

ATTORNEY'S CORNER

By Jack Feldman

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A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review a decision from the Second Circuit that favors deference to the decisions of the SRO rather than district courts when both the SRO and district court review the same record. This is based on the SRO's educational expertise. In a Federal District Court decision it was found that the short-term objectives for a student who was alternately assessed should be considered in determining whether IEP goals are measurable.

We also review four Office of State Review ("SRO") decisions. In one SRO decision, it was found that a District provided FAPE in securing a New York State Education Department ("SED")-approved residential placement that was geographically far from the student's home. In another, a decision from the SRO held that in the absence of a final order from an IHO, SRO, or court, pendency is determined based upon the student's last agreed-upon IEP, rather than an interim pendency order issued by an IHO in a previous impartial hearing.

Second Circuit Court of Appeals

1. District Court Should Give Deference To SRO Decision When Determining Whether School District Provided FAPE.

Hardison v. Board of Educ. Of Oneonta City Sch. Dist., 2014 WL 6778755 (2d. Cir., 2014)

SALIENT FACTS:

A student with emotional and behavioral issues and a tentative bipolar disorder diagnosis began to exhibit academic difficulties in high school. The District conducted a CSE evaluation and determined that an IEP was not necessary, although it identified a number of reasons for the student's difficulties. The Parents sent the student to live with her grandparent when it became evident that the student would fail a number of her classes. The student also had a number of disciplinary actions due to tardiness, absences, and behavioral outbursts in class. The student returned to the District the following school year and demonstrated similar emotional and behavioral problems that resulted in a hospitalization and placement in a District program for students with similar difficulties. The Parents referred the student to the CSE a second time, and it was again determined that the student did not meet criteria to be classified as a student with a disability. After another hospitalization, the Parents enrolled the student at the Family Foundation School, a non-SED approved private residential school. While at the Family Foundation School, the district of location (Hancock Central School District), classified the student with an emotional disturbance and developed an Individualized Education Service Plan ("IESP"). The Parents requested a due process hearing for tuition reimbursement and alleged that the District of residence denied the student a free appropriate public education ("FAPE").

The IHO determined that the District of residence denied the student FAPE because it failed to properly evaluate the student, develop an IEP, or identify an appropriate program. The SRO overturned most of the IHO's decision, finding that the District did not provide FAPE for part of the school years at issue, but that it did provide FAPE for other school years. However, the SRO also determined that the record was insufficient to indicate whether "Family Foundation" was an appropriate unilateral placement when applying the second prong of the Burlington/Carter test. (See Sch. Comm. of Burlington v. Dep't. of Educ., 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993)). The SRO stated that the subjective testimony provided by Family Foundation staff was insufficient to determine whether the student's special education needs were being addressed by the private school. As such, the Parents were denied tuition reimbursement. The district court reversed the SRO's decision and found that the Family Foundation School was appropriate and that the equities favored tuition reimbursement.

COURT'S DECISION:

The Circuit Court reversed the district court's decision and upheld the decision of the SRO. Although the Circuit Court agreed that the District did not provide FAPE, the Parents were denied tuition reimbursement because the record did not provide adequate information regarding the appropriateness of the unilateral parental placement. The Second Circuit found that, "when an IHO and SRO reach conflicting conclusions, we defer to the final decision of the state

authorities, that is, the SRO’s decision.” As such, the district court should have given greater deference to the SRO’s decision than the IHO’s decision. The Circuit Court also noted that it should defer to the SRO’s decision because the district court and SRO had the same record and evidence to consider. The SRO also has “greater expertise in drawing conclusions from educational proceedings” when compared with the district court. As such, the SRO decision is entitled to deference.

WHY YOU SHOULD CARE:

The Second Circuit will give greater deference to the SRO’s decision than to a district court’s decision because of the SRO’s education expertise. This is especially true when the district court has not expanded the record before the SRO by receiving additional evidence before issuing its decision. This case also stresses the importance of the second prong of the Burlington/Carter test. School districts have the initial burden of proving that their recommendation provided FAPE. However, if the District does not prevail in establishing that it provided FAPE, the burden shifts to the Parents to prove that their unilateral placement is appropriate. Parents must provide objective evidence regarding their child’s progress and how the unilateral placement addresses the child’s special education needs. Absent such evidence, Parents may not prevail in receiving tuition reimbursement despite the District’s failure to provide FAPE.

Federal District Courts

1. Short-Term Objectives Considered When Determining Measurability Of Annual Goals.

B.P. v. New York City Dept. of Educ., 2014 WL 6808130 (SDNY, 2014)

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 IEP included 16 annual goals with short-term objectives and a recommendation for an in-District 6:1:1 special class with related services. The Parents rejected the proposed IEP 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.

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.

COURT'S DECISION:

The district court determined that the SRO's decision was entitled to deference because it 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."

WHY YOU SHOULD CARE:

Goal objectives or benchmarks are only mandated to be included on the IEPs for CPSE and alternately assessed students. In these situations, courts will

consider the objectives to be part of the goal in its entirety. The objectives will be included in the court's analysis of the goals to determine whether they are measurable. However, because most students will not have objectives on their IEPs, it is best practice to write measurable annual goals that specify how and when progress will be measured. This will insure that Districts are in compliance with the Regulations. The fact that parent counseling and training was programmatic and not added to the IEP was treated as a procedural violation that did not constitute a denial of FAPE. However, had it been included on the IEP as a related service, the District would have given the Parents one less argument to make and would have reduced its exposure to liability.

Office of State Review

1. IHO Is Not Biased When Making A Well-Reasoned Decision And The IEP Adequately Addresses Student's Needs.

Application of a Student with a Disability, Appeal No. 13-076 (2014)

SALIENT FACTS:

A CSE recommended an in-District 12:1:1 program for a student with a disability for the 2012-13 school year. The Parents disagreed with the recommendation and requested an impartial hearing. They requested reimbursement for services they provided to the student, including special education itinerate teacher ("SEIT"), behavioral consultation, and related services. The Parents argued that the District did not adequately develop the student's IEP and did not consider the student's interfering behaviors. The IHO determined that the District provided FAPE.

SRO'S DECISION:

The Parents appealed and argued among other things, that the IHO was biased. Specifically, they challenged the fact that the IHO did not make "specific cites to the transcript or exhibits" to support the conclusions. The SRO stated that this did not provide evidence that the IHO did not have sufficient familiarity with the record to support the decision. The Parents also argued that the IHO did not accurately describe the proposed program, but the SRO determined that this error did not indicate that the "IHO's knowledge of the facts of the case was so lacking that reversal is warranted." The Parents asserted that the IHO should have recused himself because the Parents' attorney filed an SED complaint regarding the IHO's mishandling of previous cases. However, the SRO held that the Parents did not submit sufficient evidence to support their position.

The SRO also held that the IHO properly determined that the District provided the student with FAPE for the 2012-13 school year. There were no procedural violations regarding the CSE's recommendations. The proposed placement was appropriate for the student given his most recent evaluations and testimony from the student's Parents, teachers, and related service providers. The Parents argued that the District should have conducted an FBA, but the SRO determined that the student did not demonstrate interfering behaviors in school. Although there was some evidence that the student was inattentive, easily frustrated, and had difficulties with coping with changes in his environment, the District school psychologist testified that none of these behaviors interfered with the student's learning. Further, the student's IEP indicated specific behavioral strategies to be used with the student to address his behavioral and social-emotional needs, including "praise, encouragement, refocusing, redirection, and being given tasks in increments." The SRO also found that there was no requirement for the student to have an extended school year program. This is because there was no actual evidence indicating that the student demonstrated "substantial regression." Rather, the student's progress reports indicated adequate progress toward his IEP goals. Further, the only indication that the student required an extended school year program was in the SEIT's progress report stating that the student's acquisition of skills "would be impeded if the student had to start from scratch in September." However, because the SEIT did not include additional information regarding substantial regression (such as regression data), and because none of the other service providers recommended a 12-month program, the SRO determined that there was insufficient evidence to support the student's need for extended school year services.

WHY YOU SHOULD CARE:

Parents need to present objective evidence when they argue that their child requires specific services that are not provided for in the IEP. A student can have some behavioral, social-emotional, and/or management needs, but not require an FBA or BIP. Rather, mild difficulties in these areas may be addressed in the IEP through program modifications and goals. Similarly, a child who does not evidence substantial regression does not require extended school year services. Absent significant proof of bias, the SRO will likely not find an IHO should have recused himself when the IHO issued a well-reasoned decision.

2. District Does Not Deny FAPE When Securing A Residential Placement That Is Far From Student's Home.

Application of a Student with a Disability, Appeal No. 13-043 (2014)

SALIENT FACTS:

A student with severe autism, developmental delays, limited communication skills, aggressive behavior, and extremely low cognitive ability had an initial eligibility CSE meeting in August 2012. The CSE determined that the student was eligible for special education services as a student with autism and developed a 12-month IEP, including a 6:1:1 special class and residential placement at the SED-approved School for Adaptive and Integrated Learning (“SAIL”). Although the Parent agreed with the CSE’s recommended programs and services and the need for a residential placement, the Parent did not agree with the location of the proposed placement. The Parent filed for an impartial hearing and requested a different residential placement that was in closer proximity to the student’s home. The decision did not indicate the distance between SAIL and the student’s home.

The IHO determined that SAIL was an appropriate placement for the student and found that the District provided FAPE. The IHO also ordered the CSE to reconvene within one month to amend the student’s IEP and provide a two-month trial placement at SAIL, if the District and Parent agreed with this decision. The IHO stated that although placing the child at SAIL was the Parent’s voluntary decision, he urged the Parent to “consider it with utmost seriousness and to cooperate in its execution.”

SRO’S DECISION:

The SRO agreed with the IHO’s determination that SAIL provided the student with FAPE. The student’s history of aggressive behaviors and need for 24-hour supervision in a setting that addressed his cognitive, academic, and adaptive behavioral needs made it difficult for the District to identify an appropriate SED-approved residential placement. This difficulty justified the location of the program and its distance from the student’s home.

WHY YOU SHOULD CARE:

It is frequently difficult to identify appropriate placements for students with severe social-emotional, behavioral, cognitive, academic, and adaptive behavioral needs. It would be ideal to find residential placements that are in close proximity to a student’s home to allow the family to have frequent visits with the student and to participate in any face-to-face family therapy and parent counseling and training that may be offered by such programs. Districts should make a good faith effort to secure a placement in programs that are within close proximity of the student’s home. However, in situations where it is not possible to find an appropriate program that is close to home, a District will still provide FAPE when identifying a placement that meets the student’s individual needs.

3. Parent Not Entitled To Reimbursement When District Provided FAPE.

Application of a School District, Appeal No. 13-037 (2014)

SALIENT FACTS:

A CSE developed a 12-month IEP for a student classified with autism that included a 6:1:1 special class, a 1:1 crisis management paraprofessional, related services, and special transportation. The student had delays in “all domains, including expressive and receptive language, adaptive daily living skills, and social and emotional development.” The Parent disagreed with the recommendations and unilaterally placed the student at Imagine Academy, a private school that is not approved by the SED. The Parent filed for an impartial hearing and requested tuition reimbursement for Imagine Academy, home-based special education teacher support services (“SETSS”) and related services.

The IHO first provided an interim ruling on pendency and provided the student with speech-language therapy and eight hours per week of home-based SETSS based upon the student’s last agreed-upon IEP. After the completion of the impartial hearing, the IHO determined that the District offered the student FAPE. However, the IHO also stated that the student required a home program combined with a school program and that Imagine Academy, with the home-based services paid for by the Parents, was an appropriate unilateral placement because these services were provided. The District was ordered to provide eight hours per week of home-based SETSS and home-based speech-language therapy even though its proposed IEP provided the student with FAPE.

SRO’S DECISION:

The SRO agreed that the District provided FAPE. The District considered input from a variety of sources, including the student’s most recent evaluations, an FBA and BIP, input from the student’s Parent, and input from the student’s teachers and related service providers at Imagine Academy. This information was used to determine the student’s present levels of performance and to develop appropriate goals. Further, the Parent had the opportunity to meaningfully participate in the CSE meetings. However, the SRO held that the IHO’s award of home-based services was “inconsistent with her determination that the District’s recommended program offered the student a FAPE.” Further, “it is well settled that an award of further services than those proposed by the District must be predicated upon a finding that the student was denied a FAPE.” As such, the SRO reversed the IHO’s reimbursement award for home-based SETSS and speech-language therapy.

WHY YOU SHOULD CARE:

A student is not entitled to reimbursement or compensatory services when it is determined that a District provided FAPE. As such, it is inappropriate for an IHO to award additional services to a student after determining that the District provided FAPE. Indeed, under the Burlington/Carter test, an IHO does not need to consider the second prong, whether a unilateral placement is appropriate, if it has already been determined that the District met its burden in providing the student with FAPE. In situations where an IHO provides tuition reimbursement after determining that the District provided FAPE, the SRO will likely reverse the IHO's award if it agrees with the FAPE determination.

4. Pendency Based On Last Agreed-Upon Placement And Not Previous Interim Order By IHO.

Application of a Student with a Disability, Appeal No. 14-024 (2014)

SALIENT FACTS:

A Parent initiated an impartial hearing for the 2012-13 school year, alleging that the District failed to offer her child FAPE. The IHO first made an interim order for pendency, and determined that the child was entitled to a placement in a “state approved non-public school in an 8:1:2 or 8:1:1 or 6:1:1” program for students with autism. The District was also ordered to pay for certain related services and special education itinerant teacher (“SEIT”) services. The IHO determined this based upon the “last agreed upon IEP,” dated July 2011. If such a placement could not be obtained, the District was to identify a non-SED approved school with the same ratios. When the District could not find an SED-approved program, it secured a seat for the child at the Manhattan Children’s Center (“MCC”), a non SED-approved program. The parties went on to settle the matter in April 2013.

The Parents then requested another impartial hearing for the 2013-14 school year and requested that MCC be considered the student’s pendency placement. In an interim order, the IHO found that the student’s July 2011 IEP was the “last agreed upon and implemented IEP.” Further, the IHO found that since the requested pendency at MCC was the result of “earlier litigation,” and because the parties understood that such placement was temporary, it “did not form a basis for a later pendency placement.”

SRO’S DECISION:

The SRO stated that since both parties understood that the December 2012 pendency order was temporary, it was only in effect until the matter was resolved.

As such, the pendency order expired when the parties reached a settlement in April 2013. Further, the IHO's interim order in December 2012 clearly stated that it was not establishing a pendency placement for the student. Finally, MCC was not a pendent placement because it was never the program recommended by the District through an IEP or by an IHO, SRO, or court ruling; rather, it was the result of an agreement between the parties during the prior litigation. As such, the IHO was correct in determining that the student's pendency placement should be based upon the July 2011 IEP.

WHY YOU SHOULD CARE:

A District is obligated to provide pendency services to a student while the parties are engaged in litigation to insure that the student continues to receive a special education program and services. Pendency is based on either the last-agreed upon IEP between the District and the Parents, a final order by an IHO, SRO, or federal court, or an agreement between the parties. In situations where the parties do not agree on pendency services, an IHO may issue an interim order directing pendency for the student. A District's pendency obligation ends when the litigation is finalized. In situations where the parties settle their dispute, and there is not a final IHO determination, pendency services in subsequent litigation would be the last agreed-upon IEP, rather than any interim pendency order in the previous litigation.

Jack Feldman is a Senior Partner with Frazer & Feldman, LLP, a law firm in Garden City.

Anne McGinnis, an Associate with Frazer & Feldman, LLP, provided research, writing and assistance.

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