



ATTORNEY'S CORNER

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A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review a number of federal district court decisions that examine whether a school district provided a free and appropriate public education ("FAPE") to students who were unilaterally placed by their parents in nonpublic schools. One decision found that an individualized education program ("IEP") that did not comply with state regulations did not result in a FAPE denial when considering the programmatic supports that were embedded in the program recommended by the District. Other decisions found that procedural violations, such as failing to conduct a functional behavioral assessment ("FBA") before developing a behavior intervention plan ("BIP") or having a Committee on Special Education ("CSE") without the necessary components, do not arise to a FAPE denial when the IEP adequately addressed the student's needs. It was also found that Parent arguments were speculative when they alleged that the District would not appropriately implement the IEP as written for students who were unilaterally placed and never attended the recommended in-District program.

We also review two SRO decisions. One decision holds that it is permissible for an IEP to provide that related services begin after the first day of school provided that the student will be able to derive meaningful educational benefit from the services. The other SRO decision examines whether a student who was allegedly bullied was eligible for classification for special education services.

Federal District Courts

1. Private Religious School Did Not Adequately Address Student's Special Education Needs.

M.L. v. New York City Dept. of Educ., 2015 WL 1439698 (EDNY, 2015)

SALIENT FACTS:

A student began to receive special education itinerant teacher ("SEIT") services at the age of two and was diagnosed with pervasive developmental disorder at age three. He attended a special education preschool that utilized the principles of applied behavior analysis ("ABA") with additional SEIT and residential habilitation services. The student attended first and second grade during the 2010-2011 and 2011-12 school years, respectively, at the Ha'or Beacon School ("Beacon"), a private special education school for Orthodox Jewish boys that is not approved by the New York State Education Department ("SED"). The student was educated in a 10-month 6:1:1 special class with a 1:1 aide and related services at Beacon. He also received both home- and school-based 1:1 ABA services.

The District's CSE convened in May, 2011 to develop an IEP for the 2011-12 school year. The CSE recommended a 12-month special education program in a 6:1:1 special class and related services. A BIP was also developed. The student's father visited the District's recommended school and notified the District that he was rejecting the placement because the classes were based on student age and not performance level, the placement did not provide sufficient related services, the school did not know where the classroom would be located within the building, the class number on the IEP did not exist, and the unit coordinator at the school could not guarantee that there would be a spot for the student in the upcoming school year. The Parents enrolled the student at Beacon for 2011-12 and requested a due process hearing (pro se), alleging that the CSE had a number of procedural and substantive violations. The Parents requested reimbursement for tuition, costs, and services at Beacon and Camp Chaverim, a special education summer camp, for the 2011-12 school year.

Over the Parents' objection, the IHO found that the CSE was appropriately constituted, considered appropriate information to determine the student's present levels of performance to create an IEP, and the annual and short-term goals were adequate. The IHO further found that the District's proposed program was appropriate, based on the methodology it utilized, including a combination of the Treatment and Education of Autistic and related Communication Handicapped Children ("TEACCH"), ABA, and a multisensory approach. Based on these factors, the IHO found that the District offered FAPE. The IHO continued his analysis and found that the Parents did not meet their burden of establishing that Beacon was an appropriate placement. The Beacon placement was only a 10-month special education program and the evidence indicated that the student required a 12-

month program as per his IEP. Further, the Parents failed to demonstrate how Beacon would meet the student's individual needs and there was insufficient evidence that the student appropriately progressed at Beacon. Further, the IHO found that the equities did not favor the Parents because the record indicated that they were unwilling to consider a public school placement.

The Parents appealed to the SRO who dismissed the appeal. The SRO found that the District offered FAPE because the IEP "was reasonably calculated to provide [the student] with educational benefits." The SRO also found that the Parents failed to demonstrate that Beacon was an appropriate placement.

COURT'S DECISION:

The District Court found that the CSE was procedurally appropriate as it included the Parents and allowed them to adequately participate in the meeting and development of the IEP. Further, the IEP was substantively adequate, as the BIP was created using data regarding antecedents and consequences and the IEP was developed to allow the student to make meaningful academic progress. The Parents argued that the IEP failed to include a transition plan, but the Court found that transition plans are only required on the IEPs of students who are at least 16 years old. Further, the Court rejected the Parents' arguments that the student required a 1:1 aide and that the IEP should have included the specific teaching methodology. Although the IEP did not include parent counseling and training as required by state law, the Court agreed with the SRO's determination that this failure did not rise "to the level of denying FAPE." The Court upheld the SRO's decision and found it to be "well-reasoned, fully supported by the record, and worthy of deference."

WHY YOU SHOULD CARE:

When applying the Burlington Carter analysis, the District has the burden of proof to demonstrate that it has offered FAPE. 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)). If the District fails, the burden shifts to the Parent to prove that the unilateral parental placement is appropriate and the equities favor the Parent. If the District is successful in meeting its FAPE burden, it is unnecessary to determine whether the Parental placement is appropriate or if the equities favor the Parent. However, in this case, the SRO continued with the analysis and determined that, even though the District provided FAPE, the private, religious, non-SED-approved school was not appropriate. This supports the notion that in addition to providing evidence to support an offer of FAPE, Districts should also examine the unilateral parental placement for an indication as to whether it is appropriate to meet the student's special education needs. Further, Parents must demonstrate that they considered the placement offered by the District, rather than rejecting it outright before a recommendation was made by the CSE.

2. Failure To Conduct FBA And Include Parent Counseling And Training On IEP May Not Arise To Denial Of FAPE.

L.O. v. New York City Dept. of Educ., 2015 WL 1344759 (SDNY 2015)

SALIENT FACTS:

A 19-year-old student with autism, pervasive developmental disorder, intellectual disability, obsessive compulsive disorder, mood disorder, asthma, and pica was placed in an in-District 6:1:1 special class and received related services; including counseling, speech, physical therapy, and occupational therapy. In September 2010, the student had a new teacher, began to exhibit self-injurious behaviors and became physically and verbally aggressive toward others at school. By November 2011, the student refused to attend school.

The Parent requested a due process hearing in December 2011 and alleged that the District failed to provide the student with FAPE for 2009, 2010, and 2011. Specifically, the Parent argued that the CSE did not appropriately evaluate the student and that the IEP was inadequate because it did not include: “meaningful and measurable annual goals,” mandated services for students with autism, the instructional methodologies to be used with the student, social skills training, an FBA/BIP, adequate speech/language therapy, and an appropriate transition plan. The Parent alleged further that the inadequate IEP resulted in the student’s increasing behavior problems and the need for a residential placement. The Parent requested updated evaluations, a revised IEP, increased speech/language therapy, a residential placement, and compensatory services.

The IHO found that the District provided FAPE and appropriately implemented the student’s IEP. Specifically, the “CSE had adequate evaluative information” regarding the student’s present levels of performance and used that information to develop the student’s abilities and needs section on his IEP. The annual goals and short-term objectives were related to the student’s educational needs. The IEP did not need to include the instructional methodologies. The transition plan was appropriately described on the student’s IEP and the speech/language therapy recommended was adequate. Although the CSE should have conducted an FBA based on the student’s interfering behaviors, the failure to do so did not arise to a denial of FAPE because the student’s BIP appropriately addressed the student’s behavioral needs. Further, although the IEP did not specifically indicate that the parent would receive parent counseling and training, this did not result in a denial of FAPE, because such services were available at the student’s assigned school.

On appeal, the SRO found that all three IEPs adequately addressed the student’s educational needs. The SRO found that there was sufficient evidence

that the IEPs incorporated recent evaluations into the present levels of performance sections. Further, the goals were specific and appropriately related to the student's identified needs. The IEP also provided sufficient speech/language therapy to the student. Although the CSE did not develop an FBA, "the lack of an FBA does not automatically result in a denial of a FAPE." The SRO found that the IEPs "adequately identified the problem behavior and prescribed ways to manage it." Similarly, although the failure to include parent counseling and training on the IEP was in violation of state regulations, it did not arise to a FAPE denial.

COURT'S DECISION:

The District Court agreed with the SRO and found that the District provided FAPE. Although the IEPs did not conform to state regulations by including an FBA and parent counseling and training, this did not rise to a denial of FAPE. The Court considered the student's actual progress in the program and the services provided by the school that were not specifically provided for on the IEP, but that were delivered programmatically at the school.

WHY YOU SHOULD CARE:

New York State regulations require that Districts must conduct FBAs for students who exhibit problem behaviors that could require a BIP. Further, parent counseling and training must be provided as part of a student's IEP for any students who are classified with autism or who are educated in special classes that have a ratio of 8:1:1 or lower. Here, the student's IEP did not indicate that an FBA was conducted or that parent counseling and training would be provided. Nevertheless, the Court found no denial of FAPE because the CSE properly considered the student's interfering behaviors when developing the BIP and because it provided parent counseling and training programmatically.

This decision differs from previous decisions that indicate that a District can only use the actual IEP to support the special education program that would be offered to the student, rather than retrospective testimony indicating programmatic services that would have been implemented. See R.E. v. New York City Dept. of Educ., 694 F.3d 167 (2d Cir. 2012). Here, the student was actually enrolled in the program and actually received the programmatic services that were not included on the IEP. In R.E., the student was unilaterally placed in a private school by the Parents and did not receive services under the IEP provided by the District. Based on R.E. and subsequent decisions, Districts should not risk the consequences of failing to include all required programs on a student's IEP. As such, all services should be identified on a student's IEP, even if they are "programmatic."

3. Updated Evaluations And Transition Assessment Not Necessarily Required When Developing An IEP.

M.M. ex rel. J.S. v. New York City Dept. of Educ., 2015 WL 1267910 (SDNY 2015)

SALIENT FACTS:

An 18-year-old student with autism attended the Cooke Center for Learning and Development (“Cooke”) during the 2012-13 school year. He began to attend Cooke in 2008. In March 2012, the District’s CSE convened to develop an IEP for the 2012-13 school year. The CSE considered input from Cooke staff and the student’s parent. The District did not conduct the scheduled three-year reevaluation of the student and instead relied on a 2009 evaluation submitted by the Parent. The CSE also did not conduct a vocational assessment of the student. The CSE recommended a 12:1:1 special class in a specialized school and related services. The IEP also included postsecondary transition goals. Staff members from Cooke stated that a 12:1:1 ratio was inappropriate for the student and that he required a smaller special class size. The student was in a class of 12 students at Cooke, but this was taught by two special education teachers, a teacher and an assistant teacher. District staff did not agree with the student’s need for a smaller student-to-teacher ratio.

The Parent rejected the CSE’s recommendation and requested a due process hearing. The Parent alleged that the District did not provide FAPE because it failed to conduct a three-year reevaluation and vocational assessment, it did not recommend an appropriate class placement, and the CSE did not consider an appropriate balance of “academic instruction and vocational training.” The Parent requested tuition reimbursement at Cooke for the school year.

The IHO found that the District offered FAPE. The District was not required to conduct a three-year reevaluation at the time of the meeting because the 2009 evaluation on which it relied was conducted within the three-year statutory period. Further, the 12:1:1 classroom was appropriate and the IEP properly addressed the student’s academic instruction and vocational training needs. The SRO affirmed the IHO’s decision.

COURT’S DECISION:

The Court found that the District’s failure to conduct a reevaluation did not render the IEP to be inappropriate. This is because the CSE had sufficient evaluative information to develop the student’s IEP, including a progress report from Cooke and input from the student’s teachers at Cooke. The Parent also had a sufficient opportunity to participate in the CSE meeting and did not require updated evaluations to do so. The IEP also contained sufficient post-secondary transition goals and the Parent did not require a transition assessment in order to

meaningfully participate in the transition planning for the student. The 12:1:1 placement was “reasonably calculated to meet the student’s educational needs” given his “educational needs, skills, and performance levels.” As such, reimbursement for the Parents was denied.

WHY YOU SHOULD CARE:

Districts must ensure that they have proper information regarding a student’s abilities and needs when developing the student’s IEP. This is especially important when a student is in a unilateral parental placement and District staff do not work directly with the student. A CSE must include input from a variety of sources, including most recent evaluations and input from the student’s Parent and current parentally placed private school teachers, when developing an IEP. This does not necessarily mean that a District must conduct updated evaluations prior to a CSE meeting. Although Districts must conduct a reevaluation every three years, the District has no obligation to conduct updated evaluations prior to the three-year deadline in the absence of a specific request from the Parent or District staff or some indication from the private school staff that new evaluations are warranted.

4. Integrated Co-Teaching Class Appropriate When Student Will Make Meaningful Academic Progress In Least Restrictive Environment.

S.W. v. New York City Dept. of Educ., 2015 WL 1097368 (SDNY 2015)

SALIENT FACTS:

A 12-year-old student was classified with a learning disability based on reading and mathematics disorder diagnoses. The CSE developed an IEP for the student in September 2011 and recommended a general education classroom with Special Education Teacher Services (“SETSS,” a service that is similar to direct consultant teacher), five periods per week in English Language Arts and occupational therapy. The Parents expressed concern to District staff about the student’s academic progress during the 2011-12 school year. The CSE recommended an integrated co-teaching program for the student for 2012-13. The Parents continued to express concern regarding the proposed placement and enrolled the student at the Stephen Gaynor School (“Stephen Gaynor”), a private non-SED-approved school located in New York City. The Parents requested a due process hearing and sought tuition reimbursement.

The IHO found that the IEP was both procedurally and substantively deficient. He found that the CSE was not properly composed, as it did not include

a parent member (i.e., another parent of a child with a disability). Further, he found these portions of the IEP that were based on input from the SETSS teacher lacked credibility because of evidence that the teacher assisted the student with cheating on state examinations. The IHO also found that the CSE predetermined the integrated co-teaching placement recommendation. The IEP was substantively inadequate because an integrated co-teaching class would not adequately address the student's needs in reading, math, attention and processing speed. Rather, the student required a small student-to-teacher ratio. Stephen Gaynor was found to be an appropriate placement and the equities favored the Parents for tuition reimbursement.

On appeal, the SRO reversed the IHO's decision. The SRO disagreed with nearly all of the IHO's determinations, and held that the recommendation was not predetermined, the SETSS teacher's input into the IEP should be given due consideration, and that the recommended placement reflected the least restrictive environment for the student. The SRO found that the District provided FAPE and did not address the appropriateness of Stephen Gaynor or equitable considerations.

COURT'S DECISION:

At the time of the CSE meeting in question, New York State regulations required that a CSE include a parent member. However, the District Court found that the student's stepfather meaningfully participated in the CSE meeting and that the meeting included the student's current service providers. The Court noted that it was "unclear from the hearing record how an additional parent member could have contributed any more knowledge, expertise, or support to the Parents than they already had available to them." The Court found that the lack of a parent member did not result in a FAPE denial. The Court then considered whether the District engaged in predetermination when the District's principal told the stepfather that they were considering an integrated co-teaching classroom prior to the CSE meeting. The Court held that it is permissible for CSE members to have a draft IEP prior to the CSE meeting as long as the IEP is not finalized, and so long as the District will allow the IEP to change at the CSE meeting based on the Parents' participation. Here, the record reflected that District staff considered the Parents' input and different special education placements for the students before making their final recommendation. The draft IEP also included input from the Parents based on information they provided prior to the CSE meeting. As such, there was no predetermination. The Parent argued that the CSE did not consider adequate evaluative information, including a private evaluation submitted by the Parent. The Court held that the CSE only needs to consider private evaluations provided by the Parent, but that there is no requirement for a CSE to adopt the recommendations in such reports. The Court also did not find that the IEP was inadequate because it was developed with the assistance of a teacher who was accused of helping the student cheat on state examinations. This is because the IEP was developed with the input of many teachers and service providers and that

the investigation regarding the teacher's alleged improprieties was not yet completed.

The Court also found that the IEP was substantively adequate. The integrated co-teaching recommendation was appropriate, because it met the student's social needs of being with typical peers, while providing him with adequate academic support. It also allowed the student to be educated in the least restrictive environment. Therefore, the Court upheld the SRO's decision and determined that the District provided the student FAPE.

WHY YOU SHOULD CARE:

A reviewing court will examine an IEP to determine whether it is procedurally and substantively adequate. Procedural violations, such as missing a required CSE member, may not result in a FAPE denial if it does not affect the overall IEP development. Nevertheless, CSEs should always be properly constituted, or a District will find itself arguing before an IHO, the SRO or the courts that the failure to meet with the correct participants did not result in a denial of FAPE. Further, a court will look to all of the student's needs, including academic, social, physical, and management, to determine whether a District's recommended program is appropriate. The court will then determine whether the IEP provides a special education program that meets the student's needs, while educating the student in the least restrictive environment.

5. Parent Assertion That District Would Not Implement IEP As Written Is Speculative If Student Did Not Attend District's Recommended Program.

J.F. v. New York City Dept. of Educ., 2015 WL 892284 (SDNY 2015)

SALIENT FACTS:

An elementary-aged student was classified with a speech or language impairment. During the 2009-2010 school year, the District's CSE approved the student's placement in a non-public school. The Parents unilaterally enrolled the student at the Aaron School, which is not SED-approved. The District reimbursed tuition for that year. In January 2010, the Parents reenrolled the student at the Aaron School for the 2010-11 school year and made an \$8,000 nonrefundable deposit. In June 2010, the CSE met to develop an IEP for the 2010-11 school year. The CSE recommended a 12:1:1 special class in an in-District community school. The Parents expressed their concern regarding this placement at the CSE. In August 2010, the District provided notification to the Parents regarding the proposed school placement for the student. The Parents did not visit the proposed

school until after school started for the 2010-11 school year. The Parents continued the student at Aaron and filed a due process complaint seeking tuition reimbursement.

The IHO found that the Aaron School was an appropriate placement and that the equities favored tuition reimbursement. On appeal, the SRO reversed much of the IHO's decision, but "did not reach any determination regarding the appropriateness of the assigned school" made by the District (presumably because of the Parents' failure to cross-appeal that issue). The SRO therefore did not address whether the District should provide tuition reimbursement. In March 2012, the Parents requested that the District Court determine whether they were entitled to tuition reimbursement. The Court granted summary judgment to the District regarding the adequacy of the student's 2010-11 IEP. However, the Court did not determine whether the District's proposed placement was sufficient because neither the IHO nor the SRO addressed the issue. The case was remanded to the IHO.

The IHO found that the District's placement was not appropriate and awarded tuition reimbursement to the Parents. The SRO determined that the placement was appropriate. The SRO quoted the Second Circuit, which held,

Where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented.¹

Here, the Parents argued that the District would not have adequately implemented the IEP at the District's proposed school. As such, the SRO found that this attack on the proposed placement was "speculative and retrospective...rather than attacking the face of the IEP." The SRO then determined that there was insufficient evidence to decide that the proposed school would not have adequately implemented the student's IEP. The SRO found that the Parents were not entitled to tuition reimbursement.

COURT'S DECISION:

The Parents appealed again to the District Court, which found that the Parents did not make a sufficient argument that the SRO's decision should be reversed. The Court found that the SRO's decision was well-reasoned based on evidence in the record. The Parents also argued that they should be awarded tuition reimbursement based on equitable considerations; however, the Court

¹ *A.M. v. N.Y.C. Dept. of Educ.*, 2013 WL 4056216 (SDNY Aug 9, 2013)

found that this argument was moot as it was already determined that the District offered FAPE. As such, the Court granted summary judgment to the District.

WHY YOU SHOULD CARE:

A district court will not reverse an SRO's decision when it is well-reasoned and based on evidence within the record. This is because an SRO has greater educational expertise than federal district courts. Further, a Parent will not prevail in proving that a District has failed to provide FAPE when the Parent speculates that the District would not implement the IEP as written, but the child has not attended the District's recommended program. Indeed, where the child has not attended the recommended school placement, the Parents' argument is limited to a challenge of the adequacy of the IEP as written. This supports the notion that a CSE must ensure that all recommendations are clearly articulated on each student's IEP. A reviewing body, such as an IHO, SRO, or federal court, will examine the District's IEP as written to determine whether a District has offered FAPE for a child who did not attend the District's recommended program due to the Parents' decision to unilaterally place the child. The Parents will not be entitled to tuition reimbursement if it is determined that the District offered FAPE.

6. Procedural Violations Do Not Rise To FAPE Denial When IEP Adequately Addresses Student's Needs and Abilities.

D.N. v. New York City Dept. of Educ., 2015 WL 925968 (SDNY 2015)

SALIENT FACTS:

A 14-year-old boy with autism had limited verbal skills and presented with sensory issues and self-injurious and aggressive behaviors. He attended the Rebecca School ("Rebecca"), a private school that is not SED-approved, since September 2006 and was placed in an 8:1:3 classroom during the 2010-11 school year. In January 2010, the District's CSE convened and developed an IEP for the 2010-11 school year. The CSE considered input from the student's Parent, staff members at Rebecca, and the most recent evaluations that were conducted for the student from the fall of 2009. The CSE recommended a 12-month in-District program in a 6:1:3 classroom with the support of a 1:1 paraprofessional and related services. The District provided the Parent with notification of the student's school placement in June 2010. The Parent visited the school and notified the District of her intention to unilaterally enroll the student at Rebecca for the 2010-11 school year. The Parent requested a due process hearing and alleged that the District denied the student FAPE.

The IHO held that the District did not provide FAPE on two grounds. First, it was found that the Parent was not able to have meaningful participation in the CSE meeting because District staff determined that it would recommend a 6:1:3 placement prior to the meeting. Second, the proposed placement did not properly address the student's sensory needs, including supplying swings and other sensory equipment. The IHO found that Rebecca was an appropriate placement and ordered the District to provide tuition reimbursement.

On appeal, the SRO reversed the IHO's decision. The SRO found that the District did not predetermine the student's placement and that there was "meaningful and active parental participation in the development of the student's January 2010 IEP and a willingness among the CSE members to consider different program options for the student." The SRO also found that the Parent's objection to the lack of sensory opportunities for the student at the District's school was speculative, as the student never actually attended that school. The Parent appealed the case in federal court and the entire case was remanded to the SRO to consider claims that were not previously addressed. The SRO issued a second decision and found that the District offered FAPE.

COURT'S DECISION:

The Parent again appealed the case to the District Court, which determined that the Parent did not provide a convincing argument to deny deference to the SRO's decision. The Court stated that "a predetermination claim amounts to a challenge to the Parent's opportunity to participate." Here, the Parent had a meaningful opportunity to participate in the CSE meeting and the record reflected that the District considered the Parent's input. Further, although the lack of parent counseling and training on the IEP was a procedural violation, it did not rise to a denial of FAPE. The record also supported the fact that the District offered a notification of placement prior to the start of the school year, and as such, the notification was timely. The Court agreed with the SRO's determination that the failure to develop an FBA did not result in an inappropriate BIP for the student, because the CSE "considered the use of positive behavior interventions and supports, and other strategies." Finally, the District Court determined that the program recommended by the District was appropriate.

WHY YOU SHOULD CARE:

A Parent has the burden of proving that an SRO's decision should not be given deference in federal court. The federal court will determine whether the SRO made its decision based on evidence on the record. It will also determine whether the IEP was procedurally and substantively adequate. The District must demonstrate that it correctly followed the procedures of developing an IEP, including providing the Parent with a meaningful opportunity to participate in the CSE meeting and complying with state regulations. Even where there are findings of procedural violations, the court may determine that they do not deny the student FAPE if they did not result in an inadequate IEP.

Office of State Review

1. Districts Permitted To Have Delayed Start Time For Related Services Provided They Will Allow For A Meaningful Educational Benefit.

Application of a Student with a Disability, Appeal No. 14-110 (2014)

SALIENT FACTS:

During the 2011-12 school year, the District developed an IEP for a student that provided that speech/language therapy would begin on September, 11, 2011; however, the services did not actually begin until September 22, 2011. As a result, the student missed six 30-minute group speech/language therapy sessions. The Parent requested a due process hearing and the SRO dismissed the appeal as there was no evidence that the student was not making progress toward her speech-language goals.

The CSE again developed an IEP for the student for the 2012-13 school year and recommended an integrated co-teaching class and group speech/language therapy. The IEP provided that all services would begin on September 5, 2012, but the speech/language therapy would begin on September 13, 2012. The Parent requested an impartial hearing and alleged that the delayed start time for the speech/language therapy was “the result of the District’s implementing an unlawful policy and/or practice which delays the provision of related services.” The Parent further alleged that this denied the student FAPE “by systematically violating the procedures in the IDEA.” The Parent requested that the District be ordered to “Rescind and discontinue its unlawful policy” and requested compensatory services.

The IHO dismissed the allegations regarding the “District’s alleged unlawful ‘policy and/or practice’” because he did not have jurisdiction to order such relief. The IHO also found that the student was not denied FAPE because speech/language therapy started eight days after the beginning of the school year. This start time of services resulted in three missed sessions and the IHO found that this was a “de minimis” deprivation of services and had little impact on the student’s progress.”

SRO’S DECISION:

The SRO determined whether “the speech-language therapy services contained in the May 2012 IEP, as written, are reasonably calculated to provide some meaningful benefit.” The SRO considered the student’s academic and social

progress in addition to her special education needs, particularly in the areas of speech/language development. The Parent did not present evidence indicating that the student required speech/language therapy to start at the beginning of the school year. The SRO indicated that the student was not in “imminent danger” by having a delayed start time for speech/language therapy and she did not demonstrate substantial regression in her speech/language skills. As such, the SRO found that the student was not denied FAPE.

WHY YOU SHOULD CARE:

School Districts frequently begin related services after the school year begins due to the practical considerations, such as allowing students to become acclimated to their new schedule and teachers and to allow related services providers to finalize their schedules. The regulations do not explicitly prohibit these delayed start times. Based on this case, a student will be denied FAPE if the IEP as written does not allow the student to make a meaningful educational benefit or if the loss of services due to the delayed start resulted in a loss of educational benefit to the student. It is important for Districts to begin special education services on the date specified in the IEP. The District will be in compliance with a delayed start time as long as it is indicated on the IEP and it allows the student to make progress towards his or her goals.

2. Classification Not Warranted For Student Who Was Bullied Absent Evidence Of An Educational Need.

Application of a Student Suspected of Having a Disability, Appeal No. 14-115 (2014)

SALIENT FACTS:

A student attended an in-District general education class from kindergarten through fifth grade. He began to receive academic intervention services (“AIS”) in third grade due to reading difficulties. The Parents reported that the student began to be bullied in school in second grade and this bullying increased in severity over the years. The student was suspended from school in April of fifth grade after drawing violent pictures related to another student. The District and Parents agreed that the student would receive homebound instruction at District expense until a psychiatrist determined that the student could return to school. The Parents requested a CSE evaluation the following summer. The Parents also indicated to the District that they would enroll the student at a nonpublic school for the following school year. The Parents requested that the District pay for this nonpublic school, but the District denied their request because it indicated that the alleged bullying was unsubstantiated. The District conducted the initial evaluation

and the CSE determined that the student was not eligible for classification. The student attended the non-public school during the following school year and the Parent requested a due process hearing, alleging that the “District failed to identify, evaluate, and classify the student as a student with a disability eligible for special education.”

The IHO agreed with the District’s determination that the student did not have a disability requiring special education services. The IHO further stated that bullying is “not a legally recognizable disability, a disabling condition, or a disability under the IDEA.”

SRO’S DECISION:

The Parents appealed to the SRO and stated that the homebound instruction provided at the end of fifth grade did not provide the student with FAPE. The Parents further alleged that the District should have classified the student with either an emotional disturbance or an other health impairment that required special education services. The SRO considered the evaluations and other information used by the CSE in making its decision. The SRO found that the student did not demonstrate behaviors that would support an emotional disturbance classification. This is because the record did not indicate that the student suffered from “a generally pervasive mood of unhappiness or depression.” The student also did not demonstrate “an inability to build or maintain satisfactory interpersonal relationships with peers and teachers.” The evidence indicated that the student enjoyed school and had appropriate friendships with peers. The SRO also determined that the student did not meet eligibility for an other health impairment, because although he demonstrated some symptoms of attention-deficit/hyperactivity disorder (“ADHD”), these symptoms were not severe enough to warrant a classification.

Although the SRO determined that the student did not meet criteria for a special education classification, he continued his analysis in determining whether the student’s alleged difficulties resulted in a negative impact on his academic performance. The SRO found that the student exhibited social-emotional and attentional problems, but that these did not “adversely impact his educational performance.” The student consistently made academic progress as evidence by his report cards. This included both academic courses and the student’s social-emotional development as measured by his report cards. The SRO ruled that the District was correct in determining that the student did not meet eligibility for special education classification. The Parents were denied tuition reimbursement.

WHY YOU SHOULD CARE:

A District must ensure that it conducts thorough evaluations and considers information from a number of sources, including the student’s classroom performance, when determining whether a student meets eligibility for special education classification. Further, a student is not eligible for classification merely

because he or she was the victim of bullying or harassment. A single incident of a student acting-out is not dispositive in determining classification. Rather, a CSE must consider the student's educational performance as a whole, including his or her academic, social-emotional, physical, and/or management abilities and needs

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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.