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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

This month, we review several cases concerning procedural deficiencies in the development of IEPs that did not rise to the level of a denial of FAPE. Specifically, one federal court reiterated the principle that an omission of parent counseling and training ("PC&T") from the IEP by itself, does not rise to the level of a denial of FAPE. In that case, the court found that the omission of PC&T, coupled with the district's failure to conduct an FBA or develop a BIP, despite the parent's indication that the student had behavioral needs, did not rise to the level of a FAPE denial.

Federal District Courts

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1. A "Conditional Placement" Found to Be a Procedural Violation That Did Not Deny Fape.

S.M. and F.M. v. Taconic Hills Cent. Sch. Dist., 2012 WL 3929889 (N.D.N.Y., 2012)

SALIENT FACTS:

The parents of a student with autism challenged the district's IEP for 2010-11, which recommended the student's placement in a private school for children with autism ("Wildwood"). The parents demanded that the student remain in the public school setting delineated in the IEP from 2009-10. However, the district

argued that the student required a more restrictive setting. The IHO concluded that the district denied FAPE because there was no evidence that Wildwood had a seat for the student by the start of the school year, and therefore, the District would not have been able to implement the student's IEP. The SRO reversed the IHO's decision. The SRO reasoned that, although the IEP did not identify a placement that was *immediately* available, the District was prepared to provide the student's pendency placement pursuant to the parents' request. The parents appealed the SRO's decision.

COURT'S DECISION:

The student's assignment to Wildwood was improper because, at no time was there a seat actually available for him. The district's position was that it had a recommendation for the student, but it simply failed to present it as "conditional." However, the parents countered that a "conditional placement" is invalid under IDEA. The court pointed out that retrospective evidence that alters an IEP is not permissible, and therefore, the District could not seek to change the plain written terms of the IEP. However, the court held that there was no requirement in IDEA that the IEP name the *specific* school location (citing R.E. v. NYC Dept. Of Educ., 694 F.3d 167, 188 [2d Cir., 2012]; T.Y. v. NYC Dept. Of Educ., 584 F.3d 412, 420 [2d Cir., 2009]). Therefore, the court held that, although the IEP indicated the student's assignment to Wildwood, Wildwood was not itself part of the IEP. Rather, Wildwood, was the location at which the district intended that the IEP would be implemented. Because a due process proceeding regarding the appropriateness of the IEP, which included Wildwood was pending, the District was precluded from insisting on the student's placement at Wildwood. Accordingly, pursuant to pendency, the district was obligated to provide the student with the public school placement as delineated in the 2009-10 IEP, the last agreed upon IEP. Thus, the court held that the SRO correctly determined that the procedural violations did not amount to a denial of FAPE.

WHY YOU SHOULD CARE:

In IDEA, "educational placement" refers to the education program recommended in the IEP, such as class ratio and supports and services a child will receive rather than the "bricks and mortar" of the specific school. Thus, although an IEP may list a specific school, the school itself is not a part of the IEP. Rather, the school is the location where the district intends that the IEP will be implemented. However, districts must use caution in delineating a specific school on the IEP itself. Generally, it is a good rule of thumb not to recommend a specific school until the student has been accepted and the school has a chair or bed for the student.

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2. Student's Exposure to Typically Developing Peers Did Not Warrant Private School Placement.

J.L. and J.L. ex rel. C.L. v. City School District of the City of New York, 2013 WL 625064 (S.D.N.Y., 2013)

SALIENT FACTS:

Parents of a student with receptive and expressive language delays challenged the district's recommendation for placement in the district's public school. At the CSE meeting the District considered and rejected two possible settings - a general education setting with special education teacher support and additional services, and a special class program in a special school (the parents' preferred placement). The CSE rejected the former setting because it would not have addressed the student's delays in language processing and social/emotional skills. The CSE rejected the latter setting because a setting that did not expose the student to his nondisabled peers was too restrictive. Accordingly, the CSE recommended a special class in the district's public school with related services. The parents rejected this recommendation and unilaterally placed the student at the Churchill School, an SED-approved private school. The parents' principal objection was that, in the public school placement, there would be too many other children around their son during lunch, recess, assemblies and other school-wide events. The SRO reversed the IHO's award of tuition reimbursement. The SRO reasoned that the public school placement balanced the student's need for intensive language-based instruction with his need to learn important social skills. The parents appealed.

COURT'S DECISION:

The court noticed no difference between the program offered by Churchill and that offered by the District, except that at the public school, the student would have been offered more services and 1:1 time. The court observed, "the only substantive difference between the IEP and the parents' preferred placement is that Churchill is a small school attended only by disabled children, while [the public school] is a community school attended by a larger number of children, most of whom are general education students."

The court pointed out that all of the evaluation reports recommended placement in a special education *classroom*, not a special education *school* as determined by the IHO. The only evaluation, which explicitly recommended placement in a special education school was the recommendation of the parent's private psychologist. The court concluded that the evidence demonstrated that the student had sufficient social skills to benefit from interactions with typically developing peers during lunch, recess and school assemblies. In relying on a classroom observation conducted of the student one month before the development of his IEP, the court noted that, the student did not mimic excitable peer behaviors or become distracted by them. Rather, during these times he

remained focused on his teacher and the lesson. Further, the student's play therapy/counseling service provider indicated that he made "clear gains" in peer interaction, specifically in his ability to take turns. Even the private psychologist who recommended a special school placement "describe[d] the student as 'well-related once he becomes familiar and comfortable' and as showing interest in other children and engaging with them, having good attention skills, academic skills ranging from high average, to superior [], to low [] and showing interest and making progress interacting with peers."

The court deferred to the SRO's finding that "intensive specialized classroom instruction in a general school setting addressed [the student's] academic and social needs in the [LRE] in which he could expect to make progress". Accordingly, the court affirmed the SRO's holding that the district offered FAPE.

WHY YOU SHOULD CARE:

Many parents want their disabled children educated in an environment with similarly situated students so that their children do not feel different. In addition, parents may find the low student to teacher ratio offered in special education schools particularly appealing because their children may receive individualized attention. Therefore, the special education school may be preferable to the parents because the individualized attention offered in a special education school will maximize the student's potential. However, districts are not obligated to *maximize* each student's potential. Rather, districts are obligated to provide an appropriate education in the LRE that will enable the child to progress, not regress.

Where there is clear evidence in evaluations, reports and classroom observations, that demonstrates that the student will benefit from interactions with typical peers, the district has a legal obligation to recommend an appropriate program in the LRE. In a special school placement, the child will have very few or no opportunities to interact with typical peers. Therefore, while the parent may wish that the student be secluded from typical peers, the district is obligated to provide a placement consistent with IDEA's LRE requirement. Thus, where there is evidence that the student can benefit from interactions with nondisabled peers, the district must make an appropriate recommendation in the LRE, which may, in this case, be in a general education environment.

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3. Despite Child Find Violation, Equities Support Reduction In Tuition Reimbursement.

Scarsdale Union Free School Dist. v. R.C., 2013 WL 563377 (S.D.N.Y., 2013)

SALIENT FACTS:

A student with academic difficulties and attention deficits entered the district's public school at the beginning of the 2006-07 school year. Prior to that time, she had attended a private school in another country, which followed a curriculum similar to that used in the United States. That private school developed an IEP for the student. Shortly after the student entered the district, the district developed a 504 accommodation plan for her, but later concluded that the student did not meet the eligibility requirements to continue receiving accommodations. Despite multiple conversations and email correspondence between the parents and the district regarding the parents' concerns about the student's academic struggles, the district did not evaluate the student. For 2008-09 and 2009-10, the parents unilaterally placed the student at the Kildonan School, a residential school located 70 miles from her home, and sought tuition reimbursement for both years.

Although the IHO awarded full reimbursement of tuition and boarding costs for 2008-09, the IHO reduced the award for 2009-10 to cover only tuition. The IHO reasoned that during 2009-10, the parents did nothing to "foster the cooperative process". Specifically, the parents did not provide the district with the student's Kildonan progress reports during that year. Moreover, the IHO reasoned that there was no evidence that the parents sought the student's placement in a day school closer to home despite having ample time to do so. The SRO affirmed the IHO's decision.

COURT'S DECISION:

The Court agreed with the IHO and SRO that the district failed to evaluate the student after receiving the mother's written request for such evaluation. Specifically, the court referenced an email from the parent inquiring "whether 'another CSE meeting' should be scheduled to address her concerns about [the student's] academic progress," and the mother's statement that, "[she] want[s] to give [the district] sufficient time to plan a CSE meeting after [a private neuropsychological evaluation was conducted]..." According to the court, these statements were sufficient to satisfy IDEA's standard for a written request for an evaluation. Upon receiving these statements, the district was obligated to begin the evaluation process to determine whether the student was eligible for special education programs under IDEA. The district's failure to do so resulted in a denial of FAPE during 2008-09 and 2009-10. Based on the parents' private evaluations illustrating the student's learning difficulties, which affected her academic performance, the court agreed with the SRO that the student was eligible under IDEA.

For the same reasons articulated by the IHO, the court affirmed the award of full reimbursement of tuition and board for 2008-09 and reimbursement of tuition only for 2009-10.

WHY YOU SHOULD CARE:

Any "student suspected of having a disability shall be *referred in writing*...for an individual evaluation and determination of eligibility for special education programs and services". 8 NYCRR §200.4(a). IDEA does not delineate the components of a referral, nor provide a form which parents must use. However, according to this decision, upon receiving written correspondence from a parent alluding to a referral to the CSE, the district should, at a minimum, clarify the nature of the request. This will allow the district to understand whether the parent is seeking a referral to the CSE, clarification about the CSE process or something else. In the event the district fails to respond to an arguably ambiguous letter or email, and the parent believes that the written correspondence satisfies IDEA's written referral requirement, the District will be left with egg on its face at a potential due process hearing or before SED, when the parent files a State Complaint. Therefore, districts must respond to all written inquiries from parents regarding their child's eligibility for services under IDEA, even where it is unclear whether the parents are making a formal referral.

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4. Omission of PC&T From IEP Did Not Obligate The District To Fund Unilateral Placement.

F.B. and E.B. v. New York City Dept. Of Educ., 2013 WL 592664 (S.D.N.Y., 2013)

SALIENT FACTS:

For 2008-09 and 2009-10, pursuant to settlement agreements, the district reimbursed parents of a child with autism for tuition paid to the Rebecca School ("Rebecca"). For 2010-11, the CSE recommended the student's placement in an in-district 6:1:1 special class along with related services. The IEP did not include parent counseling & training ("PC&T"). Prior to visiting the proposed school, the parents informed the district that they would maintain the student's unilateral placement at Rebecca. After visiting the proposed school, the parents determined that the school was "grossly deficient with respect to addressing [the student's] sensory needs," and provided the district with 10-day notice of their intent to unilaterally place the student at Rebecca and seek reimbursement of tuition. The SRO overturned the IHO's decision that the district denied FAPE. In particular, the SRO concluded that the failure of the IEP to include PC&T did not amount to denial of a FAPE because the assigned school would have provided this service.

COURT'S DECISION:

On appeal, without identifying particular errors by the SRO, the Parents simply articulated general disagreement with the SRO's conclusions. The court dismissed the parents' appeal and deferred to the conclusions of the SRO.

First, the court addressed the SRO's finding that the district's failure to develop an FBA and BIP despite the parents' assertions that there were "strong indications of the need for them". The court agreed with the SRO that, "case law is clear that 'a failure to conduct an FBA is a procedural violation, but it does not rise to the level of a denial of FAPE if the IEP adequately identifies the problem behavior and prescribes ways to manage it'" (citations omitted). Here, reports from Rebecca supported the district's argument that the student's behavior could be addressed by the classroom special education teacher. Specifically, the reports indicated that the number of the student's episodes of dysregulation had significantly decreased, that they lasted for less than one minute, and they had decreased in intensity.

Next, the court addressed the district's failure to include PC&T in the IEP. As with the failure to conduct an FBA and develop a BIP, the court pointed out that, the lack of the provision in an IEP for PC&T does not, by itself, result in a denial of FAPE. The court wrote:

> [T]he failure to include [PC&T] in the IEP is less serious than the omission of an FBA. The presence or absence of a [PC&T] provision does not necessarily have a direct effect on the substantive adequacy of the [IEP]...[T]he failure to include [PC&T] in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of FAPE, in the ordinary case, that failure, standing alone, is not sufficient to warrant reimbursement (*citing* R.E. v. NYC Dept of Educ, 694 F.3d 167, 191[2d. Cir., 2012]).

The court pointed out that the District's proposed placement provided PC&T to parents. Specifically, the school's parent coordinator testified that the school offers between 10 and 12 workshops a year and facilitates parent access to various other training resources.

The court held that none of the procedural deficiencies viewed singly denied the student FAPE. Further, the court held that the totality of the procedural deficiencies did not deny FAPE.

WHY YOU SHOULD CARE:

The Regulations define PC&T as "assisting parents in understanding the special needs of their child, providing parents with information about child development and helping parents to acquire the necessary skills that will allow

them to support the implementation of their child's IEP". 8 NYCRR 200.1(kk). PC&T is provided to enable parents to perform appropriate follow-up intervention activities at home. See 8 NYCRR §200.13. The IEP must indicate the extent to which the student's parents will receive PC&T. However, because districts remain obligated to provide PC&T to all parents of students with autism, students in 8:1:1 and 6:1:1 classes, they remain accountable for their failure to provide this service without regard to the contents of the IEP.

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

