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***By Jack Feldman***

## MONTHS IN REVIEW: July 2015

## Read All About It!

***A Monthly Synopsis of Salient Cases in Special Education***

In this installment of the Attorney's Corner, we review an important Second Circuit decision holding that a Parent cannot speculate that a District will not appropriately implement an otherwise adequate individualized education program ("IEP"). We review a similar District Court decision where a Parent did not prevail on a speculation case even after testifying that the school principal stated that the proposed placement would not be appropriate for the student. Another District Court case held that school districts are not responsible for alleged constitutional violations committed against students by third party agency employees. We also review several Office of State Review ("SRO") decisions, including one that calculated the amount of compensatory services to which the student was entitled. The SRO also dismissed a case as moot because the school year in question was completed and the Parent did not request compensatory education services. Another SRO decision found that a District offered a free appropriate public education ("FAPE") when it consistently revised a student's individualized education program ("IEP") to address his changing needs related to his disability. Our final SRO decision examines a Parent's request for an independent educational evaluation and the District's refusal to grant that request. We close with a "Dear Colleague" letter from the Office of Special Education Programs ("OSEP"), which highlights the importance of including speech/language therapists in the development and implementation of IEPs for students with autism (This "Dear Colleague" letter was previously posted in the "Informational Documents" section of NYSEDirectors on July 30, 2015).

  

## *Second Circuit Court of Appeals*
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### I. Claim That District Will Not Implement An Appropriate IEP For Student Who Never Attended Recommended Program Is Speculative.

**M.O. v. New York City Dept. of Educ., 2015 WL 4256024 (2d. Cir. 2015)**

**SALIENT FACTS:**

A student classified with a speech or language impairment attended second grade in an integrated co-teaching class during the 2010-11 school year. The Committee on Special Education ("CSE") convened in March 2011 to develop the student's 2011-12 IEP. However, the meeting was delayed at the Parents' request, while they awaited the results of a private evaluation conducted by Dr. Herman Davidovicz. The CSE reconvened in June 2011, reviewed Dr. Davidovicz's evaluation and recommended that the student attend third grade in a 12:1:1 special class in a community school. The student's IEP also provided for related services, including speech/language therapy and counseling, and English Language Arts ("ELA") instruction in an integrated co-teaching class.

The student's Parents visited the recommended school and rejected the placement for a number of reasons. First, the Parents stated that the student's 2011-12 IEP recommended that he repeat second grade, but the recommended school did not have a second grade 12:1:1 classroom available. Rather, the student would be educated in a combined third and fourth grade 12:1:1 class. The Parents notified the District of their intention to enroll the student at the Lowell School ("Lowell"), a private school approved for school district placement by the New York State Education Department ("SED"). In July, the District responded to the Parents' concerns and reassigned the student to another school that housed a 12:1:1 second grade special class. The Parents were unable to visit the school because classes were not in session during the summer months. The Parents stated that they would continue with their plans to enroll the student at Lowell because they were unable to determine whether the recommended placement was appropriate.

The Parents requested a due process hearing, alleging that the District denied a free appropriate public education ("FAPE") and requesting tuition reimbursement. The Parents challenged the District's recommended IEP, stating that the proposed placement, level of related services and the recommendation to repeat second grade were all inappropriate. The Parents also argued that the IEP did not address the student's need for a language-based program or provide the student with 1:1 reading support. The Parents challenged the adequacy of the

  

District's proposed placement due to a number of factors, including the size of the school, the teaching methodology utilized in the 12:1:1 classroom, and the profiles of the other students in the proposed classroom.

The impartial hearing officer ("IHO") found that the District offered FAPE, as the proposed IEP was appropriate. The IHO did not consider the Parents' challenges regarding the adequacy of the proposed schools. The SRO affirmed the IHO's decision, holding that the proposed placement was appropriate as the District responded to the Parents' concerns by changing the recommended school placement. The SRO rejected the Parents' "'unsubstantiated allegations' regarding the adequacy of the second assigned school because 'meaningful analysis of those claims…would require a determination of what might have happened had the District been required to implement [the student's] IEP.'"

On appeal, the Southern District of New York examined the IEP to determine whether it offered FAPE, rather than accept the Parents' allegations that the District would not have been able to appropriately implement the IEP as written. The court reasoned that: "speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement." See R.E. v. N.Y.C. Dept. of Educ., 694 F.3d 167 (2d Cir. 2012). The court rejected the Parents' argument that the District was required to present evidence regarding its ability to implement the IEP at the recommended placement. As such, the District Court granted the School District's motion to dismiss.

## COURT'S DECISION:

You may remember that in R.E., the Second Circuit ruled retrospective, or speculative, testimony was inadmissible to prove an IEP could not be properly implemented if the student did not attend the placement. Here, the Second Circuit clarified its R.E. analysis to determine whether a placement challenge is speculative for students who do not actually attend the District's recommended program. Specifically, the Court ruled that a Parent may not demonstrate that a District failed to offer FAPE by arguing that an "otherwise appropriate school" would not adequately implement the student's IEP. Rather, the student must physically attend the recommended school before a Parent can offer proof that the District would have been unable to implement the student's IEP. Here, the proposed IEP provided FAPE, so the Court rejected the Parent's argument that the recommended school would not have been able to implement the IEP. The Court also agreed with the SRO's decision that although the School District must prove that its proposed IEP provides an appropriate program, it does not need to prove that it would be able to deliver the IEP at the recommended school. The Court found that the IEP was appropriate and offered FAPE. As such, the Parents' request for tuition reimbursement was denied.

**WHY YOU SHOULD CARE:**

This case provides clear guidance regarding the Second Circuit's analysis for determining whether a Parent's claim is speculative. Lower courts have grappled with this issue for some time. The Second Circuit clearly holds that the Parent will not prevail in a FAPE denial claim when arguing that a District could not adequately implement an otherwise appropriate IEP in situations where a student never attends the District's recommended program. This provides even more evidence of the need for School Districts to develop IEPs that, on their face, adequately address student needs, and include measurable goals and appropriate placements and programs. Such a practice will provide protection for Districts when Parents unilaterally place a student without first allowing the student to participate in the District's recommended program. However, a Parent can still prevail on a FAPE denial case for students who are unilaterally placed when the District does not develop an appropriate FAPE IEP.

## *Federal District Courts*

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### I. School Districts Not Responsible For Alleged Constitutional Violations Committed By Employees Of Other Agencies.

**J.L. v. Eastern Suffolk BOCES, 2015 WL 3971778 (EDNY, 2015)**

**SALIENT FACTS:**

A 14-year-old student classified with autism attended eighth grade at the Jefferson Academic Center ("Jefferson"), operated by Eastern Suffolk BOCES ("BOCES"). The student's District of residence was Sachem Central School District ("the District"). During the first incident in issue, the student was sent to Jefferson's Behavioral Intervention Room ("BIR") to assist him with calming down after having a "difficult morning." While in the BIR, he placed his coat over his head and refused to remove it after being asked to do so by Jefferson staff. The staff member allegedly ripped the coat off of the student, causing it to tear. This caused the student's behavior to escalate and he stood up and began to yell. In response, the staff member allegedly "football tackled [the student] from behind, knocking [him] to the floor." The student's mother reported that the incident was described to her as a "spontaneous nosebleed." The Parent observed "bruises on [the student's] hand and arm and redness on half of his face." The student was later diagnosed with a nasal contusion, although the Parent did not provide documentary evidence to support this diagnosis.

The following day, a BOCES administrator allegedly informed the Parent that the student's injuries were the result of a staff member "taking [him] down from the side." The Parent also reached out to the District's school psychologist and another District employee to inform them of the situation. The school

  

psychologist suggested that the District convene a CSE meeting to discuss transferring the student to another school. The Parent stated that this was not acceptable as the student had only one month left in the school year. The Parent also requested information from the District regarding the BOCES' employees' credentials; however, the Parent was informed that those credentials needed to be obtained directly from BOCES. The Parent made a number of additional accusations against BOCES staff members regarding instances of assault. She further reported that the student had continued physical difficulties and increased mental health problems as a result of the allegations.

In ninth grade, the student transferred to Islip, a different BOCES program. The Parent reported that Islip staff members retaliated against the student due to the mother's threat to file a lawsuit against Jefferson. The mother also reported that the student was assaulted by another student at Islip and that the police refused to press charges against the other student. Islip provided the student with a one-on-one aide to assist him with feeling safer in school, although all investigations indicated that the bullying allegations were unfounded. The Parent then moved so the student could attend school in a different district.

The Parent commenced the present action in Federal District Court against BOCES, the District, and each of the individual staff members who were involved in the alleged assaults. The claim asserted that the student's constitutional rights were violated under U.S.C. §1983, as (1) staff members utilized "unjustified and unreasonable force" against the student; (2) the student was "treated differently" by staff members; (3) the defendants violated the student's Due Process rights by "intentionally interfering in the parent-child relationship;" and (4) the District and BOCES "failed to maintain adequate policies and conduct adequate training to prevent violation of constitutional rights." Further, the Parent alleged that the District was "deliberately indifferent," as it failed to adequately address the Parent's concerns. The Parent also brought 42 U.S.C. §§1985(3) and 1986 claims against all defendants for "conspiring to conceal facts of [the alleged incidents] from the plaintiffs and neglecting to prevent future violations." State law claims were also brought against all defendants, including violations under New York Education law, assault and battery, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress. The Parent alleged that BOCES and the District were "jointly and severally liable for all state-based claims under the doctrine of respondeat superior."

The District moved to dismiss, claiming that the Parent did not allege a "municipal policy or custom" as required by law, and that the complaint was not sufficient as a matter of law.

**COURT'S DECISION:**

The District Court granted the District's motion to dismiss, holding that it had no authority to train or supervise BOCES' employees. A Parent may hold a

  

District responsible for an employee's violations of a student's constitutional rights only if the employee acted in accordance with a longstanding practice or custom. Here, none of the staff members who allegedly caused the injuries were District employees, so the Parent could not demonstrate that the injuries resulted from a District custom or practice. Further, the District was appropriately responsive to the Parent's report of the alleged assault by suggesting that they convene an emergency IEP meeting to discuss the student's possible transfer to another school.

**WHY YOU SHOULD CARE:**

A school district is generally not responsible for alleged constitutional violations committed by employees of other agencies. This is true even if the school district is responsible for placing the student in that agency's care. However, upon any allegations of abuse or assault by a third-party service provider, a District must take immediate action to ensure the well-being of the student. This could include convening a CSE meeting to determine whether the student should have a change of service providers and/or immediately removing the student from the allegedly abusive placement pending the outcome of an investigation. Further, Districts could remain liable for constitutional violations committed by their own employees, and should ensure that all employees receive proper supervision and training to manage difficult behaviors.

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## II. Parent Cannot Rely On Principal's Statements Regarding School's Inability To Implement Student's IEP In Case Based Upon Speculation.

**M.C. v. New York City Dept. of Educ., 2015 WL 4464102 (SDNY 2015)**

**SALIENT FACTS:**

Upon transitioning to kindergarten, a CSE recommended that a student with Asperger's Disorder and Attention-Deficit/Hyperactivity Disorder ("ADHD") attend an in-District 12:1:1 special class with related services. The District adopted all of the recommendations from the student's preschool providers, with the exception of recommending a 12:1:1 class rather than a 12:1:2 class. The Parents visited the student's recommended school and informed the District they were unilaterally enrolling the student at the Lang School ("Lang"), a private special education school that is not SED-approved. The Parents stated that the District's recommended program was "not appropriate" because the school principal allegedly said that the student was not the "right fit," he would be the only kindergartener in a class of second graders, the class might be cancelled and all of the other students in the class "functioned at a very low level."

  

The Parents requested a due process hearing, alleging that the District denied FAPE. The District then provided the Parents with another possible school placement, but the Parents rejected this placement as the school was "too large and overwhelming," the student would not be placed with similarly functioning students and the school would not appropriately implement the student's IEP. The IHO found that the District offered FAPE. Specifically, the IHO held that the IEP was appropriate, the assigned schools would be able to implement the student's IEP and the student was appropriately grouped with similar peers. The SRO upheld the IHO's decision.

**COURT'S DECISION:**

The District Court agreed with both the IHO and SRO. Specifically, the Court found that the Parents' engaged in speculation when arguing that the assigned school would not be able to appropriately implement the student's IEP. Further, the Parents were not permitted to use the information allegedly provided by the school principal to support their claim. Although the claim regarding the principal's statements was unsubstantiated, the Court found that the Parents would not have prevailed even if they could prove that the principal discussed the school's inability to implement the IEP. This is because the District demonstrated that the assigned classroom was not canceled and the age-range of students within the class was appropriate. New York State Education law permits students with a 36-month age range to be placed within the same classroom. The judge also noted that the Parents did not provide any facts, such as services the school was unable to provide, indicating that the school could not meet the student's needs. Instead, the Court examined the proposed IEP and found that it provided the student with FAPE.

**WHY YOU SHOULD CARE:**

This decision was issued on the same day as the Second Circuit's M.O. v. New York City Dept. of Educ. reviewed above, and as such, it did not apply the Second Circuit's analysis. However, the outcome for this case is similar and reaffirms the difficulty Parents have when speculating that a District will not be able to implement an IEP. Here, a Parent was unable to use statements from the school's principal to demonstrate that a school would not be able to adequately implement the student's IEP. The District prevailed because the Court determined that the recommended IEP offered FAPE.

## *Office of State Review*

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## I. Compensatory Education Services Calculated Based On The Amount Of Services Student Should Have Received.

  

***Application of a Student with a Disability*, Appeal No. 154-172 (2014)**

**SALIENT FACTS:**

A student with "cognitive, academic, language processing, attention, and social/emotional/behavioral deficits" was referred for an initial evaluation in November 2011. He was classified in January 2012 and received special education teacher support services ("SETSS") and related services through the 2013-14 school years while attending Success Academy Charter School ("Success Academy"). The Parent provided the CSE with a letter at the student's annual review meeting to develop the 2014-15 IEP. The letter stated that the school psychologist had informed the mother that the student could either be retained or educated in a 12:1:1 special class during the 2014-15 school year. The mother indicated her disagreement with retaining the student and her concern that Success Academy did not have a 12:1:1 class. The letter expressed the Parent's disagreement with the most recent psychoeducational evaluation (conducted in June 2014) and requested "additional testing," including neuropsychological, assistive technology and auditory processing evaluations. The Parent also asked that the District apply to nonpublic schools because the school did not have a 12:1:1 class.

The District again recommended an integrated co-teaching class with related services for the 2014-15 school year. The District acknowledged the Parent's request for additional assessments, and requested the Parent's consent, informing her that she should contact the District if she wanted "specific assessments to be conducted."

The Parent requested a due process hearing, alleging that the District denied FAPE for the 2012-13, 2013-14 and 2014-15 school years. She argued that the student's IEPs were not "reasonably calculated to provide the student with educational benefit" and that the student did not make adequate academic progress. The Parent requested a placement in a nonpublic school and compensatory education services.

The IHO found that the District provided FAPE for 2012-13, but not for 2013-14 or 2014-15. The IHO pointed to the limited academic progress the student made in mathematics and literacy, the student's borderline level of functioning, and her "extremely low scores" in determining that the integrated co-teaching class was not appropriate. The District was aware of the student's lack of progress as early as December 2012, yet it continued to recommend that program each school year. The IHO found that the Parent was not entitled to a neuropsychological independent educational evaluation ("IEE") as the District was never given an opportunity to conduct this type of evaluation. The IHO also denied the Parent's request for auditory processing and assistive technology evaluations, as she

  

provided no evidence that the student was suspected of having deficits in those areas.

The IHO awarded 500 hours of compensatory 1:1 tutoring services, but denied the Parent's request for a nonpublic school placement because the Parent already refused a more restrictive in-District 12:1:1 class. The CSE was ordered to reconvene to develop an appropriate IEP for the 2014-15 school year.

## SRO'S DECISION:

The Parent appealed the IHO's award of relief and his determination that the District offered FAPE during 2012-13. The District did not challenge the determinations regarding its denial of FAPE. The SRO first examined the award of compensatory services, stating that such services should be calculated so they place "the student in the same position she would have occupied but for the district's failure to offer…FAPE." The SRO determined that the student made limited educational progress in reading, writing and mathematics from 2012-13 through 2013-14. She then calculated that based on three 45-minute periods per day during a 10-month school year, the student should have received a total of 625.5 hours of services in these subjects. However, because the student received some special education services during the school year in question, the SRO reduced the total amount by 50 percent, thus awarding 104.25 hours of 1:1 tutoring in each subject of reading, writing and mathematics.

The SRO affirmed the IHO's decision to deny a placement in a nonpublic school as the District recommended a less restrictive in-District special class. The District also agreed to conduct the evaluations requested by the Parent, thus obviating the need for the SRO to issue a decision on this matter.

## WHY YOU SHOULD CARE:

An award of compensatory education is an equitable remedy that is calculated on an individual basis. As the SRO noted, these services are designed to place the student in the position he or she would have been if there was no FAPE denial. There is no standard method for calculating compensatory services, and IHOs, SROs and federal courts frequently develop their own rationale in fashioning an appropriate remedy. In general, the SRO and the courts try to determine the impact of the denial of services and fashion a remedy to restore the student to where he or she would have been but for the denial. Here, the SRO did actual calculations to determine the amount of services to which the student was entitled, first by calculating how frequently the student should have received instruction in her areas of deficit. The SRO then subtracted an estimated amount of services the student actually received. Although this is not a typical method of calculating compensatory damages, it provides a logical methodology. Further, it worked in the District's favor because the total amount of services awarded to the student was decreased from the IHO's original order.

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## II. Case Dismissed When Issue Is No Longer A Live Controversy That Can Be Settled By Hearing Officer.

***Application of a Student with a Disability*, Appeal No. 15-018 (2015)**

**SALIENT FACTS:**

A student was diagnosed with ADHD, cognitive disorder, mixed receptive-expressive language disorder, reading disorder, disorder of written expression, mathematics disorder, anxiety disorder and oppositional defiant disorder. He was in sixth grade during the 2012-13 school year and was educated in a 12-month 12:1:1 special class with individual and group counseling. The IEP provided that the student would be placed at BOCES and indicated that "the parent had expressed complete disagreement with placement outside the district." The CSE recommended home instruction with counseling as an interim placement if a different placement could not be found before the start of the school year. The CSE reconvened in June 2012, noting that the parent would not cooperate with the District's efforts to place the student out-of-District. The IEP was amended two additional times before the start of the school year, but continued to recommend a 12:1:1 special class as the student's placement.

The Parent requested a due process hearing with the assistance of an advocate in January 2013, requesting that the student's IEP be changed to allow him to attend an in-District placement. The IHO found that the District offered FAPE in the least restrictive environment ("LRE"). On appeal, the SRO found that there was insufficient information to make a decision. He remanded the matter to the IHO to determine whether a subpoena should be issued to allow the Parent to bring the school principal in for testimony.

The Parent was not responsive to the IHO's requests to schedule a pre-hearing conference. The District moved to dismiss the matter based on "abandonment by the Parent." The Parent then replied, providing an explanation for the delay and explaining that the student returned to an in-District program. The IHO then found that there was no longer a "live controversy," because the school year in dispute was over and the student returned to District. He also found that the principal's testimony was not "relevant or material to the dispute," and refused to issue a subpoena for this matter.

**SRO'S DECISION:**

The Parent again appealed the IHO's decision, pro se, alleging that the IHO was not "impartial or accurate" when dismissing the claim. The Parent requested a remand to a different IHO to determine whether the school principal should be subpoenaed to testify. The SRO found that the Parent did not provide any

  

evidence or argument indicating why the principal's testimony was relevant. The case was also dismissed as moot, as the school year in dispute was over and the student had already returned to an in-District program.

**WHY YOU SHOULD CARE:**

This case, which had fairly simple and straight-forward facts, demonstrates how matters can become exacerbated when a Parent is not satisfied with the District's recommendation. The Parent's dissatisfaction extended to the IHO, causing both the IHO and SRO to consider the case twice. Given the severity of the student's diagnoses, it appears that the District's initial recommendation was appropriate. However, the SRO never considered whether the District offered FAPE as the Parent focused the argument on the IHO's methodology in rendering his decision. As such, by the time the SRO heard the case on the merits, the central issue was moot.

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## III. No FAPE Violation When District Appropriately Addressed Student's Changing Special Education Needs.

***Application of a Student with a Disability*, Appeal No. 15-009 (2015)**

**SALIENT FACTS:**

During the 2012-13 school year a sixth grade student was classified with an other health impairment due to Tourette's Syndrome and received integrated co-teaching, consultant teacher and speech/language therapy, in addition to a number of program modifications and testing accommodations. In October 2012, the Parent applied for the student's admission to Eagle Hill, a private school that is not SED-approved. The CSE convened in March 2013 to develop the student's 2013-14 IEP. It recommended integrated co-teaching, a 15:1 special class for academic support, speech/language therapy, assistive technology (i.e., access to a word processor and audio books), program modifications and testing accommodations. The Parent signed a contract with Eagle Hill for the 2013-14 school year in May 2013.

Also in May 2013, the student's neuropsychologist provided a letter stating that the student's symptoms associated with Tourette's syndrome were so severe that he could no longer attend school. However, the neuropsychologist recommended that the student attend school for two hours per day and longer based on his ability to tolerate the amount of time. The District's CSE reconvened to review the neuropsychologist's letter and discuss the student's "increasingly more challenging episodes of Tourette's." The CSE revised the 2012-13 IEP to include home instruction for 60 minutes per day and allow the student to have

  

"flexible attendance" and "transportation services." The Parents informed the District of their intention to unilaterally enroll the student at Eagle Hill for the 2013-14 school year. The District's CSE reconvened in September 2013, and determined that the 2013-14 IEP continued to be appropriate for the student given his progress on new medication and academic success the previous school year.

In their due process complaint notice, the Parents alleged that the District denied FAPE for the 2011-12, 2012-13 and 2013-14 school years. They alleged that the District did not timely evaluate the student for initial eligibility determination during 2011-12. They also argued that the student's IEPs did not adequately address the severity of his Tourette's or his social-emotional and academic needs. The Parents also disagreed with the District's recommendation for home instruction during the end of the 2012-13 school year. They argued that the District erroneously failed to consider Out-of-District placements for the student for the 2013-14 school year.

The IHO found the Parents' request for tuition reimbursement during the 2011-12 and 2012-13 school years to be "moot" because they did not incur any tuition costs or request compensatory education services for those school years. The IHO also held that the District did not violate its child find obligations by failing to classify him before the 2011-12 school year because the student was supported with a 504 Plan and was performing "reasonably well with his studies at that time." The IHO also found that the District offered FAPE during every school year in question. For 2013-14, the IHO noted that there was no indication that the student required a change in placement, especially given that the student's Tourette's symptoms improved the summer before the school year began.

**SRO'S DECISION:**

The SRO upheld the IHO's decision. The SRO found that the District did not violate child find by failing to classify the student for special education services until the 2011-12 school year. This is because the student received a 504 Plan. Further, based on the student's adequate academic performance, there was no reason for the District to suspect that the student had a disability that required special education services prior to the Parents' referral to the CSE in December 2011. It was at this time that the Parents provided the District with a report from the student's neuropsychologist indicating that his symptoms associated with Tourette's were worsening.

The SRO also found that the 2011-12, 2012-13 and 2013-14 IEPs provided the student with FAPE. First, the SRO found that the student's IEP goals adequately addressed his identified needs, including the needs that arose from tics related to Tourette's. Further, the student's special education program, related services, and program modifications allowed the student to make appropriate academic progress. The District was also responsive to the student's changing

  

needs related to his diagnosis by changing his IEP to allow for home instruction during a period when the student experienced worsening symptoms.

The SRO did not address the issue of whether Eagle Hill was an appropriate placement for the student, or whether the equities favored the Parents, because it was determined that the District provided FAPE.

**WHY YOU SHOULD CARE:**

This case demonstrates how important it is for a District to develop a bulletproof IEP. Here, the District prevailed because it developed IEPs that were both procedurally and substantively adequate. The IHO and SRO examined the District's IEPs, including the present levels of functioning and goals, to determine whether the IEP appropriately addressed the student's needs. Districts should consider all reports or evaluations provided by the Parent, and the District fulfilled this by convening a CSE meeting to review recent letters from the student's neuropsychologist. The District also amended the student's current IEP for the last few weeks of school when it reviewed evidence that the student could not tolerate school due to his disability. Although a District does not need to adopt all of the recommendations provided by the Parent through a private evaluator, it does need to formally consider these recommendations during a CSE meeting. Here, the District appropriately gathered information from the student's teachers and service providers to corroborate the neuropsychologist's letter indicating a need for home instruction. The District's diligence in creating the student's IEPs protected it from liability for the student's tuition at his unilateral parental placement.

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## IV. Parent Not Entitled To Independent Educational Evaluation When District's Evaluation Was Comprehensive And Appropriate.

***Application of a Student with a Disability*, Appeal No. 15-026 (2015)**

**SALIENT FACTS:**

During the 2014-15 school year, a student was classified with an other health impairment. The student was educated in integrated co-teaching classes for all core academic subjects and received counseling and a 1:1 crisis management paraprofessional. The Parent presented a neuropsychological evaluation to the CSE indicating that the student required a speech/language evaluation. The District conducted the evaluation in October 2014, and the Parent informed the District that she disagreed with the evaluation in November 2014. Although the Parent did not disagree with the tests used or the results of the evaluation, she stated that the evaluation "may have been predetermined to support the District's

  

prior decision to terminate speech services." The Parent requested a speech/language independent educational evaluation ("IEE").

The District filed a due process request in response to the Parent's request for an IEE. The District argued that its evaluation was "comprehensive and provided an appropriate recommendation." The District joined this demand with another that was already initiated by the Parent.

The IHO refused to consolidate the District's demand with the one already filed by the Parent. However, on the issue of the IEE, the IHO agreed with the District, finding that the evaluation was "sufficiently comprehensive to determine the student's speech and language needs in the classroom." As such, the Parent's request for an IEE was denied. The IHO also held that the student did not require speech/language therapy, and ordered an amendment to remove the services from the student's IEP.

## SRO'S DECISION:

On appeal, the Parent asserted that the IHO exceeded his authority by ordering the District to remove speech/language therapy from the student's IEP. The Parent also challenged the IHO's refusal to order an IEE.

The SRO determined that the District's speech/language evaluation was comprehensive, as it was conducted by a certified speech/language pathologist, utilizing a variety of assessment tools. Further, there was evidence of improvement in speech/language skills when comparing the results from a previous evaluation. The student was also better behaved and more focused during the 2014 evaluation when compared to the previous evaluation, indicating that the 2014 evaluation results were more valid. As such, the District's evaluation was valid and there was no need for an IEE. However, the SRO reversed the IHO's order to remove speech/language therapy from the student's IEP, as this was outside the scope of the hearing.

## WHY YOU SHOULD CARE:

There are limited circumstances that allow a District to initiate a due process hearing against a Parent. One situation is when a Parent refuses to consent to a CSE evaluation. The other may occur when a Parent requests an IEE, but the District believes its evaluation is comprehensive and no additional information is required to develop an appropriate IEP. Districts frequently do not take a Parent to a due process hearing over the latter issue, as the cost of the IEE is usually less than the cost of prevailing in due process. However, here, the issue was joined with a due process hearing already in place that was initiated by the Parent. In such situations, it makes sense to attempt to consolidate the two matters and for the District to endorse the quality of its evaluation.

## *Office of Special Education Programs*

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## School Districts Must Ensure That Students With Autism Receive Services To Address Communication Needs If Appropriate.

***Dear Colleague Letter*, 115 LRP 33911 (2015)**

### SALIENT FACTS:

The Office of Special Education Programs ("OSEP") recently issued a Dear Colleague Letter regarding services delivered to children with autism spectrum disorder ("ASD"). Specifically, the letter concerned recent reports that children with ASD were not receiving speech or language therapy and that speech/language therapists were not included in the assessment of students with ASD for special education eligibility. Some programs utilizing applied behavior analysis ("ABA") do not include, or solicit input from, speech/language therapists when developing the student's special education program.

### OSEP's OPINION:

OSEP reiterated school districts' obligations to provide FAPE to all eligible students with disabilities. Further, when evaluating students for special education purposes, their functioning must be assessed in "the following developmental areas: cognitive development; physical development, including vision and hearing; communication development; social or emotional development; and adaptive development." Additionally, the IEP team (in New York, the CSE) must include all individuals who specialize in the functional area being considered to "ensure that an appropriate program is developed to meet the unique individual needs of a child with a disability."

OSEP stated that ABA is "just one methodology" that is used as an intervention for students with ASD. As such, states and public school districts must ensure that they consider input from any professionals who are qualified in the student's areas of deficits when developing and implementing the student's IEP.

### WHY YOU SHOULD CARE:

As you are aware, ASD is a spectrum disorder characterized by impairments in social functioning, stereotypical behaviors, and communication difficulties. ABA is currently considered to be the "gold standard" in ASD interventions, as it provides a systematic and data-driven approach to teaching discrete skills.

  

However, given that students with ASD frequently present with both receptive and expressive language deficits, it is important to assess their language needs by a qualified speech/language therapist. A speech/language therapist may choose to incorporate ABA principles when address a student's communication needs; however, it is inappropriate for a student's communication needs to be addressed only by a teacher or behaviorist without input from a speech/language therapist.

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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.

  