NYSE Directors
Centris Group

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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

This month, we review federal district court cases, which contemplate procedural and substantive missteps in the IEP development process. In one case, specifically, as a result of a cursory district-conducted classroom observation of a student in his parental placement, one district was ordered to pay the parents $125,000 in tuition reimbursement. The court reasoned that the district erred when it relied solely on an insufficient, 75 minute, classroom observation in making its 6:1:1 placement recommendation, and ignored clear evidence from the private school that the student could only learn in a 1:1 placement. The main lesson in this case is that when a student is parentally placed, it is safe to assume that the parents will seek tuition reimbursement. Therefore, districts must be especially meticulous when gathering information about the student's current functioning, so that the CSE can develop an accurate and reliable IEP, which makes a well-reasoned and appropriate placement recommendation.

Federal District Courts

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1. Parents' Active Participation in CSE Meeting Negates Deficiencies In Meeting Composition.

DiRocco ex rel. M.D. v. Board of Educ. of Beacon City Sch. Dist., et al., 2013 WL 25959 (S.D.N.Y., 2013)

SALIENT FACTS:

Parents of a unilaterally placed, rising 9th grade student with speech-language deficits, ADHD and anxiety, sought reimbursement of tuition on the grounds that deficiencies in the development of the student's IEP denied the student FAPE. In preparation for the CSE meeting, the District sent the parents a draft IEP. To prepare the draft IEP, the district reviewed the IEP from the previous year, a private neuropsychological evaluation submitted by the parents, and the results of the student's psychological re-evaluation. At the time of the preparation of the draft IEP, the parents had not provided the district with the student's then-current private school academic records from the Kildonan School ("Kildonan"). Therefore, this information was not incorporated into the draft IEP.

By the time of the CSE meeting, the Parents still had not provided the district with updated information about the student's progress at Kildonan. However, the District's Director of Pupil Services observed the student at Kildonan and discussed this visit during the CSE meeting. Further, Kildonan's Academic Dean discussed the student's progress at the CSE meeting. The Dean reported to the CSE that the student was doing well, and opined that much of the student's progress was attributable to his time in small classes with teachers using Orton-Gillingham. The CSE did not include a general education teacher who would have taught the student had he participated in the District's program. Rather, the CSE included a math teacher who taught 10th, 11th and 12th graders, but not 9th grade math. Despite this, the Parents did not request that the CSE be tabled until a time when it would have a full complement of mandated members. The CSE recommended integrated co-teaching classes for English, Science and Social Studies; a 15:1:1 special class for Math; daily resource room services; and counseling to address general anxiety the student may have experienced as a result of his transition to high school. The parents expressed their disagreement with the recommendation and requested that the district duplicate the program the student was receiving at Kildonan. The IHO decided that the district denied FAPE. The SRO reversed that decision and the Parents appealed.

COURT'S DECISION:

First, the court addressed the alleged procedural deficiencies in the development of the IEP. Specifically, the court pointed out that it was undisputed that the general education teacher who participated in the CSE meeting was not assigned to teach ninth grade during 2009-10, and therefore, the teacher was not a teacher of the student as required by IDEA. The parents argued that because the CSE recommended the student's placement in an ICT class with general education students, it was incumbent upon the District to include a general education teacher of the student, and failure to do so denied the parents a meaningful opportunity to participate. The court disagreed. The court pointed out that the parents engaged in extensive dialogue with several CSE members regarding the ICT class, expressed their dissatisfaction with the CSE's proposal, discussed the parents' private psychologist's recommendation that the student required small classes, and

provided the district with information regarding the student's progress at Kildonan. Moreover, the court found persuasive that the parents sent the district a letter indicating that they had "shared with the [CSE], *in length*, their serious concerns...." (emphasis added). The court noted that the crux of the due process complaint was the parents' insistence that the district's ICT program had previously failed the student and their expressed desire to have him placed in a special class that duplicated the Kildonan program ("program"). Accordingly, the court held that under these circumstances, "it [was] unclear what role, if any, a ninth grade regular education teacher could have played in the CSE discussion." Therefore, the failure to include a general education teacher of the student did not deny FAPE. The court wrote:

> The fact that District staff ultimately disagreed with the opinions of [the parents] and their outside professionals does not mean that [they] were denied the opportunity to participate in the development of the IEP or that the outcome of the CSE meeting was pre-determined. A professional disagreement is not an IDEA violation.

Thus, the court affirmed the SRO's decision that the procedural errors in the development of the IEP did not deny FAPE. Further, the court held that the preponderance of the evidence supported the SRO's conclusion that the IEP was reasonably calculated to enable the student to receive educational benefits. Accordingly, the court denied the parents' request for reimbursement.

WHY YOU SHOULD CARE:

IDEA requires CSEs to include not less than one regular education teacher of the child, if the child is, or may be, participating in the regular education environment. See 20 U.S.C. §1414(d)(1)(B)(ii); 34 C.F.R. §300.321(a)(2); see also 8 NYCRR §200.3(a)(1)(ii). The "regular education teacher serving as a member of the CSE should be a teacher who is or may be responsible for implementing a portion of the IEP." See 34 C.F.R. Part 300, App'x A. Question 26. Although, as illustrated here, a district may be able to avoid liability for failure to include a general education teacher of the student when the parent insists that the student be placed in a special education program, districts should still make every effort to satisfy the required composition of the CSE. A general education teacher of the child must be someone who was or could have been the child's teacher in a subject the CSE anticipated would be or could be a part of the child's program.

Although a district may not *finalize* an IEP prior to a CSE meeting, it may develop a *draft* IEP prior to the CSE meeting. However, the CSE remains obligated to provide the parents with a meaningful opportunity to participate in the IEP development process. District staff may "prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make

objections and suggestions." See M.M. ex rel. A.M., 583 F.Supp.2d 498, 506 (S.D.N.Y., 2008).

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2. A Poorly Conducted Classroom Observation Resulted in a School District Paying $125,000 in Tuition Reimbursement.

C.L. v. New York City Dep't of Educ., 2013 WL 93361 (S.D.N.Y., 2013)

SALIENT FACTS:

In preparation for the student's annual review, the district's psychologist observed the student at the McCarton School ("McCarton"), his unilateral placement. The student had extreme difficulty learning and retaining new information. During her visit to McCarton, the psychologist observed the student for 75 minutes where he received no 1:1 instruction. Rather, she observed the student in a group reading activity and while he ate snacks at a table with other students. The observer was advised that during the student's group reading period, he was working on maintenance skills rather than new skills. At the CSE meeting, the parents and McCarton staff objected to the district's offer of a 6:1:1 small group class. According to the parents and McCarton staff, the student required significant 1:1 instruction to make progress and would not receive educational benefits if placed in a small group class. After visiting the student's proposed placement, the parents rejected the recommendation and sought reimbursement of tuition paid to McCarton. The IHO found that the district denied FAPE. The SRO reversed and the parents appealed to federal court.

COURT'S DECISION:

In reviewing the conflicting decisions of the IHO and SRO, the court assessed whether the SRO's decision was adequately reasoned. In doing so, the court first reviewed the SRO's finding that the proposed 6:1:1 class would have enabled the student to receive educational benefit and learn new skills. The court wrote:

> The SRO's decision on this issue merely restates the issue, states the conclusion, summarizes the CSE meetings and the IEP, states the conclusion again, summarizes the evidence presented at the hearing, and then states the conclusion a third and final time. At no point does the SRO actually analyze the evidence or explain the reasons for its determination.

The court found that the district psychologist's testimony failed to contradict the testimony from McCarton staff that the student required 1:1 instruction to learn new skills. At best, the court wrote, "[the psychologist's] testimony show[ed] that [the student] was capable of *functioning* in a group class,

not that he could *learn* in that setting" (emphasis added). The court held that, because the psychologist observed the student during maintenance time, she had no basis to conclude that he could learn in a group. The court afforded greater weight to the testimony of McCarton teachers who had worked closely with the student for a full school year than that of a school psychologist who had observed the student for only 75 minutes. As a result of its finding that the District denied FAPE, and the district's failure to appeal the decision that the private school was appropriate, the court awarded the parents reimbursement for tuition paid to McCarton in the amount of $125,000.

WHY YOU SHOULD CARE:

This case illustrates an important lesson - all observations of students in parental placements must be comprehensive. By virtue of the student being unilaterally placed, it is safe to assume that the parent may seek tuition reimbursement. Therefore, the district must ensure that it has a legally defensible IEP, which supports its claim that it offered FAPE. In order to develop a FAPE IEP, the district must first thoroughly develop the student's needs statements. In order to do so, the district must have accurate information about the student's current levels and abilities.

With a parentally placed student, receiving reports from the parental placement are important, but District-conducted observations of the student are critical. When conducting these observations, it is important that the student is observed in meaningful educational settings and on multiple occasions, whenever possible. For a student who has difficulty during unstructured periods of the day, the student should be observed during lunch and recess. If a student is receiving 1:1 instruction, observe him learning new information as well as during his skill maintenance period. Where possible, when the observation is local, consider having more than one observer from various disciplines observe the child. It is important that the observers are familiar with the student's IEP before the visit, so that he or she knows what to look for, in what settings to observe the child, and what questions to ask the staff. Also, if due to time limitations, the observer is incapable of gathering a thorough picture of the student on the day of the observation, arrangements should be made for the observer to return. In the case of a parentally placed student, classroom observations of the student in the unilateral placement become that much more important as a source of information.

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3. Filing a State Complaint is Not a Component of IDEA's Exhaustion Requirement.

Intravaia v. Rocky Point Union Free School District, 2013 WL 358162 (E.D.N.Y., 2013)

SALIENT FACTS:

The parent of a student with autism filed a state complaint with SED alleging that the district denied FAPE because it refused to provide the student with her IEP-mandated related services. Two weeks later, the district filed a demand for due process challenging the parent's allegations that the district denied FAPE. Once informed of the impartial hearing, in accordance with its federal and state obligations, SED set aside its investigation of the parent's complaint, as an impartial hearing regarding the same issues was pending. However, SED informed the parent that if the issues raised in her complaint were not addressed in the IHO's decision, she was entitled to request that SED reopen its investigation. The parent filed a law suit in federal court alleging that the district's request for an impartial hearing was intended to interfere with and block SED's investigation as well as to allow the district to continue its FAPE denial. The district made a motion to dismiss the parent's federal court complaint on the grounds that the parent failed to exhaust her administrative remedies prior to pursuing a federal court action.

COURT'S DECISION:

In agreeing with the District, the court concluded that by initiating the impartial hearing, the district commenced the administrative process the parent had to complete before going to court. The parent did not dispute that she failed to exhaust her administrative remedies. However, she argued that the futility exception applied because the district blocked and effectively denied her ability to exhaust her administrative remedies by initiating an impartial hearing while knowing that doing so would cause SED to cease its own investigation. However, the court disagreed. The court wrote:

> [F]iling of a complaint with SED has no bearing on the administrative process that needs to be exhausted, [therefore] the fact that [the] district initiated an impartial hearing shortly after [the parent] filed her complaint did not…block or deny them from exhausting the requisite administrative remedies before filing a civil action. If anything, by initiating an impartial hearing regarding the very violations which are the subject of the instant action, [the district] started the administrative process that [the parent] had to complete before coming to court.

Had the parent continued the impartial hearing and then appealed the IHO's decision (if unfavorable to her), the parent would have been in a position to file the federal action. However, because she did not, the court lacked jurisdiction to hear the matter before the parent exhausted her administrative remedies. Accordingly, the court dismissed the complaint for lack of subject matter jurisdiction.

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4. Using The IEP From The Previous School Year As The Basis For Developing The Subsequent IEP Was Permissible For One District.

McCallion v. Mamaroneck U.F.S.D., 2013 WL 237846 (S.D.N.Y., 2013)

SALIENT FACTS:

The parents of a student with speech language deficits ("SLDs") challenged the IEP developed for a student's ninth grade year, which included all of the services that helped the student in the past, as well as new accommodations and services. In response to a letter from the parent outlining her concerns with the district's program, the CSE convened to further review the IEP. The CSE added an additional skills class and a reading class where the teacher would use a methodology other than the Wilson program, which up to that point, had not sufficiently improved the student's skills. Because the parents believed that the

District's high school was just developing its customized program for learning disabled students, and did not have a completely integrated and structured reading program other than Wilson, they withdrew the student and unilaterally placed him at the Gow School. The IHO concluded that the district denied FAPE, but ordered that tuition reimbursement be reduced by eighty percent because the Parents failed to provide the requisite 10-day notice to the district that they would be seeking reimbursement. The SRO reversed on the grounds that the student did not require placement in a specialized boarding school to receive educational benefits.

COURT'S DECISION:

The parents argued that because the student failed to progress with previous IEPs and the current IEP included the same supports as contained in the previous IEPs, the student would not have been able to progress with the subject IEP. The court disagreed. The court agreed with the SRO's finding that the student received passing grades and successfully progressed from grade to grade with the IEPs from previous school years. Additionally, the court concluded that the SRO accurately noted that some of the student's test results indicated that he maintained the same overall achievement levels from grade to grade when compared to same-aged peers.

Even if the student had failed to make meaningful academic progress prior to 2008-09, the court reasoned that the ninth grade IEP contained several recommendations and accommodations not contained in the previous IEPs. For example, the ninth grade IEP included the use of Kurzweil, provision of class notes prior to lectures and access to a word processor to address the student's assistive technology needs. Additionally, at the CSE meeting, and in response to the parents' concern that Wilson was ineffective, the student's reading class would use a methodology other than the Wilson program. As such, the court found that the parents failed to demonstrate that the district's proposed program would not provide the student with FAPE.

Next, the court addressed the parents' argument that the SRO relied too heavily on the testimony of the district's experts while giving little or no weight to the conclusions of the parents' experts from NYU's Child Study Center. The court found this argument unavailing. Specifically, the court reasoned that NYU evaluated the appropriateness of the district's program based entirely on the mother's representations, some of which were inaccurate. Accordingly, the court held that the SRO appropriately discredited certain recommendations made by NYU.

WHY YOU SHOULD CARE:

Oftentimes, CSEs use the previous school year's IEP to serve as the basis for the subsequent IEP. As illustrated here, this may be permissible practice where the student has progressed under the previous IEP and the CSE has thoroughly

reviewed the student's current needs in combination with the prior IEP to make the necessary adjustments to ensure the student's progress in the upcoming year. Specifically, when developing the new IEP, the student's SPAMs as identified in the previous IEP must be thoroughly reviewed and updated as necessary to ensure an accurate reflection of the student's current levels of performance. Based on these needs, the goals need to be reviewed and revised, as necessary. If a student has progressed under the previous IEP, the student will likely have achieved certain goals and therefore mastered certain skills. The skills and goals in the new IEP must be modified to ensure that the new IEP accurately reflects the student's levels and abilities and delineates the skills that he needs to achieve in the upcoming school year. Further, based on the student's needs, related services should be reviewed, modified or revised, and new services, accommodations and modifications added, as necessary.

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OCR Letter

1. Districts Must Provide Students With Disabilities With An Equal Opportunity to Participate in Athletics.

***Dear Colleague Letter*, 113 LRP 3326 (OCR, Jan. 25, 2013)**

In its *Dear Colleague* Letter, the U.S. Department of Education's Office for Civil Rights ("OCR") reminded districts that under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), districts must afford students with disabilities ("SWD") an equal opportunity to participate in extra-curricular activities, including athletics. According to OCR, affording SWDs an "equal opportunity" to participate in extracurricular athletics does not mean that *every* student with a disability is *guaranteed* a spot on an athletic team when other students must try out. Rather, districts may require that all students, with and without disabilities must meet the same, non-discriminatory eligibility standards to participate in school sports.

When developing these standards, districts must be cautious not to adopt eligibility standards based upon stereotypes or generalizations regarding disabilities. For example, where a student with a learning disability has met the lacrosse team's eligibility standards, a coach cannot refuse to allow the student on the team based on the belief that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. OCR wrote, "[t]he student, of course, does not have a right to participate in the games; but the coach's decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions)."

OCR encourages districts to consider offering alternative opportunities for sports participation (e.g. wheelchair basketball or tennis), where there are children in the school who are capable of and interested in participating in the modified sport. To encourage sports participation, districts must provide students with disabilities with the aids, services, modifications and accommodations needed to level the playing field. Provided that these accommodations will not result in a fundamental alteration to the nature of the activity, students with disabilities are entitled to receive them if they enable participation.

For example, a student who is eligible under Section 504 due to her hearing impairment is interested in running track. At the tryouts, the start of each race was signaled by the coach using a visual cue. The student's speed was fast enough to qualify her for the team. Before the first scheduled meet, the student requests that the district provide a visual cue simultaneously when the starter pistol sounds. Although the district determined that the modification was necessary in order for the student to participate in meets, the district refuses this request. The district reasoned that the use of a visual cue may distract other runners and trigger complaints once the track season begins. However, the district ignored the fact that in previous years, other districts had used the same visual cue without complaints. The student is informed that although she may practice with the team, she will not be allowed to participate in meets. This decision would violate Section 504. According to OCR,

> While a [] district is entitled to set its requirements as to skill, ability, and other benchmarks, it must provide a *reasonable* modification *if necessary*, unless doing so would *fundamentally alter* the nature of the activity. Here, the student met the [] requirements as to speed and skill...to make the team. Once the [] district determined that the requested modification was necessary, the [] district was then obligated to provide the visual cue unless it determined that providing it would constitute a fundamental alteration of the activity (emphasis added).

When a modification is necessary to enable a student to participate in an extracurricular athletic activity based upon his or her specific needs, unless the modification would fundamentally alter the program or give the student an unfair advantage over others, the district should permit the provision of the modification. For more detailed information regarding the responsibility of school districts to ensure that SWDs are afforded an equal opportunity to participate in extracurricular athletics, we encourage you to review OCR's Dear Colleague Letter, accessible at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf. (OCR's Dear Colleague Letter can also be found in "Informational Documents" on this website, posted January 29, 2013.)

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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.

