NYSE Directors
Centris Group

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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review a series of decisions refining the Second Circuit's holding in R.E. and M.O. regarding retrospective testimony and a school district's burden of proving it provided FAPE at an impartial hearing. In January 2015, we reported on a decision from the Southern District of New York which held that a school district may present evidence beyond the four corners of the IEP in support of implementation of the IEP program in its recommended placement. The Court of Appeals has now affirmed the lower court's decision, holding that so long as the offered evidence explains or justifies what is written in the IEP, testimony or documentation describing the placement is acceptable, making this the law of the entire Second Circuit, including all of New York State.

In addition, a number of district court decisions are reviewed which analyze the definition of "meaningful participation" regarding a parent's right to be heard by the CSE and how to properly identify which issues are actually in controversy in an impartial hearing. Last, we conclude with an SRO opinion looking closely at factors to consider in adjudicating parental participation and equitable considerations.

Second Circuit Court of Appeals

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I. District May Present Evidence of a Placement's Ability to Implement a Program at Hearing so Long as Evidence is

Consistent with the Recommendations Contained in the IEP.

***B.P. v. New York City Dept. of Educ.*, --- Fed.Appx. --- , 2015 WL 9487873 (2d Cir 2015)**

SALIENT FACTS:

An 11-year-old child with autism spectrum disorder, attention-deficit/hyperactivity disorder, sensory integration disorder, obsessive compulsive disorder, and Tourette's Syndrome attended the Rebecca School for four years. He was educated in a 7:1:3 class and received speech-language therapy, occupational therapy, and counseling. The District's CSE convened in March 2012 to plan for the student's 2012-13 IEP. The Parents rejected the proposed placement and continued the student's enrollment at Rebecca. The Parents filed a due process complaint and alleged that the District failed to provide the student with FAPE based on procedural and substantive violations. Specifically, they argued that (1) the District did not provide them with a copy of the IEP before the beginning of the school year; (2) the Parents were not able to meaningfully participate in the CSE meeting; (3) the IEP did not provide parent counseling and training; (4) the IEP did not include an accurate reflection of the student's current levels of performance; (5) the goals were inappropriate because they were not measurable and did not address the student's needs; and (6) the classroom placement was inappropriate.

ADMINISTRATIVE DETERMINATIONS:

The IHO found that the District provided FAPE because the Parents had a meaningful opportunity to participate in the CSE meeting, the CSE had adequate information regarding the student, and the recommendations were appropriate. The SRO upheld the IHO's decision.

DISTRICT COURT'S DECISION:

The District Court determined that the SRO's decision was entitled to deference because the SRO conducted a "comprehensive review of the record and articulate[d] clear explanations for each conclusion." The Court found that the Parents received a copy of the IEP two weeks before the start of the school year; thus, there was no FAPE denial based on this issue. Further, the Parents had adequate opportunities to participate in the CSE meeting based on testimony regarding their "lengthy discussions" and the participation of Rebecca staff. Although the failure to include parent counseling and training on the IEP was a procedural violation, it did not rise to a denial of FAPE. The District psychologist testified that such services were provided "programmatically." Further, the District Court stated that "the failure to include parent counseling and training is insufficient, on its own, to amount to a FAPE denial." The present levels of performance were appropriate because they were made based on input from the

Parents and from Rebecca staff who were familiar with the student. Further, the CSE recommended program and placement were appropriate.

Then the Court turned its attention to the challenge to the goals. The district court considered three elements to determine whether the goals were appropriate. First, the Court considered whether the annual goals were written in a manner which would enable them to be measured, in order to determine "whether the goal has been achieved." Next, the Court considered "how progress will be measured." Finally, the Court determined "when progress will be measured." Although not all of the IEP goals were deemed measurable, the short-term objectives "remedied any deficiency in the measurability of the annual goals." Based on the District psychologist's testimony, the objectives for each goal "composed part of the annual goals," and could be read together with the annual goal to determine measurability. The Court explained that the short-term objectives to the annual goals were "detailed and appear[ed] sufficiently tailored to the annual goals."

The Parents appealed to the Second Circuit Court of Appeals, arguing that 1) the District Court improperly concluded the recommended placement would have been able to implement the IEP at issue; and, 2) both the SRO and District Court failed to address procedural challenges raised by the Parents at the impartial hearing.

COURT OF APPEALS' DECISION:

Consistent with its prior holding in M.O. v. New York City Dep't of Educ., the Second Circuit held that districts bear the burden of proving an offered placement is appropriate when the issue is placed in controversy. The Court found that as long as the offered evidence explains or justifies what is written in the IEP, testimony or documentation describing the placement is acceptable. The Second Circuit rejected the Parents' argument that the placement was unable to provide pull-out related services (here, occupational therapy and speech therapy) and lacked a sensory gym. The Court found no reason to disturb the IHO's credibility findings as to the District's witnesses who testified the placement could implement the IEP as written. The Parents' rejection based upon the absence of a sensory gym was unfounded, as the IEP not did specifically require access to such a facility. The Second Circuit stressed that parents who rely on "information from a single school official [bear] the risk that the school district [will], in fact, satisfy its burden of proving the appropriateness of the challenged placement." This suggests the Court maintains a presumption that a school district will be able to implement an IEP absent significant or extraordinary evidence to the contrary.

The Second Circuit also held that the SRO and the District Court did not err in declining to consider six issues raised by the parents in a separate letter to the district but not enumerated in the due process demand. While the Federal Courts may consider issues for which a record was made before the IHO or SRO and the

issue may go to the heart of the complaint, the Second Circuit stressed that an issue must not be "completely absent" from the due process complaint for it to be considered on appeal. The six issues referred to by the Parents were not ripe for consideration because those issues were never identified in the due process request.

WHY YOU SHOULD CARE:

The Second Circuit has reduced the scope of review on Prong I in a tuition reimbursement case. In R.E., the Court limited the scope of challenges to a recommended placement to those facts known by the parent at the time the recommendation was rejected. The Court in M.O. further limited placement challenges when a parent argued a school district would be unable to implement the IEP, again focusing the lens of analysis on the time the parent rejected the district's IEP. If the parent alleges the recommended placement would be unable to implement the IEP, the district is entitled to present evidence which supports both the four corners of the IEP and why and how the placement would be able to implement the IEP. Furthermore, the parent's issues must be contained in the four corners of the due process request, and districts should be very careful to avoid expanding the scope of the hearing on the record.

All together, these cases demonstrate why it is so critical to develop an IEP which comprehensively describes the student – from present levels of performance, to needs, goals, and program. An IEP should ideally be a fully self-contained snapshot of the student at the time the CSE met. Districts should aim to have the IEP serve as a one-stop reference of the child's program for the school year in question. In the unfortunate event the parent challenges the IEP at a hearing, a strong IEP should answer any questions the finder of fact – whether a hearing officer or reviewing court – may have as to what the student was actually expected to receive. R.E. and M.O. both were cases which *limited* the types of evidence districts could present to prove FAPE was offered. A complete IEP keeps the focus of inquiry on the program itself instead of (a now impermissible) attempt to fix a faulty IEP by showing how the placement would fill in the gaps. For example, if the contemplated placement offers a service or support to all attending students, identify those details in the IEP.

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Federal District Courts

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I. The CSE's Willingness to Discuss Issues Raised by the Parent is at the Heart of Parental Participation.

***M.P. v. Carmel Central School District*, 2016 WL 379765 (SDNY 2016)**

SALIENT FACTS:

The student had received special education services from the district since the 2007-08 school year. Following receipt of an independent neuropsychological evaluation diagnosing the Student with an autism spectrum disorder, the parent and the CSE met in May 2012 to develop an IEP for the 2012-13 school year. The parent requested an out-of-district placement, and the CSE decided to meet at a later date in order to continue its program search. The CSE met again in June yet did not recommend a placement, instead determining to continue its program search. In July, the parent signed an enrollment contract with Franklin Academy ("Franklin"), a private boarding school. The CSE met once more in August and recommended that the student be placed in a 12:1+2 special class. The same day, the parent rejected the recommendation and notified the District the student would attend Franklin for the 2012-13 school year.

In January 2013, the parent signed an enrollment contract with Franklin for the 2013-14 school year. The CSE met in May 2013 and developed an IEP for the same time period. The parent rejected the 2013-14 IEP one month later, notifying the District of her intention to again unilaterally place the student. Thereafter, the Parent requested a due process hearing seeking tuition reimbursement for the 2012-13 and 2013-14 school years.

The IHO denied the Parent's claim for tuition reimbursement after a 16 day hearing, and the SRO affirmed the IHO's decision.

COURT'S DECISION:

The Parent appealed the SRO's decision to federal court. The first issue was what constituted the operative IEP for the 2012-13 school year. The Parent argued on appeal that it was the June 2012 IEP, as that was the last IEP developed before the parent signed the tuition agreement with Franklin. The Court held that the August 2012 IEP was the operative one for the purpose of an R.E. inquiry, as it was the one the District chose to defend at the end of the mandatory resolution session. Furthermore, the Court reasoned that there was no prejudice to the parent in focusing on the August IEP, as the due process demand wasn't filed until the summer of 2013, nearly one year later. Moreover, even if the June IEP was the proper IEP under R.E., the district would have had the opportunity to amend the June IEP to substantially conform to the August IEP during the mandatory resolution secession. The Court reasoned that, under state and federal regulations, the district would have the opportunity to amend the operative IEP to address the issues raised by a parent at the resolution session, thereby making an argument about which IEP was in effect moot.

The Court refused to consider allegations of procedural violations having occurred, following the July 2012 signing of the contract agreement. The Court reasoned that since the parent had made her decision to unilaterally place the student in July, any violations alleged to have occurred after that point were

irrelevant to her determination. The parent's argument that the CSE failed to consider out-of-district placements for the student fared no better. The Court found that the record clearly indicated that the District considered and discussed potential out-of-district programs. Turning to the substance of the operative 2012-13 and 2013-14 IEPs, the Court found both the SRO and IHO properly found the programs were appropriate.

WHY YOU SHOULD CARE:

While the result would have been the same, it is interesting to note that the district court focused on the parent's signing of the private school tuition contract as opposed to her ten-day letter. Certainly, the district was not aware that the parent intended to unilaterally place the student as of July 2012. More importantly, parents have successfully argued in prior actions that the signing of a tuition agreement only serves to reserve a seat, suggesting a willingness to forgo the deposit or identifying an exit clause in the contract as proof the parents met with the CSE in good faith at a subsequent meeting. The upshot is, regardless of what the parents communicate, CSEs should develop an IEP and make appropriate, timely recommendations as if the student were expected to attend a district-recommended program.

Similarly, the CSE loses nothing by listening to, and considering, a parent's concerns or desires for his or her child's education. Critically, failing to listen to a parent's concern will render the IEP inappropriate, for failing to permit a parent's meaningful participation. The IDEA minimally requires that parents are given an opportunity to be heard. This is the floor of engagement in this collaborative process. Districts should document parental participation, as well as the CSE's response, in their CSE minutes and in a prior written notice letter.

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II. Last Minute Delivery of an IEP Denies Parent Ability to Meaningfully Participate.

***E.H. v. New York City Dep't of Educ.*, 2016 WL 631338 (SDNY 2016)**

SALIENT FACTS:

A New York City student, classified as autistic, had attended the Rebecca School – a private placement not approved by NYSED for the placement of classified children ("Rebecca") – since the 2009-10 school year, as a twelve month student. The CSE met June 21, 2012 to develop the 2012-13 IEP, relying on a December 2011 Rebecca progress report, a classroom observation, and a private neuropsychological evaluation. The district sent the parent a Final Notice of

Recommendation[1] ("FNR") on June 28, 2012, which offered a 6:1:1 twelve month program with related services in a public school setting. On June 29, the parent signed a contract with Rebecca for the 2012-13 school year. Thereafter, the parent visited the CSE's recommended setting on July 13, 2012, and four days later notified the CSE of her intention to unilaterally place the student at Rebecca.

The parent requested an impartial hearing alleging, among other things, that the CSE denied her the opportunity to meaningfully participate by sending out an untimely IEP; by refusing to consider more restrictive interventions; and by providing an IEP that was substantively inadequate because it didn't offer a sufficient level of support or incorporate DIR methodology when adopting the private school's goals. The parent had sought to be reimbursed for tuition at Rebecca for the 2012-13 school year. The IHO agreed, holding that the timing of the CSE meeting and the mailing of the FNR occurred after the deadlines set out in the Jose P.[2] consent decree (June 15 for twelve-month students). The district appealed to the SRO.

The SRO reversed the IHO, holding that an IHO is not empowered to determine whether a student is a member of the Jose P. class, that the parent was afforded the opportunity to participate in the formation of her child's IEP, and that the IEP was substantively adequate. Therefore, the SRO found that the district offered the student FAPE and dismissed the parent's claim for tuition reimbursement. The parent appealed to the Southern District of New York.

COURT'S DECISION:

The District Court reversed the SRO's decision. The Court found that the parent was not afforded sufficient opportunity or time to visit or evaluate the proposed placement, prior to the start of the school year, reasoning that Congress envisioned more than a single business day's notice before the implementation of a new program for a student. Rather, the Court held that the district must adhere to its own internal operations manual (which described the same timelines as mandated in Jose P.). The Court agreed with both the IHO and the SRO in finding the student's BIP to be insufficient to meet her needs; however, the Court declined to adopt the SRO's ultimate holding that the inadequacy of the BIP was sufficiently overcome by other supports offered in the IEP. The Court reversed the SRO's determination on predetermination, holding that the CSE's refusal to discuss a more restrictive setting – taking into account that the student had been in a setting with a 2:1 teacher-student ratio for a number of years before the impartial hearing

[1] An FNR is a document used only in New York City which informs the parent of the placement site in which the IEP program is to be implemented. This is typically the first time placement is addressed in the special education process. Please note that an FNR is not a prior written notice letter as it does not describe proposed changes, parental requests the CSE declined to adopt, or the reasons for refusing.

[2] Jose P. was filed by a group of New York City school children with disabilities over three decades ago to force the Department of Education to obey federal laws that require appropriate evaluation, placement and services be provided to all students with disabilities. The resulting consent decree remains in effect to this day.

– denied the parent the opportunity to meaningfully participate in her child's education. The Court found that each procedural violation individually denied the student FAPE.

The Court also reversed the SRO and affirmed the IHO's findings that the goals were inappropriate and that the CSE's reliance on stale progress reports was insufficient to determine the student's present levels of performance. The Court found that the CSE failed to take into account the student's progress made subsequent to the December 2011 Rebecca progress report, and failed to determine the student's present levels of performance, i.e. the student's abilities at the time the CSE met.

The Court declined to consider whether the IEP's failure to include a BIP or FBA rendered the recommendation inappropriate as the issue was not raised in the parent's impartial hearing demand. Since the SRO did not rule on whether the parent's unilateral placement was appropriate, the Court affirmed the IHO's ruling on Prong II of Florence v. Carter[3] and the equities.

WHY YOU SHOULD CARE:

It is critical that a CSE's recommendations be timely, but also that they be communicated to parents with enough time to consider the CSE's recommendations. This is different and distinct from the mandate requiring a program to be offered to each student by the beginning of the school year – usually shown by having an IEP in the parents' possession before the first day of the school year. If the parents are limited to challenging the actual recommendation made by the CSE, including the placement offer, then they must have sufficient time before the placement begins to consider the recommendations. Reading this case in light of the holding in B.P., it would appear that two weeks before the placement is to begin is minimally sufficient time to give to a parent. In this case, the family visited the placement, and based their final rejection of the IEP on what they observed. The IHO and the Court found there was no time between the mailing of the IEP and the start of the 12-month school year. Thus, there was no way for the parent to bring her concerns back to committee before the start of the school year. The take-away is that 12-month recommendations should be prioritized in the annual review process to ensure IEPs and offers are sent to families well before the end of the current school year to provide parents with a reasonable opportunity to make their decisions. .

The Court deviated from the identified continuum of services described in the Commissioner's Regulations. Instead, the decision suggests CSEs must consider what program or services are appropriate for the student at the time of the meeting. CSEs are reminded to consider the question of the child's needs rather than what placement choices are available in-district. Should the parent ask

[3] The appropriateness of the parent's unilateral placement. See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993)

for a setting that is not on the continuum – such as individual instruction or home-based resource room – the CSE should discuss the parent's request and explain the individualized reasons why the parent's program cannot be implemented.

Note that in both E.H. and B.P. (discussed above), the respective CSEs adopted the goals used by the Parent's unilateral placement. The Second Circuit found no problem with this practice. However, the CSE in B.P. had up-to-date information concerning the student's present levels of performance. In E.H., the district relied on dated information and adopted goals that were written to be used with a particular methodology while not incorporating that methodology in the IEP. This is a problem for two reasons: 1) the goals in E.H. were drafted to expire after six months and before the year at issue in the impartial hearing, and 2) the district was unable to demonstrate how it would implement the IEP without also implementing the methodology folded into the language of the goals. Better practice would be to discuss the unilateral placement's methodology while in committee, and then ensure the language of the goals is not tied to a particular methodology. This is a reminder to districts to ensure that the IEP reflects an actual "snapshot" of how the student presents at the time of the meeting. While present levels of performance is a moving target, it is critical that CSE recommendations be based on accurate and up to date information.

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III. District's Failure to Document Need for a Less Restrictive Setting Constitutes a Failure to Offer FAPE.

***D.M. v. City Sch. Dist. Of the City of New York*, 2016 WL 319859 (SDNY 2016)**

SALIENT FACTS:

A student classified as speech-language impaired had attended a unilateral placement – the Aaron School ("Aaron") – since kindergarten. In January 2011, the parents re-enrolled the student at Aaron for third grade in the 2011-12 school year. Thereafter in February 2011, the CSE convened to consider the student's needs and program, recommending a 12:1+1 special class in a community school, with a host of related services. At the meeting, the parents voiced their disagreement and concerns with the 12:1:1 special class. The parties agreed that the CSE discussed and addressed these concerns at the meeting. The parents received an FNR identifying the community school placement from New York City on July 19, 2011. After visiting the placement in September, the student's father rejected the district's program and – presumably, as the record is silent – gave notice of the parents' intention to unilaterally place the student in Aaron for the 2011-12 school year.

ADMINISTRATIVE DETERMINATIONS:

The parents filed a demand for due process in October 2011, alleging the CSE failed to consider appropriate evaluative measures, failed to develop appropriate goals, recommended a program not restrictive enough in light of the student's needs, and recommended a community school setting which would engender anxiety and increased distractibility in the student. After a three-day hearing, the IHO found that the district failed to submit evidence demonstrating the appropriateness of the CSE's program, that Aaron was appropriate to meet the student's needs, and that the equities favored the parents. The SRO reversed, finding the district offered FAPE.

COURT'S DECISION:

Overall, the Court upheld the SRO's rulings, finding no procedural violations in the formation of the student's IEP. Nevertheless, the Court reversed the SRO, finding that the IHO's decision warranted deference, as it more persuasively reasoned the issue of substantive appropriateness, and specifically that appropriateness of the community school setting was not credibly supported in the record. The Court held that a challenge to the placement was appropriate in light of R.E., as the challenge was grounded in the appropriateness of the student's IEP as opposed to the site or IEP implementation. In light of the Court's ruling, the parents were awarded tuition reimbursement for the student's attendance at Aaron.

WHY YOU SHOULD CARE:

Despite the fact that the CSE followed the procedures set out in IDEA and its implementing regulations, the Court nonetheless found that the CSE failed to offer FAPE. In this instance, the student was moving to a less restrictive setting. A change to a less restrictive setting requires a district to prove the child will receive the support necessary to continue making progress.

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IV. IHO May not Raise and Decide Issues not in Controversy.

***C.W.L. v. Pelham U.F.S.D.*, 2015 WL 8485258 (SDNY 2015)**

SALIENT FACTS:

Starting in middle school, the student began exhibiting increasing psychological problems including social isolation and inconsistent grades, culminating in a suicide attempt in eighth grade. Performance continued inconsistent into high school, including another hospitalization for suicidal ideation.

The parents raised the question of a special education referral during the student's sophomore year 2010-11, but decided not to refer the student for evaluation for reasons not explained in the record. In March 2011, the parents provided notice to the district that the student would begin attending the Robert Louis Stevenson School ("RLS") in April 2011. Neither the parent nor the district referred the student to the CSE.

Following the student's attendance at RLS, the parents referred the student to NYC's CSE[4] for the development of an IESP. While evaluations were being completed, the parents signed an attendance contract with RLS for the 2011-12 school year. NYC's CSE classified the student as emotionally disturbed at their June 2011 meeting, but declined to offer a placement, as the student was not a resident of NYC. Thereafter, the parents forwarded the materials to Pelham's CSE[5] requesting an IEP. In October 2011, the CSE agreed the student was classifiable, recommending an in-district therapeutic support program consisting of a classroom with 8-10 students, a resource room period and indirect consultant teacher services. In December 2011, the parents rejected the recommendation and gave notice of their intention to seek tuition reimbursement for the student's attendance at RLS. In June 2012, the CSE recommended a substantially similar program for the student's 2012-13 school year. The parents again rejected the CSE's recommendation in September 2012.

ADMINISTRATIVE DETERMINATIONS:

The parents filed for due process in June 2013 alleging child find violations for the 2011-12 school year, and FAPE violations for the 2011-12 and 2012-13 school years. The IHO found for the parents, ruling that the district failed to properly identify the student during the 2010-11 school year. The IHO also found that the IEPs at issue failed to give adequate attention to the parents and parents' professionals, lacked sufficient goals to address the student's emotional needs, and lacked an FBA or crisis management plan. The district appealed.

The SRO reversed the IHO, finding that the IHO exceeded her jurisdiction. The SRO noted that the parents had not raised the issue of child find for the 2010-11 school year in their due process request. The SRO found further that the parents gave insufficient notice to the district regarding their intention to unilaterally place the student. The SRO found that the student exhibited no behaviors which interfered with his education, and therefore, did not require the support of an FBA or crisis management plan. The SRO held that the CSE had sufficient evaluative materials to make appropriate recommendations at both CSE meetings, and appropriately considered the parents' input. Finally, the SRO held that any argument the parents had concerning implementation of the various IEPs was wholly speculative. The parents appealed.

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[4] The "district of location" for purposes of dual enrollment, or the school district in which the private school is located. See NY Educ. Law Sec. 3602(c).

[5] The "district of residence." Id.

COURT'S DECISION:

The Court sustained the SRO's decision. Regarding issues outside the scope of the due process request, the Court found that the issue of child find during the 2010-11 school year was not raised before the IHO, nor was it put into controversy by the district. The Court clarified that the mere mention of facts, such as RtI efforts during the 2010-11 school year by the district, does not suddenly create an issue. Rather it functions more as an historical description. The Court found that the district's testimony concerning RtI at the impartial hearing was merely descriptive and not advanced as a legal defense to any child find claim.

Regarding the parents' allegations of procedural violations, the Court dismissed the claims finding that the parents were unable to demonstrate an actual FAPE denial. The Court found that the parents had unilaterally placed the student months before contacting the NYC CSE for support, and some months later before sharing that information with the district of residence. The Court found that, regardless of the CSE's recommendations, there was no support for the prospect that the parents would have altered their placement decision.

WHY YOU SHOULD CARE:

The district in this instance developed a robust record in support of the recommendations contained in the various IEPs and appropriately documented the parents' and their private therapists' input. This is a strong reminder that, while convincing the IHO is the first best defense of a CSE's recommendation, showing a complete and expansive record at the hearing can serve to reverse adverse findings. Districts should resist the temptation to contradict everything in a parent's offered testimony, instead focusing on facts critical to the issues raised in the demand for due process. Certainly the IHO's disregard of the articulated issues in this instance supported the district's arguments that the IHO made other errors in her decision.

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Office of State Review

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II. Tuition Reimbursement Award for Obstructive Parents Reduced Despite Appropriateness of the Unilateral Placement.

Application of a Student with a Disability, Appeal No. 15-086 (9/16/15)

SALIENT FACTS:

The student was diagnosed with ADHD and the parents referred him to the CSE. The CSE found the student ineligible for special education. Following the CSE's determination, the student was admitted to a psychiatric hospital and was subsequently enrolled in a wilderness program. The district sought to re-evaluate the student when he returned to the district, but the parents refused to make the student available. I nstead, the parents' arranged for the student to be privately evaluated. The CSE met in August 2014 and considered the student's hospital discharge summary, the private evaluations, the wilderness program progress reports, and a single district evaluation in the form of a BASC. The CSE found the student eligible for special education and sent applications to therapeutic day programs. The parents rejected the programs and notified the district that they would seek reimbursement for the 2014-15 school year for a private placement at the John Dewey Academy ("JDA"), a private placement recommended by the wilderness program counselor. The parents filed a due process complaint, alleging a denial of FAPE and requested reimbursement.

At the impartial hearing, the district conceded it failed to offer the student FAPE for the 2014-15 school year. Notwithstanding the concession, the IHO denied the request for reimbursement. The IHO found that the private placement was not appropriate, because JDA did not offer sufficient therapeutic supports to address the student's needs. The IHO found that the equities did not support the parents' claim, as the parents had frustrated the district's efforts to properly evaluate the student. The parents appealed, alleging that the IHO failed to render a decision regarding the district's failure to properly identify the student before he attended the wilderness program, and that JDA was appropriate to meet the student's needs.

SRO'S DECISION:

The SRO upheld the IHO's ruling on child find, holding that the district appropriately determined not to classify the student prior to his hospitalization or attendance in the wilderness program. The SRO also found that JDA was appropriate because, as a residential school with a behavioral control program, it properly addressed the student's emotional and behavioral issues and offered a rigorous academic curriculum. Further, since the district never completed the IEP, the SRO found that the parents were permitted to rely on the advice of private providers regarding the student's placement. However, the SRO found that the parents had attempted to exercise a veto of the district's proposals and accordingly only awarded the parents reimbursement for 25% of the tuition.

WHY YOU SHOULD CARE:

This decision is a reminder that equities matter. Even with an indefensible IEP, the district was relieved of a significant financial burden due largely to the parents' refusal to cooperate.

The District conceded it had failed to offer the student FAPE because the district failed to have an IEP in place at the start of the 2014-15 school year. While the district had equitable arguments (lack of parental participation, failure to make the student available for evaluation, the veto power the parents sought to exercise), equitable arguments did not relieve the district of its Prong I duties. If parents demonstrate intransigence, CSE's must consider more aggressive approaches, such as conducting meetings without the parent being present or making recommendations based on materials available at the time – even if the CSE rightfully acknowledges it requires more – in order to make a timely recommendation. The takeaway is that the CSE must work with what it has available – uncooperative or stonewalling parents included.

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