAPE. See 8 NYCRR §200.4(e)(8). The provision of FAPE includes providing the student with services comparable to those described in the sending district's IEP until such time as the receiving district convenes a CSE meeting. However, the receiving district may not begin providing services to the student until it consults with the parents. Consultation with the parents is an important step that must not be overlooked.

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2. Parents' Failure to Cooperate With Intake Interviews Results in Denial of Partial Tuition Costs at Residential Treatment Center.

Application of the Board of Education, SRO Appeal No. 11-131 (Dec. 16, 2011)

SALIENT FACTS:

A student with a history of hospitalizations due to her suicidal ideations was parentally placed in a residential treatment center located in Utah. Thereafter, the parents referred the student to the district's CSE. The student traveled back to the district for evaluations related to the initial referral. The CSE classified the student with an emotional disturbance, determined that a residential placement was appropriate, and referred the placement to the district's central based support team ("CBST"). The CBST was responsible for identifying a particular State-approved nonpublic school that would be a "good match" for the student. The IEP recommended that the student be placed on home instruction pending placement by the CBST. The CBST case manager sent the student's referral packet to 19 SED approved nonpublic schools. After screening the four schools to which the student was accepted, the parents rejected them without making the student available for intake interviews. A placement was never finalized and the parents maintained the student's placement in Utah.

SRO'S DECISION:

Although the district did not appeal the IHO's determination that it denied FAPE or that the Utah placement was appropriate, the district argued that the equities weighed against reimbursement. The parents argued that there was no

reason to present the student for an interview at a school that they unilaterally determined was inappropriate.

First, the SRO disagreed with the district's argument that because the parents moved the student to an out-of-state placement prior to requesting an initial evaluation, this prevented the district from offering a placement. The SRO found persuasive that, for two months prior to the student's unilateral placement, she had been educated by district staff at a hospital-based therapeutic school in which she was placed by her parents. At no time during her hospitalization, "when she would have been more easily accessible to the district," did the district identify her has a child suspected of having a disability or refer her to the CSE. Although the SRO noted that the parents cooperated with the CSE's initial referral process by making the student available for evaluations, the SRO concluded that this cooperation waned after the district applied to the SED-approved in-state placements. The parent's failure to cooperate with the intake interview process weighed against their claims for reimbursement. Although the student was home for three days during the holiday period, the parents did not make any attempt to schedule intake interviews. Therefore, the SRO concluded that the equities did not support an award for full-tuition reimbursement for the 2010-11 school year. Rather, the SRO awarded tuition reimbursement for April 15, 2010 through October 28, 2010, the period during which the parents cooperated with the district.

WHY YOU SHOULD CARE:

While parents may want to pre-screen recommended out-of-district placements, they cannot do so to defeat the district's efforts to complete its process of offering FAPE. CSEs must explain to parents that they have an obligation to cooperate with the district's efforts to provide FAPE. These efforts may include applying to and interviewing with out-of-district placements, and making their child available to be screened. Just as districts have an obligation to offer FAPE, parents have a concurrent obligation to cooperate with the district's efforts to do so.

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