

ATTORNEY'S CORNER

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MONTHS IN REVIEW: August 2015

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A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review several District Court decisions. One decision ordered a public school district to provide compensatory education services, including credit-bearing instruction, past the student's 21st birthday. Another decision held that a Committee on Special Education ("CSE") appropriately considered the Parents' input, even though it did not grant their requests when developing the student's individualized education program ("IEP"). We review another speculation case that found in favor of the District when the Parents' only argument was that the District would not appropriately implement the student's IEP. We review two procedural cases in this issue. One examined whether a Parent was entitled to appeal a case to federal court when the Office of State Review ("SRO") dismissed it on the merits and on procedural grounds. The other case found that Parents could bring additional claims directly to federal court when they prevailed in a free appropriate public education ("FAPE") denial case at an impartial hearing. We also review a case from the New York State Supreme Court that considered whether a student who was allegedly bullied demonstrated an academic need for special education services. We close with a case from the SRO which found it was improper for an impartial hearing officer ("IHO") to order that a student's pendency placement become his "permanent" placement.

Federal District Courts

I. Student Entitled To Earn High School Credits As Compensatory Services After Turning 21.

M.W. v. New York City Dept. of Educ., 2015 WL 5025368 (SDNY, 2015)

SALIENT FACTS:

A 21 year old student was diagnosed with speech/language, auditory, and language processing disorders. She lived with her mother who was unable to read and was also diagnosed as “mildly intellectually disabled.” The District misclassified the student as “severely cognitively impaired¹,” and she was educated in a school for students with severe developmental disabilities. The school did not provide curriculum that would allow students to earn a high school diploma. The student was placed in this setting for nine years, and made very little academic progress.

The District did not correct its misclassification until the student was 19 years old. She was transferred to another school within the District and began to earn high school credits towards a diploma. The student argued that she should have been eligible to take the Regents Competency Tests (“RCTs”), an alternate assessment to earning a high school diploma that was only available to students who began ninth grade before the 2011-12 school year. However, due to an administrative error in determining her grade, the student was determined to be ineligible for the RCTs.

The District then reclassified the student as “severely cognitively impaired,” and placed her in a special school for students with severe behavioral problems. She was taken off of the diploma track at this time. The student alleged that the District made this decision because it became evident that the student would not have sufficient credits to earn a high school diploma before turning 21. The District allowed the student to return to her previous school and continue to earn credits after this decision was challenged by her attorney. One year later, the District again changed the student’s placement without her consent to a part-time vocational program.

In October 2014, the student requested an impartial due process hearing, seeking compensatory education and instruction to allow her to accrue high school credits after she turned 21. The District acknowledged that it denied the student FAPE for 11 years. The District did not present any witnesses, provided no defenses, and waived the statute of limitations claim. The impartial hearing officer (“IHO”) held that there was no “gross violation” and the student was not entitled to compensatory education after the age of 21. The District was ordered to continue

¹ Note: “Severely cognitively impaired” is not a New York State or federal special education classification; however, this was the term used by the Court.

the student in her current program where she would receive compensatory services for the current school year.

On appeal, the SRO found the IHO's decision to be erroneous, and held that the student was entitled to receive compensatory education beyond the age of 21. However, the SRO did not allow the student to receive instruction that would lead to a high school diploma after she turned 21. Instead, the student was awarded 1,931 hours of 1:1 tutoring (that would not lead to high school credits), 300 hours of speech/language therapy, and 50 hours of social work services over four years.

The student "aged out" of her eligibility to receive a high school diploma as of June 30, 2015. The student completed slightly more than half of the credits she required to graduate.

COURT'S DECISION:

Here, the student moved to preliminarily enjoin the District from terminating her education services. When discussing the facts, Judge Pauley stated that, "they reveal a Dickensian saga of bureaucratic neglect over more than a decade." The judge agreed that the District denied FAPE and wrote that the "case is unlike any other."

The Court considered the following elements in determining whether the student was entitled to a preliminary injunction:

(1) Irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation.

First, the Court held that there was a substantial likelihood of success, because the District committed "gross procedural violations." It also held that the SRO did not provide an appropriate remedy, stating that,

Compensatory education is prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education.

The Court found that receiving credit-bearing instruction to allow the student to obtain a high school diploma was the only remedy that corrected the District's failure to provide FAPE. Further, the District caused "irreparable harm" by placing her in an inappropriate setting and thereby preventing her from earning a high school diploma.

The Court awarded the student's request for a preliminary injunction, and ordered the District to provide her with "1:1 credit-bearing instruction, in addition

to the tutoring, speech and language therapy, and social work services ordered by the SRO.” Further, the District was directed to apply to appropriate schools for the spring of 2016, and to enroll the student in one of those programs instead of receiving the 1:1 instruction. The District was ordered to provide the instruction in five credit-bearing classes per semester and to prepare the student to take the RCTs.

WHY YOU SHOULD CARE:

This case provides an example of “what not to do.” The District made a number of errors by misclassifying the student and not providing her with instruction that would lead to a high school diploma. Due to the District’s admission that it denied FAPE, compensatory education was the appropriate relief. Compensatory education is an equitable remedy that is available to students who have been denied FAPE. There is no standard calculation for determining the amount of compensatory education to provide to eligible students. However, the Second Circuit recently provided the following standard:

The ultimate award of [compensatory education] must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

Here, the Court did not specify the amount of compensatory services to provide the student. Rather, it directed the District to provide instruction to allow the student to earn a high school diploma.

Typically, students are not entitled to receive public education services after the end of the school year in which they turn 21. However, the Court noted that due to the “gross procedural violations” committed by the District, the student was entitled to FAPE beyond the age of 21.

II. FAPE Offered Even Though Parent Rejected Recommendations Due To CSE Discussions That Considered Parent’s Concerns.

A.P. v. New York City Dept. of Educ., 2015 WL 4597545 (SDNY, 2015)

SALIENT FACTS:

A student attended the Aaron Academy, a private school that is not approved by the New York State Education Department (“SED”). He was classified

with a speech or language impairment and was diagnosed with attention-deficit/hyperactivity disorder, dyspraxia, and sensory integration disorder.

In April 2012, the District's CSE convened to develop the student's IEP for the 2012-13 school year. Participants included the student's father, a District special education teacher, the student's former teacher at Aaron, a parent member, and the District's school psychologist, who also acted as the district representative. The CSE recommended an in-District integrated co-teaching ("ICT") class with related services. The student's father testified that he felt the CSE was rushed and that he had limited opportunities to participate. The father also stated that he did not believe the student would be successful in an ICT class.

The Parents requested an impartial hearing, alleging that the recommended IEP did not provide FAPE because the ICT class had too many students; there would not be sufficient small-group instruction; there were too many English language learners in the recommended class; the student would be susceptible to bullying; the lunchroom was too noisy; and the student would be "pulled out from instruction to receive his related services." The IHO found that the CSE engaged in predetermination and deprived the Parents of the opportunity to meaningfully participate in the meeting. Further, the CSE was not properly comprised due to a missing general education teacher and the ICT class was inappropriate. As such, the Parent was awarded tuition reimbursement for Aaron.

The SRO reversed the IHO's decision, finding that the "IEP was reasonably calculated to meet [the student's] needs and to provide him with educational benefits."

COURT'S DECISION:

The District Court determined that the CSE did not engage in predetermination; rather, the Court found that the District representatives "came to the April 2012 CSE meeting with an open mind." The Court noted that when comparing the draft IEP with the final IEP, there were many changes that were made during the meeting. Further, the CSE appropriately reviewed each section of the draft IEP and made changes based on feedback from CSE members. The Parent was also able to meaningfully participate in the meeting based on evidence that he frequently stated his opinion and expressed his disagreement with the recommendations. The IEP also indicated that the CSE considered special class programs, but rejected them based on the student's needs and abilities.

The Court also rejected the Parents' argument that the CSE was not properly comprised because it did not include a general education teacher. It held that a general education teacher only needs to be included if the student was to participate within the general education environment. Here, the CSE only considered special class and ICT placements, which are not general education programs that "require the participation of a general education teacher at the CSE

meeting.” The Court also stated that even if the lack of a general education teacher was a procedural violation, it did not amount to a denial of FAPE. This is because the Parents did not provide “any evidence of the additional value that a general education teacher would have added to the CSE meeting.”

The Court gave deference to the SRO’s decision regarding the appropriateness of the IEP. It agreed that the IEP adequately addressed the student’s special education needs, including his social and emotional needs. Further, the ICT class provided an appropriate setting as the student had the ability to participate in the general education curriculum. Accordingly, the Court found that the District offered FAPE.

WHY YOU SHOULD CARE:

A public school district is under no obligation to incorporate all of the parents’ concerns or to provide the parents’ requested programs and services when developing a student’s IEP. Rather, a CSE must only demonstrate that it allowed the parent to meaningfully participate in the CSE meeting and that it considered all of the parents’ input. In situations where the parents and district disagree, the CSE must ensure that it has justified reasons for making its decisions. The IEP must appropriately address the student’s identified needs and abilities while educating him or her in the LRE. The IEP minutes or accompanying Prior Written Notice (“PWN”) letter should document the parents’ concerns. Such documentation should also note the reason that a CSE either accepted or rejected the parents’ requests during the CSE meeting.

III. Parents Do Not Prevail When Speculating That District Would Not Adequately Implement Student’s IEP.

E.P. ex rel. E.P. v. New York City Dept. of Educ., 2015 WL 4882523 (EDNY 2015)

SALIENT FACTS:

A student was diagnosed with pervasive developmental disorder (“PDD”) and had demonstrated needs in a variety of domains, including speech, attention and motor skills. During the 2010-11 school year, the Parents enrolled the student at the Rebecca School (“Rebecca”), a private school that is not SED-approved. The District conducted a classroom observation of the student in October 2010 and reported that the student “laid face down on a trampoline and was nonresponsive” during instruction. The student did not interact with his peers during the observation. A December 2010 progress report from Rebecca similarly indicated that the student did not conform to classroom expectations of behavior.

The CSE convened in March 2011 to develop the student's 2011-12 IEP. The CSE changed the student's classification from speech/language impairment to autism and recommended a 12-month school year. The CSE also considered a variety of special class placements, and recommended a 6:1:1 classroom with a 1:1 teacher assistant to address the student's distractibility and need for 1:1 adult assistance. The IEP also provided a number of related services and program modifications.

The Parents enrolled the student at Rebecca for the 2011-12 school year before receiving a finalized IEP from the District. They requested an impartial hearing, stating that the recommended school was too noisy and big for the student and would cause him to be distracted and overwhelmed. The IHO found that the District offered FAPE as the IEP "mirrored as closely as possible [the student's] current class setting" at Rebecca. Further, the Parents were more concerned with the recommended site of the program rather than the actual IEP. Such concerns were not justified.

The SRO affirmed the IHO's determination and found the Parents' concerns regarding the proposed placement to be inappropriately speculative. The SRO stated that "when the student never attends the assigned public school, the law bars a counterfactual retrospective analysis of what problems might have arisen." Accordingly, the District offered FAPE and the Parents were not entitled to tuition reimbursement.

COURT'S DECISION:

The District Court agreed with the SRO's decision. It found that there was no evidence to indicate that the proposed school would be unable to accommodate the student's needs or implement the IEP. It rejected the Parents' arguments that the physical school building would create an overwhelming environment for the student and the school was not adequate because the student's classroom would be on the fourth floor. It also disagreed with the Parents' argument that the IEP was not appropriate because it did not consider private out-of-District placements for the student. This is because "once a CSE has determined that a public program is appropriate, there is no legal requirement to weigh it against private alternatives."

WHY YOU SHOULD CARE:

This case is another in a long line of speculation cases that have been considered by the SRO, District Courts and the Second Circuit. It is becoming increasingly clearer that parents will not prevail when their argument is mere speculation that a district will be unable to adequately implement the student's IEP. Rather, in cases where a student never actually attended the District's recommended program, a parent will only prevail when the District cannot demonstrate that it offered FAPE and the parent demonstrates that their unilateral placement is appropriate and the equities are in their favor. Here, the IEP recommended program was virtually identical to the program offered by the

unilateral placement. The parents did not challenge the IEP, but unsuccessfully made the argument that the physical school building in the recommended program was not appropriate. Districts that follow the law and create IEPs that offer FAPE protect themselves from liability in these types of speculation cases.

IV. Parents Entitled To Appeal In Federal Court When SRO Dismissed On The Merits And Due To Procedural Errors.

J.E. v. Chappaqua Central School Dist., 2015 WL 4934535 (SDNY, 2015)

SALIENT FACTS:

A 14-year-old student with autism was educated in in-District programs until the 2011-12 school year, when the Parents unilaterally enrolled him in the Eagle Hill School in Greenwich, Connecticut. The Parents requested an impartial hearing, alleging that the District denied FAPE and requesting tuition reimbursement for two years at Eagle Hill. The IHO found that the District offered FAPE and denied the Parents' request.

The Parents appealed to the SRO, who dismissed their appeal because the format of their petition did "not comport with the format requirements provided by State regulations." The Parents submitted a petition for review and a memorandum of law that were both 21 pages; however, State law required such documents to be 20 pages. Further, the Parents used an "obviously compacted or compressed font that is blurry [and] difficult to read." However, the SRO continued to review the Parents' claim on the merits and found that the District offered FAPE.

COURT'S DECISION:

The Parents appealed the decision regarding FAPE and also asked the District Court to direct SED to "remove from its rotational lists any hearing officers that do not meet" State requirements. The District moved for judgment on the pleadings because the Parents did not exhaust all of their remedies as required by IDEA. The District argued that the Court did not have subject matter jurisdiction because their appeal to the SRO was dismissed on procedural grounds. The Parents argued that the SRO dismissed the appeal on the merits, rather than due to procedural error. SED also moved to dismiss the Complaint, claiming that it was not a "proper party to the proceeding."

The Court found that the Parents properly exhausted their administrative remedies. This is because the SRO made a determination on the merits of their claim. However, the Court granted SED's motion to dismiss, finding that the Parents asserted new facts for the first time in "an attempt...to bolster their

pleadings.” The Court also agreed with SED that it lacked subject matter jurisdiction to direct SED to remove IHOs that did not fulfill State statutory requirements. The Parents did not have standing because they did not show “a sufficient likelihood that they will require another hearing before an IHO, the IHO will not be an attorney, and the IHO will fail to issue a timely decision or wrong plaintiffs in some way.” The Court determined that it would move forward on determining the Parents’ claims on the merits.

WHY YOU SHOULD CARE:

This was a rare case that hinged only on procedure. It points to the importance of adhering to procedural rules when engaging in litigation. The SRO had the option of dismissing the Parents’ appeal based only on their procedural errors. If this occurred, the District may have prevailed in its argument that the Parents failed to exhaust their administrative remedies as required by IDEA. This is because the SRO would not have considered the case on the merits. However, because the SRO went on to analyze the case and also dismiss on the merits, the Parents were deemed to have exhausted their administrative remedies prior to bringing an appeal in federal court.

V. Parents May Move Forward With Claim Alleging Harassment Based On Disability In Federal Court.

J.R. v. New York City Dept. of Educ., 2015 WL 5007918 (EDNY, 2015)

SALIENT FACTS:

A middle school student was frequently bullied (i.e., slapped in the face, having his pants pulled down) due to “his perceived femininity and speech.” This bullying allegedly occurred in the presence of District employees, including teachers. The student reported the bullying to his Parents and a District staff member found a suicide note written by the student. He was then hospitalized for depression and placed on home instruction until the end of the school year.

The student entered ninth grade at another school within the District. He continued to be bullied there and was again hospitalized after cutting himself in school. In January of that school year, the District placed him at the Queens Children’s Psychiatric Center (“QCPC”). The student continued to be bullied in that setting. Two days later, the CSE was asked to refer the student to the CSE by letter from one of the student’s physicians. The District did not make the referral at that time. The student was suspended from QCPC in April for bringing a knife to school. It was at this time that the District referred the student for a CSE evaluation.

The student was classified as a tenth grader in September of the following school year and placed at Hillside Children’s Center (“HCC”), a residential school in Romulus, New York. The alleged harassment and bullying continued at HCC, and staff at HCC recommended that the District’s CSE find a “more therapeutic” school for the student. The District instead continued the student at HCC the following school year.

The Parents requested an impartial hearing, alleging that the District denied the student FAPE. The IHO found in favor of the Parents and directed that the student be placed in an SED-approved private school at District expense. The DOE did not appeal the decision and the student was enrolled in the Summit School.

COURT’S DECISION:

The Parents initiated the current lawsuit in District Court after prevailing at the impartial hearing. The lawsuit was against both the District and HCC, and included claims under the Americans with Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act (“Section 504”), Title IX, Section 1983, IDEA, Equal Protection Clause, First Amendment/Retaliation, Fourth Amendment/Due Process Clause, Municipal Liability and State Law claims. HCC filed a cross-claim against the District for indemnification and/or contribution. The current case considered both the District’s and HCC’s motions to dismiss.

Under the ADA and Section 504 claim, the District and HCC moved to dismiss, claiming that the Parents did not have standing to sue on their own behalf for their son’s injuries. In order for a court to consider both ADA and Section 504 claims, it must be alleged that:

- (1) [The student] is a qualified individual with a disability;
- (2) defendants are subject to Section 504 or the ADA;
- (3) [the student] suffered discrimination by harassment because of his disability;
- (4) the harassment was so severe, pervasive and objectively offensive that [the student] was effectively denied equal access in an educational opportunity; and
- (5) defendants were “deliberately indifferent” to the discriminatory harassment.

The Court found this argument to be without merit and cited past decisions holding that “parents possess a particular and personal interest in preventing discrimination against [their disabled] child.” The Court also found that the Parents alleged sufficient facts to demonstrate that the harassment was “severe and pervasive” and that the District was possibly “deliberately indifferent” to the student’s bullying. However, the retaliation claims were dismissed because the “alleged misconduct was not sufficiently adverse” to dissuade the Parents from pressing the issue.

Title IX prohibits discrimination on the basis of sex in any federally funded program. Title IX requires similar allegations as ADA and Section 504, except that the alleged harassment must be based on sex discrimination. Such sex discrimination can extend to sexual orientation, and the Court found that this was alleged here, as the student was bullied because “he did not meet [other students’] stereotyped expectations of how a boy should behave.” The Parents claimed that the District and HCC were deliberately indifferent to the harassment, as they knew about it and did not adequately address the issue. As such, their motions to dismiss on the Title IX claims were denied.

Section 1983 requires a claim that both the conduct in question was committed “under color of state law” and that it caused a deprivation of “rights, privileges or immunities” under the Constitution. The District, as a “municipal entity,” fulfills the requirement that its personnel acted “under color of state law.” HCC, as a privately owned entity, is not necessarily a State actor. However, the Court held that there was sufficient evidence to indicate that the District “exerted its coercive power over, or provided significant encouragement to Hillside” regarding the student’s education. This could support the Parents’ claim that HCC was a state actor under Section 1983. Accordingly, the motions to dismiss the Section 1983 claims were denied. The Court also found that the Parents asserted sufficient information to consider whether they should be awarded monetary damages for “emotional pain and suffering” under Section 1983.

The District and HCC also argued that the Parents did not exhaust their administrative remedies under IDEA. They alleged the Parents should have gone through the impartial hearing and SRO process rather than going directly to federal court. However, because the Parents were a prevailing party in their impartial hearing, they did not have an obligation to “appeal a favorable decision to exhaust their administrative remedies.” As such, the exhaustion requirement did not apply.

The Court also considered motions to dismiss the other Constitutional claims. It found that the District and HCC could be liable for violating the Equal Protection Clause based on their “deliberate indifference to racial or gender-based bullying.” However, the Court denied the Fourth Amendment/Due Process claim because there was no evidence that the student was placed at QCPC without parental consent. The First Amendment claim was also dismissed. It stated that the student was prevented from reporting the alleged harassment to school officials; however, the Parents’ claims did not support that he was deterred from reporting the harassment. The motion to dismiss the municipal liability claim was denied, as the Parents “alleged a plausible claim...based on the actions of Hillside and [the District] officials with policymaking authority.” This indicated that there were sufficient facts alleged to indicate that the District and HCC could be vicariously liable for the actions of their employees.

The Court found that the state law claims against the District were barred by the statute of limitations. The state law claims against HCC were not time-barred as the alleged harassment occurred within the statute of limitations.

WHY YOU SHOULD CARE:

In special education cases, school districts typically find themselves vulnerable to the impartial hearing process. Parents cannot recover monetary damages through an impartial hearing beyond reimbursement for actual expenses. However, some federal and state laws allow monetary damages in certain situations. This case demonstrates that parents can bring a case directly to federal court without having to go through the typical impartial hearing appeal process. This is because the parents prevailed during the impartial hearing, thereby negating the need to go to the SRO. The parents likely brought the case to federal court in an effort to obtain monetary damages, as an IHO does not have the authority to order such relief.

New York Supreme Court

I. Student With Good Grades And High Standardized Scores Not Eligible For Special Education Services Despite Mental Health Difficulties.

Paul T. v. South Huntington Union Free School Dist., 14 N.Y.S.3d 627 (Supreme Court, Suffolk County, 2015)

SALIENT FACTS:

The Parents brought a special proceeding in New York Supreme Court, Suffolk County, and alleged that their child was a student with a disability under IDEA. The Parents argued that the student should have been classified by the District's CSE and requested tuition reimbursement from the student's parochial school. In fifth grade, the student was found drawing pictures of acts of violence against another student in his school journal. The Parents alleged the other student bullied and harassed their child. The student was punished, but the District agreed to forego a superintendent's hearing in exchange for the student remaining on home instruction until he was given "psychiatric clearance" to return to school. The Parents then decided to place their child in a private parochial school.

The Parents requested that the District conduct a CSE evaluation for their child. The CSE conducted the evaluation, but determined that the student did not qualify for classification. The Parents appealed this decision to an impartial hearing, and the IHO affirmed the decision not to classify the student under IDEA.

The IHO found that the CSE properly reviewed all of the student's evaluations, including documentation submitted by the Parents. The CSE then determined that the student was not eligible for special education services as "there seemed to be no academic impact with respect to any of the issues raised." The IHO also found that there was not sufficient evidence that the student was the victim of bullying. On appeal, the SRO upheld the IHO's decision.

COURT'S DECISION:

- II. The Parents appealed the SRO's decision in New York Supreme Court. The Parents argued that there is a difference between "educational performance" and "academic performance." Although the student's grades and standardized scores indicated that his academic performance was satisfactory, the Parents argued that there was an impact on his educational performance based on his behavior and overall mood, as the result of the alleged bullying.

The Court held that "educational performance" should be measured "by reference to academic performance which appears to be the principal, if not only, guiding factor." The Court agreed that the student did not qualify for a CSE classification as either emotionally disturbed or other health impaired. Here, even if the student's mental and emotional state was severe enough for classification, he was "simply performing at too high a level" to meet eligibility criteria.

WHY YOU SHOULD CARE:

To be eligible for classification under IDEA, students must demonstrate both a disability and that the disability adversely affects the student's academic performance. A need for special education is typically determined by examining the student's academic performance through grades and standardized assessments. These criteria are particularly difficult for students who demonstrate emotional or behavioral problems, as they may not evidence an academic need. Arguments are sometimes made that educational performance is more than grades or scores, and should be measured using other factors, including a student's actual emotional functioning in school, interpersonal relationships, etc. However, the Court here declined to use this standard in determining whether the student required special education services. Rather, the student's history of good grades and average to above-average scores negated his need for an IEP.

Office of State Review

I. IHO Does Not Have Authority To Permanently Award Pendency Services.

Application of a School District, Appeal No. 15-019 (2015)

SALIENT FACTS:

During the 2011-12 and 2012-13 school years, a preschooler with a disability received special education services in an 8:1:2 special class. The CSE convened in April 2013 to develop the student's kindergarten IEP for the 2013-14 school year. The Parents disagreed with the recommended placement and requested that the District enroll the student in a school where he would have limited exposure to nuts due to the student's nut allergy.

The Parents requested an impartial hearing, alleging that the District denied FAPE and requesting reimbursement or payment for the student to attend a "nut-free nonpublic school, such as the Rebecca School." The case here concerned the IHO's initial pendency order, which stated that the student's pendency placement was the 8:1:2 special class in a "nut-free placement" with related services. One month later, the IHO found that the student's pendency placement should be Rebecca.

The IHO's final determination was that the District denied FAPE. Rebecca was found to be an appropriate placement and the IHO determined that "the pendency placement" should become the student's "permanent" placement". The District was ordered to pay tuition at Rebecca and provide the student with compensatory services.

SRO'S DECISION:

The District appealed from the IHO's determination that the "pendency placement...shall become permanent." The SRO agreed and found that a student is only entitled to a pendency placement during the administrative due process proceedings. As such, the IHO did not have the authority to order the District to permanently continue the student's placement at Rebecca. The SRO held that the student's pendency placement at Rebecca would end once "any appeals are concluded."

WHY YOU SHOULD CARE:

A student is entitled to receive his or her pendency services only during the impartial hearing process and any subsequent appeals. Pendency refers to the special education program provided by the student's last agreed-upon IEP. An

IHO will frequently issue an interim order that directs the pendency services when the District and Parents cannot agree on that issue. However, an IHO cannot hold that such services become “permanent.” Absent a demand for due process, there can be no pendency rights.

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