NYSE Directors
Centris Group

By Jack Feldman

MONTHS IN REVIEW: July-August 2013

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

The Second Circuit has reiterated that the introduction of retrospective testimony to attempt to cure a defective IEP is prohibited. However, the Court explained that, before considering whether retrospective testimony was relied upon to cure a defective IEP, it will first review whether the absence of the service, accommodation, modification or support (collectively referred to as "service") from the IEP resulted in a denial of FAPE. If not, the reliance on retrospective testimony that the service would have actually been provided will likely be deemed of no consequence.

Second Circuit Court of Appeals

***

1. The Second Circuit's Application of The Retrospective Testimony Rule.

M.W. v. New York City Dep't of Educ., 2013 WL 3868594 (2d Cir., 2013)

SALIENT FACTS:

Despite the student's diagnoses of autism, PDD-NOS, ADHD, speech and language disorders and fine and gross motor deficits, the student had an average IQ. However, he had social-emotional problems and engaged in off-task behavior. The CSE recommended that the student be placed in a co-taught integrated class;

receive the services of a 1:1 behavioral management paraprofessional ("1:1"); and related services of counseling, OT, PT and speech. Because of the student's behavioral problems, the CSE determined that the student needed a BIP. An FBA was not conducted. Nevertheless, the CSE developed a BIP, based on input from everyone participating in the CSE, including the parent, identified the student's behavioral needs in the IEP, incorporated behavioral interventions into the IEP and recommended that an FBA be conducted. Prior to the CSE convening to develop the student's 2010-11 IEP, the parent signed an enrollment contract with a private school where the student would be provided with a 1:1 paraprofessional.

Although the parents were successful in convincing the IHO that the District denied FAPE, they were unsuccessful in persuading the SRO, federal district court and Second Circuit Court of Appeals that the district failed to offer FAPE.

COURT'S DECISION:

As to the district's failure to develop the FBA prior to the CSE developing the IEP, the court held that this failure does not render an IEP legally inadequate as long as the IEP adequately identifies the student's behavioral impediments and implements strategies to address this behavior. The court wrote, "[w]here the IEP actually includes a BIP, parents should at least suggest how the lack of an FBA resulted in the BIP's inadequacy or prevented meaningful decision-making." In this case, the parents failed to make such an assertion. Because the BIP appropriately addressed the student's behaviors and identified positive behavioral interventions, the Court held that the failure to conduct an FBA was not fatal.

Next, the Court considered the omission of parent counseling and training ("PC&T") from the IEP. The court noted that it had "previously described [PC&T] omissions as procedural violations 'less serious than the omission of an FBA' because 'the presence or absence of a [PC&T] provision does not necessarily have a direct effect on the substantive adequacy of the plan.'" The Court deferred to the SRO's analysis that the absence of PC&T did not deny FAPE because the parent was a certified special education teacher who had received training and counseling in the therapies the student used.

Regarding the parent's assertion that the SRO impermissibly relied on retrospective testimony to cure the IEP's inadequacies, the court wrote:

> [W]hen the IEP suffers from a conceded procedural infirmity, we first review whether that procedural violation substantively deprived the student of a FAPE before determining whether the SRO corrected the substantive failure by impermissibly crediting future promises.

Thus, before addressing whether the SRO erred by considering retrospective testimony about services that would have been provided, the court

will first consider whether the absence of the services from the IEP substantively deprived the student of FAPE. In this case, the SRO concluded that the IEP's omission of PC&T did not deny the student FAPE. Further, the SRO concluded that the omission was not remedied by promises not contained in the IEP. Moreover, the SRO concluded that the PC&T omission did not deny FAPE in the first instance because of the BIP's collaborative approach to behavior modification, including working with the mother, in addition to the mother's previous training about the therapies the student used.

Finally, the Court considered the Parent's argument that the CTI recommendation was overly restrictive because the student would be learning alongside as many as twelve other classified students. First, the Court rejected the Parents' assertion that CTI meant a "class." Rather, the Court concluded that, as reflected by the IEP and New York State Regulations, CTI is a "*service* in a general education environment rather than a special education classroom" (emphasis in the original). The Court rejected the "unsupported assertion that the restrictiveness of the educational environment and related services turns exclusively on the number of IEP students present." Moreover, the Court found persuasive testimony from district staff that the student's behavioral needs necessitated a classroom with the supports of a special education teacher. Based on the foregoing, the Court affirmed the lower court's denial of reimbursement.

WHY YOU SHOULD CARE:

A district's failure to conduct an FBA prior to developing the corresponding BIP may not render the IEP legally inadequate as long as the IEP identifies the student's behavioral impediments and implements strategies to address this behavior. Where the BIP is based on information available to the CSE and adequately describes the student's behavioral impediments, the failure to conduct the FBA prior to developing the BIP will likely be considered a procedural violation, but not a denial of FAPE. However, if the parents argue that an FBA would have revealed that the BIP was an inaccurate assessment of the student's behavioral problems or that the recommended behavior-modification strategies failed to accommodate the frequency or intensity of the student's behavioral problems, the parents may be successful in convincing a court that the failure to conduct the FBA denied FAPE.

The Commissioner's Regulations define CTI as, "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students." See 8 NYCRR §200.6(h). Contrary to the parent's assertion here, CTI is a support provided in a general education classroom, not a segregated special education environment. A special education class is designated for students with intensive management needs who require a high level of individualized attention. See 8 NYCRR §200.6(h). Generally, students who are placed in special classes have low cognitive functioning levels. Where a student is of average or above-average cognitive functioning, and

therefore, would be inappropriately grouped in a special class, but has other needs (e.g. behavioral or management) that require more intensive support than that afforded in the general education environment, this student may be a good candidate for the services offered in an CTI program. Although there is a possibility that there will be eleven other classified students in the student's class (or more if a variance is sought pursuant to 8 NYCRR §200.6[g][1][i], [ii]), there will also be at least an equal number of non-classified students in the class. The benefits of the additional support afforded by the presence of the special education teacher and integration with the student's nondisabled peers may be a perfect fit for the child.

Perhaps the most important section of this decision is the explanation of how the Court will apply the "Retrospective Testimony" Rule to future decisions. Reliance on retrospective testimony to rehabilitate a deficient IEP is impermissible. However, when analyzing a decision that relied on retrospective testimony, the court will first consider whether the absence of the particular services from the IEP would substantively deny FAPE.

***

2. SRO's Reliance on Permissible Testimony Overshadowed His Reliance on Retrospective Testimony.

K.L. v. New York City Dep't of Educ., 2013 WL 3814669 (Summary Order) (2d Cir., 2013)

SALIENT FACTS:

The CSE recommended a 12-month 6:1 class; a 1:1 crisis paraprofessional; and related services of speech, OT, and PT for a student with severe autism. The IEP included goals to address the student's identified areas of need; including developing the student's reading and math readiness skills; and improving pragmatic language, sensory processing and regulatory skills. The BIP attached to the IEP identified interfering behaviors, including short attention span, chewing and shredding clothes, and hitting and kicking when frustrated. To address these behaviors, the BIP required the use of positive reinforcements, redirection, and sensory support (e.g. brushing). In their demand, the parents alleged that the district denied FAPE by, among other things, failing to conduct an FBA prior to developing the BIP, and failing to recommend PC&T. The IHO found in the parents' favor, the SRO reversed this decision and the federal court affirmed the SRO's decision.

COURT'S DECISION:

The parents argued that the SRO and district court decisions should be reversed because they impermissibly relied upon retrospective testimony.

According to the court, the parents pointed to "plenty of evidence in the record that is 'retrospective' in nature." Specifically, in his decision, the SRO wrote:

> I note that testimony from the special education teacher of the proposed class indicated that all of the students in the class received daily 1:1 instruction from her, and that the amount of 1:1 instruction provided was determined by the students' individual needs.

However, the court wrote:

> The question before us [] is not whether the SRO relied on impermissible retrospective evidence, but whether sufficient *permissible* evidence, relied on by the SRO, supports the SRO's conclusion that the IEP offered [the student] a reasonable prospect of educational benefits.

The court found that the SRO based his decision on an appropriate finding that the student did not require 1:1 teacher support, as opposed to 1:1 support provided by a dedicated aide. Therefore, the court concluded that any use of retrospective evidence did not disturb the SRO's conclusion that the IEP was adequate on its own terms.

Because the IEP adequately identified the problem behavior and prescribed ways to manage it, the Court held that the District's failure to conduct an FBA prior to developing the BIP did not give rise to a denial of FAPE.

As to the parent's allegations concerning PC&T, the court considered the failure to include PC&T to be less serious than the omission of an FBA. The court reasoned, "the presence or absence of a [PC&T] provision does not necessarily have a direct effect on the substantive adequacy of the plan." Rather, districts are obligated to provide PC&T to parents of students classified with autism. As such, parents have a claim for the district's failure to provide PC&T that is separate from any claims related to the deficiency of the IEP.

Accordingly, because the Circuit Court found that the district offered FAPE, it affirmed the federal court's decision.

WHY YOU SHOULD CARE:

Although only a Summary Order, this case illustrates how the Second Circuit will apply its Retrospective Testimony analysis when reviewing decisions, and further how administrative officers and courts should approach relying on Retrospective Testimony in making their decisions. Reliance on retrospective testimony is impermissible to rehabilitate a deficient IEP, after the fact. Nonetheless, testimony may be received to explain or justify the services listed in the IEP. However, when analyzing a decision, which relies on retrospective

testimony, the reviewing authority will consider whether there was sufficient permissible evidence relied upon to support the conclusions reached in the decision.

The Regulations require that IEPs of students with autism include recommendations for the provision of PC&T for the purpose of enabling parents to perform appropriate follow-up intervention activities at home. See 8 NYCRR 200.13(d). However, the Second Circuit Court of Appeals has articulated that the failure to provide PC&T is a procedural violation considered less serious than the failure to conduct an FBA prior to developing a BIP. As the Second Circuit explained, "[t]he lack of [PC&T] in the IEP itself also does not implicate the reliance interests that caused [the Court] to bar 'retrospective evidence.'" Rather, because districts are required to provide PC&T to parents of children classified with autism, they remain accountable for their failure to do so regardless of the contents of the IEP. Therefore, if a district attempts to present evidence at a hearing that it would have provided PC&T services had the student actually enrolled in the District's program, this evidence will not be considered impermissible retrospective testimony.

Federal District Courts

***

1. Parent's Failure to Consent to Updated Evaluations Precluded Challenge to District's Offer of FAPE.

V.M. v. North Colonie Central Sch. Dist., 2013 WL 3187069 (N.D.N.Y., 2013)

SALIENT FACTS:

The parent of a student with Down Syndrome commenced an action against the district alleging that the district denied FAPE during 2008-09, 2009-10 and 2010-11. The IHO found that the district offered FAPE for each year except 2010-11. The district appealed this decision. The SRO dismissed the parent's claims concerning 2010-11 as moot. Additionally, the SRO concluded that the parent was precluded from alleging that the district denied FAPE for any of the years because for nine years preceding her filing of the complaint, the parent withheld consent for the District to conduct updated cognitive testing or evaluations, including those conducted by private evaluators.

As a result, the CSE had to develop each year's IEP without the benefit of any new evaluative material. Over the course of the three school years in question, the student's in-class behavior began to deteriorate. Specifically, in 2009-10, the student began to demonstrate behavioral issues, including crying and falling asleep

in the classroom, not complying with directions, and putting her head on her desk. Nevertheless, at the parent's insistence, the CSE maintained the student's mainstream recommendation with consultant-teacher direct ("CT-direct") supports during 2008-09 and 2009-10. However, based upon the observed difficulties the student was having in the mainstream environment, for 2010-11, the CSE recommended that the student be mainstreamed for English and science and receive instruction in special classes in all of her other courses. In October 2010, the parent finally consented to updated evaluations, which revealed that the student received the lowest scores possible and showed significant delays in her cognitive ability (e.g.: IQ Score of 40).

COURT'S DECISION:

The court concluded that the parent's repeated failures to consent to have the district conduct updated evaluations precluded her from asserting that the student was denied FAPE. Nevertheless, for completeness, the court addressed the parent's challenges to each year.

As to 2008-09 and 2009-10, the parent alleged that the district failed to implement the IEP in several ways. Specifically, the parent alleged that the math goals were not implemented because the consultant teacher was not certified to teach seventh grade and the student did not receive certain IEP-mandated accommodations or homework modifications. The court pointed out:

> A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead must demonstrate that the school...failed to implement substantial or significant provisions of the IEP (*citing* D.D-S v. Southold UFSD, 2011 WL 3919040, *13 [EDNY, 2011])

Although the court recognized that certain aspects of the student's IEP were not implemented, it agreed with the SRO and IHO that these errors were only *de minimis* in their effect, and therefore, did not rise to the level of a FAPE denial.

As to the 2010-11 IEP, the parent's main argument was that the district failed to offer the student sufficient mainstream opportunities. The court noted that this inquiry is fact-specific and requires a careful examination of the nature and severity of the child's handicapping condition, needs and abilities, and the district's response to the student's needs. In this case, the court noted that the student "struggled significantly" in her mainstream classes, even when the curriculum was modified and extra CT services were provided. Without the benefit of additional evaluations, the CSE was required to base its recommendations on teacher reports of the difficulties the student was having keeping up in her mainstream class. Despite receiving significantly modified curriculum and individual teaching assistance while in the mainstream environment, the student was still unable to comprehend the material. As such, the court agreed with the

SRO that a completely mainstreamed environment would have been inappropriate.

Based upon the facts of this case, the court concluded that the district met its obligations to provide the student with a FAPE.

WHY YOU SHOULD CARE:

Annual CSE reevaluations are necessary to ensure that the educational programs are suited to meet the student's evolving needs. Prior to conducting these evaluations, the parent must be informed about and consent to the evaluations. If a parent refuses to consent to an evaluation, the district may, but is not required to pursue due process to override the parent's refusal. See 20 USC §1414(a)(1)(D)(ii). However, if the district elects not to pursue due process, it is not obligated to conduct the evaluation if the parent refuses consent, and will not be held liable for deprivation of FAPE. See 20 USC 1414(a)(1)(D)(ii)(III)(a). As explained here, a parent seeking special education services for her child under IDEA must allow the school to evaluate the student and cannot force the school to rely solely on an independent evaluation.

Although a student with cognitive deficits may have been able to keep up with the general education elementary curriculum, as the student advances from grade to grade, the CSE may find that the student no longer possesses the requisite abilities to continue to benefit from a completely general education curriculum. When considering whether to scale back on the mainstreaming opportunities, the CSE should consider the student's academic needs as well as the student's behavioral, social and management needs. As was the case here, the CSE maintained the student's mainstream recommendation in English and Science because these subjects interested her, and therefore, she was more likely to retain some educational benefit from these subjects and was therefore expected to retain some educational benefit. However, based on the student's increasing needs, the CSE recommended a special class for her other subjects.

Office of State Review

***

1. IHO's Failure to Limit Parents' Case to Issues Raised in Due Process Demand Results in Annulment of Order Directing the District to Reimburse Parents $46,000 for Tuition.

Application of the Board of Education, Appeal No. 12-195 (July 29, 2013)

SALIENT FACTS:

During 2010-11, the student was placed in a 12:1:2 special class for math and reading, with a teaching assistant for transitions to his co-teach integrated ("CTI") 2nd grade classes for science, social studies, and specials (i.e. art, music, library and gym). The student was also provided with related services of speech therapy, group counseling and OT. The student also participated in the District's extended day socialization program with typical peers.

During the CSE meeting to develop the student's IEP for 2011-12, the CSE reviewed the student's progress during 2010-11. The CSE discussed that the student made progress and either mastered or progressed toward mastering his 27 IEP goals. In reading and math, the student raised his hand, could verbalize and communicate his answers, respond to questions regarding character, setting and comprehension, maintain spontaneous conversations with his peers without teacher initiation, and his scripting decreased and attending increased in the CTI class. In fact, the student often looked to his typical peers and modeled their behavior when he missed a direction, another obvious benefit of mainstreaming. By June 2011, the student's decoding was at the end of 2nd grade level, comprehension was at mid-to-end of 1st grade level, and his instructional level was 2nd grade. The student's scripting reduced to the point that, if his teacher looked at him when he was scripting, he would know to stop. For 2011-12, the student would be a 4th grade student chronologically. Based on his ability to model the behavior of his typical peers, the CSE recommended that he be placed in a 4th grade general education class for science and social studies, classes he enjoyed and in which he was expected to receive educational benefit. During the general education classes, the student would be supported by a teaching assistant and receive consultant teacher ("CT") direct services for two hours per week. The CSE recommended further that the student be pulled out into a 12:1 special class for ELA and math. In addition, the CSE recommended related services of speech, counseling, occupational therapy and parent counseling and training.

The parents rejected the recommendation, placed the student in SLCD for 2010-11, and sought reimbursement of tuition. The parents alleged that the District's recommendation was inappropriate because he needed a more restrictive environment. The IHO agreed with the parents and ordered the District to reimburse them $46,000. The District appealed.

SRO'S DECISION:

First, the SRO addressed the District's objections concerning the IHO exceeding the scope of her authority by considering matters not raised by the parents' Complaint. Among other things, the IHO held that the CSE should have recommended a 1:1 aide and that the IEP contained "completely inappropriate" annual goals. However, the Parents' Complaint never raised these issues. Although the SRO recognized that the IHO has the authority to ask questions during the hearing, she lacks the authority to expand the scope of the hearing

without the express consent of the parties. As to the CSE's failure to recommend a 1:1 aide, the parents argued that by alleging that the IEP was inappropriate, the complaint sufficiently raised this issue. The SRO was unpersuaded by this argument. There was no evidence that the Complaint was amended and therefore, the IHO was found to have exceeded her jurisdiction in rendering a decision on this matter.

The issue of the appropriateness of the annual goals was not raised in the complaint. However, the SRO held that the IHO did not exceed the scope of her jurisdiction by rendering a decision on this matter because there was testimony concerning the appropriateness of the goals. After devoting over two pages of analysis of the goals, the SRO concluded that the goals were appropriate and vacated the IHO's *sua sponte* decision.[1]

As to the substantive adequacy of the IEP, the SRO first considered whether the 2011-12 IEP would have afforded the student a meaningful opportunity to make educational progress. Because the 2011-12 IEP was based on the 2010-11 IEP, the SRO considered the student's progress under the 2010-11 IEP. The SRO credited the testimony of district staff that by the end of the 2010-11 school year, the student "had become more social, was engaging in conversation with peers, and was beginning to regulate his own behaviors, including self-correcting his scripting." At the beginning of the school year, the student would answer questions under his breath and did not raise his hand without prompting. Whereas, toward the end of the school year, the student was more apt to raise his hand and engaged in spontaneous conversation with peers. The SRO also relied on testimony from the student's CTI special education teacher that the student modeled the behavior of his typical peers and referenced them if he missed or did not understand a direction. Most notably, the January 2011 progress report from the student's private speech language therapist indicated improvement in the student's use of spontaneous language, scripting and affective engagement. The SRO found that "the weight of the evidence shows that the student made meaningful progress in school academically, socially, and behaviorally during the period of time leading up to the…CSE meetings."

The parents argued that the IEP was inappropriate because it failed to offer the student a language-based program. The SRO pointed out that there is no standard for a language-based program in the IDEA or federal or State regulations. Nevertheless, the SRO concluded that:

> [T]he June 2011 IEP offered [the student] a supportive, structured environment with an intense language-based curriculum, multi-

[1] It should be noted that the SRO held, "the IHO erred in determining lack of progress based on the number of IEP goals the student 'achieved' during the 2010-11 school year, rather than focusing on the extent to which the student had progressed" (at 15).

> sensory instruction, individualized instruction, and small group classes, and that the program effectively addressed [the student's] language, attention, academic, and social deficits.

Regarding the CSE's recommendation that the student participate in a 4th grade general education classroom, the IHO found that the student likely could not function in such a general education setting. However, the SRO credited testimony from district staff that "the program would have been the LRE, individualized to the student's strengths and needs through a modified curriculum and incorporation of a variety of modifications and accommodations to enable the student to receive appropriate educational benefit." Unlike the IHO, the SRO found no error in the recommendation of a 4th grade general education class for science and social studies. The SRO noted that the student's curriculum in these classes would have been modified by the student's special education teacher, who had worked with him during the past two years, and the fourth grade general education teacher, as well as his consultant teacher.

The SRO ruled that because the student progressed under the 2010-11 IEP, which formed the basis of the 2011-12 IEP, the 2011-12 IEP was individually tailored to meet the student's specific needs. Moreover, the 2011-12 IEP included an increased level of services. As a result, the SRO ruled that the 2011-12 IEP would have afforded the student opportunities for meaningful progress. Thus, because the SRO found that the district offered FAPE, she reversed the IHO's decision.

WHY YOU SHOULD CARE:

Despite overwhelming evidence presented by District staff that the student would have progressed under the 2011-12 IEP, the IHO completely disregarded the testimony of all of the District witnesses who had worked with the student for several years. Although the IHO found one of the District's numerous witnesses credible, she ultimately dismissed this individual's testimony because of her lack of experience working with the child. Curiously, although the Parents' witnesses had only been working with the child for remarkably insignificant periods of time, the IHO found them credible, and relied upon their testimony to support her decision. It was argued convincingly to the SRO that this conduct resulted in reversible error and was completely against the weight of the evidence.

When the IHO's conclusions are unsupported by the hearing record, the SRO will likely refuse to defer to the IHO's conclusions. Rather, under these circumstances, it is the SRO's responsibility to review the hearing record, and upon this review, to render a well-reasoned and thorough decision upon the record rather than issues the IHO introduced, *sua sponte*. When reviewing conflicting administrative decisions, Federal courts will decline to reverse decisions of the SRO that are thorough, well-reasoned and based on the record, as was the case here.

A student's progress under a previous IEP is a relevant inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress. As explained by the SRO:

> The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate. Nor does the fact that an IEP offered in a subsequent school year, which is similar to the prior IEP, render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (citations omitted).

When attempting to prove that an IEP for a subsequent school year that is based on the IEP from a previous school year is appropriate, the district must demonstrate the student's progress under the old IEP. While, anecdotal reports of the student's progress may be presented, districts should present measurable proof (e.g. tests and quizzes, IEP goal progress reports, report cards, standardized assessments, data-based charts of the student's progress) to support claims of progress. The totality of this information will support the district's argument that because the student progressed under the previous IEP, he can be expected to make meaningful progress under the new IEP.

***

2. Methodology is Within the Purview of the Teacher.

Application of the Board of Education, Appeal No. 12-165 (Apr. 22, 2012)

SALIENT FACTS:

For eleven years, a student with autism had been placed in the McCarton School ("McCarton"). McCarton used ABA as its core intervention and teaching methodology. During 2011-12, the student was placed in a 5:1+4 or 5:1+5 class[2] and received related services of speech and OT. The student also received private services of ABA, speech and language therapy and OT. The student had a myriad of challenges, including deficits in academic achievement, and expressive, receptive and pragmatic language skills. Additionally, the student had many behavioral challenges including verbal perseveration, aggression toward others, non-contextual vocalization and inappropriate sexual and self-injurious behavior.

For 2011-12, the CSE recommended a 12-month, 6:1:1 class in a special school, along with the services of a 1:1 behavior management paraprofessional and related services of OT and speech. The Parents rejected the recommendation on

[2] The SRO noted that the student's class consisted of "four or five additional assistant teachers."

grounds including, but not limited to, that the assigned school lacked an ABA-based program, the class ratio was inappropriate, and the school did not use PROMPT therapy. The IHO held that the district denied FAPE because, among other things, the CSE failed to conduct its own evaluation and instead relied on private evaluations, the 1:1 behaviorist would not have afforded the student sufficient 1:1 instruction, and the CSE erred by failing to discuss appropriate methodology (i.e. ABA) and failing to indicate such methodology in the IEP itself.

SRO'S DECISION:

The SRO considered the parents' assertion that the district's reliance on the parents' private evaluations in lieu of conducting its own assessments denied the student a FAPE. The SRO pointed out that a CSE is not required to use its own evaluations in preparation for developing an IEP, and is not precluded from relying upon privately obtained evaluative information. In addition to reviewing evaluations and reports provided by McCarton, the CSE also considered oral reports regarding the student's current academic and social/emotional functioning, needs and progress. As such, the SRO held that the evidence did not support the parents' assertion that the lack of district evaluations compromised the IEP or denied the student FAPE.[3]

The court reversed the IHO's finding that the CSE's recommendation of a 6:1:1 class, with a 1:1 paraprofessional was inappropriate. The SRO found that the CSE's recommendation was consistent with the student's needs, as identified in the evaluations before the CSE. Further, the SRO concluded that there was nothing in the record to suggest that the student would not be adequately supported by a 1:1 aide. In contrast, while at McCarton, although the student was in a 5:1+4 or 5:1+5 class, the student's daily instruction was provided individually as well as in a group, thus, persuading the SRO that the student did not require 1:1 instruction exclusively in order to receive educational benefits.

As to the parent's argument concerning the appropriate teaching methodology, the SRO noted that generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology is usually a matter to be left to the teacher (*citing* Rowley, 458 U.S. at 204). Nevertheless, the SRO considered the merits of the parent's argument that the assigned school would have been appropriate because it used primarily TEACCH instead of ABA. The SRO concluded that, while the student made progress at McCarton using ABA, there was no evidence that the student could only make progress when instructed using ABA. The SRO wrote,

---

[3] The SRO also noted that, even if the evaluative information available to the CSE was insufficient, this procedural deficiency does not result in a *per se* denial of FAPE. Rather, it must be established that the deficiency impeded the parent's participation in the IEP development or denied the student educational benefits.

> It would be unreasonable to arbitrarily preclude the district from using other strategies that have been used with students with autism especially where, as here, there has been an extended time period since the student was last exposed to any other educational methodology.

Accordingly, the SRO concluded that the district offered FAPE and reversed the IHO's decision.

WHY YOU SHOULD CARE:

To ensure that your SPAMs are accurate and up-to-date, districts must reevaluate a student once a year. Instead of conducting its own evaluation, the CSE may rely on an updated evaluation provided by the parents. In fact, CSEs are obligated to consider any private evaluations or reports provided to it by the parents. 8 NYCRR §200.4(b). However, the CSE is not required to follow all of the recommendations made by the private evaluator. See G.W. v. Rye City School Dist., 2013 WL 1286154, *19 (S.D.N.Y., 2013) (Although the District did not provide the student with Orton–Gillingham instruction as recommended by the private evaluator, the court held that the District was under no obligation to follow her methodology recommendation). However, it should be noted that, if the CSE does not conduct any evaluations, and relies solely on the reports of private evaluators and/or staff from the parental placement, it may have a difficult time explaining why it did not include many of the recommendations made by the outside professionals into the IEP.

It is important to remember that, while teaching methodology is a matter left within the purview of the individual teacher:

> [I]f an IEP states that a specific teaching method will be used to instruct a student, the school district may introduce testimony at the subsequent hearing to describe that teaching method and explain why it was appropriate for the student. The district, however, may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used. See R.E., 694 F.3d at 186-187.

As such, CSEs should err on the side of caution, decline to specify a particular teaching methodology in the IEP and leave this matter to the discretion of the individual teacher. Moreover, it is important to remember that, parents have no right under IDEA to compel a district to provide a specific program or employ a specific strategy, technique or methodology in educating a child (see Ganje v. Depew UFSD, 2012 WL 5473491 [W.D.N.Y., 2012] report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y., 2012]) unless it is identified in the IEP.

***

3. Compensatory Services Aimed at Restoring the Student to the Status Quo.

Application of the Board of Education, Appeal No. 12-183 (Apr. 4, 2013)

SALIENT FACTS:

The CSE initially convened in April 2011 to develop the student's IEP for 2011-12 and recommended a 6:1:1 class in a special school along with related services of speech, OT and adapted physical education. Based upon the parent's concerns regarding the student's perceived lack of progress, she arranged for multiple private evaluations, including a neuropsychological. In June, the CSE reconvened to review the results of the evaluations and maintained the 6:1:1 class size recommendation, but increased the level of related services. The parent rejected the recommendation and unilaterally placed the student in Rebecca. As to the allegations of substantive inadequacies of the IEP, the parent argued that the district failed to consider the private evaluations, failed to document the student's progress and misrepresented his progress. For relief, the parent requested, among other things, reimbursement of tuition and "a compensatory education award for the gross failure to implement the recommendations of the private evaluators" and for missed services. The IHO granted the parent's request and ordered the district to pay Rebecca directly for the 2011-12 tuition.

SRO'S DECISION:

As to the parents' assertion that the district failed to consider the private evaluations, the SRO noted that IDEA does not require that the district follow the private evaluator's recommendations over the opinions of district-staff. Nevertheless, in this case, it was clear that the CSE considered the private evaluations because it increased the level of related services based upon recommendations in the private evaluations.

As to the parent's argument that the student did not make any progress in the district's program during 2010-11, the SRO relied on testimony from district-staff that the student had demonstrated "tremendous progress…and should be able to continue to make progress" if he continued in the district's 6:1:1 class. In the Fall of 2010, the student scored a "1" on the ELA and in the spring of 2011, he scored a "2." Similarly, in the Fall of 2010, he scored a "1" on his Statewide Math Assessment and in the Spring of 2011, he scored a "3." As such, the SRO found that the student made progress in the district's program and rejected the parents' assertion that the district misrepresented his level of progress.

Regarding the IHO's award of additional services, the SRO pointed out that there was no evidence that the student was excluded from school or denied special

education services for any period of time, or that the district failed to properly implement the IEPs - prerequisites to warranting an award of additional services. The SRO cited to Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir., 2005) for the position that, "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." In this case, the SRO found that even if the district violated IDEA, his progress in the District's program as well as Rebecca's program evidenced that the student did not need to be provided with compensatory services in order to make up for any lost progress resulting from the district's FAPE denial.

Regarding the IHO's award of direct payment to Rebecca, the SRO concluded that there was insufficient evidence to prove that the parent was incapable of fronting the costs of Rebecca. Although the mother submitted her 2010 Form 1040 and W-2, she did not put into evidence any information concerning resources available to her other than her income from 2010. The mother asserted that there was no evidence that the father was an active participant in the child's life. However, the father participated in a parent-teacher conference, the CSE meeting, and was listed on the IEP as living at the same address as the mother and student. The SRO declined to find that the parent sufficiently established her entitlement to direct funding. However, because the SRO found that the district denied FAPE, she awarded the parent reimbursement of tuition upon proof of payment to Rebecca.

The SRO wrote:

> Progress, although important to determining whether the program offered by the district was appropriate, is not dispositive of all claims brought under IDEA. The goal of IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible.

The district's failure to appropriately describe or address the student's behavior, sensory, and receptive language needs in the IEP and to provide PC&T collectively denied the student FAPE. However, the SRO concluded that the student's past progress weighed against awarding additional services for the district's possible failure to have provided the student with an appropriate program in the district placement.

WHY YOU SHOULD CARE:

Districts must afford parents an opportunity to participate in the development of the student's IEP. However, mere parental disagreement with the district's proposed IEP does not amount to a denial of meaningful participation. To this end, while the CSE must consider private evaluations presented to it by the parent, the CSE has no obligation to follow the private evaluator's

recommendations over the opinions of district staff. Moreover, "nothing in IDEA requires the parents' consent to finalize the IEP. Instead, [] IDEA only requires that the parents have an opportunity to participate in the drafting process." See D.D.-S v. Southold UFSD., 2011 WL 3919040, at *11 (E.D.N.Y., 2011)

As the SRO explained here: "although a parent may be concerned that her child is making minimal progress in the district's program, IDEA guarantees access to an appropriate program, not specific results" (at 20).

Compensatory education services are awarded if there has been a gross violation of IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time. Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n. 1 (2d Cir., 2008). Generally, compensatory services are awarded to students who are no longer eligible for FAPE by reason of age or graduation. However, these services, may be awarded to a student who continues to be eligible for FAPE if such deprivation cannot be remedied through the provision of additional services before the student becomes ineligible for FAPE. See Application of the Dep't of Educ., Appeal No. 12-135. Compensatory services are intended to place the student in the position he or she would have been had the district complied with IDEA.

SRO's have assigned to the parent seeking direct tuition payment the burden of establishing their inability to pay for the student's private school tuition. See SRO Appeal No. 12-183, at 34 (additional citations omitted). However, where there is no evidence to support the position that the parent is incapable of fronting the costs (e.g. Form 1040, W-2), then the parent may not be eligible for direct payment of tuition.

***

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

Eboné Woods, an associate with Frazer & Feldman, LLP, provided research and assistance.