



**By Jack Feldman**

**MONTH IN REVIEW: May 2015**

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

In this installment of the Attorney's Corner, we review a Second Circuit decision which found that a District risks denying a free appropriate public education ("FAPE"), when it adopts a private school's Individualized Education Program ("IEP") goals without also using the private school's teaching methodology to implement those goals. We also examine several District Court decisions. The Southern District Court found that school districts cannot be compelled to contract directly with private schools that are not approved by the New York State Education Department ("SED"). In another case, the Southern District Court found that a Parent has the burden of proof in demonstrating a FAPE denial based on speculation that the District would not adequately implement the student's IEP. This is without the student ever actually attending the District's recommended program. The Northern District Court found that a Parent is not entitled to pendency tuition at a private school when the most recent due process hearing decision found that the private school was not appropriate. We also review several Office of State Review ("SRO") decisions, including one that found that Parents are entitled to tuition reimbursement under the equitable consideration prong of Burlington/Carter, provided they fully engaged in the CSE process, even if they had no intention of actually sending their child to the District's recommended program.

***Second Circuit Court of Appeals***

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## **1. Adopting Private School's IEP Goals Without Including Its Teaching Methodology Could Lead To FAPE Denial.**

**E.H. v. New York City Dept. of Educ., 2015 WL 2146092 (2d. Cir. 2015)**

### **SALIENT FACTS:**

A ten-year-old student with autism was unilaterally placed at the Rebecca School ("Rebecca"), a non-SED-approved school. In a previous due process hearing, the Parent prevailed in receiving tuition reimbursement due to the District's failure to offer FAPE to the student. The following year, the District created an IEP for the student that included an in-District program using the goals developed by Rebecca. However, Rebecca's goals were designed to be implemented using the "DIR/Floortime" methodology that is utilized by Rebecca. The District's IEP did not specify that this methodology was necessary for implementing the student's program and goals.

The Parent requested a due process hearing and argued that the IEP did not provide FAPE. The impartial hearing officer ("IHO") agreed with the Parent and awarded tuition reimbursement. On appeal, the SRO reversed the IHO's decision and held that the IEP was "sufficient to address the student's demonstrated needs and [was] designed to enable him to make progress." The District Court affirmed the SRO's decision.

### **COURT'S DECISION:**

The Second Circuit vacated the District Court's decision and remanded the issue to the SRO. The Court stated that deference is usually paid to the SRO due to its expertise in educational teaching methodology. However, the Court did not defer in this case because the SRO did not "weigh the evidence about proper teaching methodologies and explain their conclusion." Neither the IHO nor the SRO determined whether DIR/Floortime was the appropriate methodology for implementing the student's IEP goals. As such, the matter was remanded to determine whether FAPE was denied due to the decision to include Rebecca's goals, but not its methodology, on the IEP.

### **WHY YOU SHOULD CARE:**

When developing an IEP, it is important for school districts to consider input from individuals familiar with the student when determining his or her current needs and abilities. This includes input from the student's current teachers and service providers, even if these individuals are not District employees. However, the District is under no obligation to adopt the recommendations provided by individuals who are not District employees. Further, the District must develop an IEP that addresses the student's needs and which can be adequately implemented within the District's recommended program. Adopting a private school's recommendations on an IEP without actually being able to implement

those recommendations or without adopting the private school's methodology could leave the District vulnerable to a claim of denial of FAPE.

## ***Federal District Courts***

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### **1. Districts Cannot Be Compelled To Contract With Private Schools That Are Not SED-Approved.**

**Z.H. v. New York City Dept. of Educ., 2015 WL 3414965 (SDNY 2015)**

#### **SALIENT FACTS:**

A student with autism and Ehlers-Danlos Syndrome (a joint disorder that causes dislocation) demonstrated significant behavioral problems, including elopement, aggression, tantrums and school refusal. The Parent withdrew the student from a program recommended by the District in mid-sixth grade due to her increasingly difficult behaviors. The District provided home instruction while attempting to identify another program for the student. A school placement was not identified for the student at the beginning of the following school year. She began to attend an in-District school in November of that year, but continued to demonstrate severe behavioral difficulties. The District offered the student a private school placement at Woodward, an SED-approved mental health center, but the Parent rejected the placement.

In August of the following year, the Parent requested a due process hearing and alleged that the District denied FAPE due to improper evaluations and classification, inappropriate placements and the failure to allow the Parent to have meaningful participation in developing the student's IEP. The IHO held that the student should be referred to the District's Central Based Support Team ("CBST"), which would "consider all options for the student's placement, including 'non-approved' non-public schools." The SRO reversed the decision regarding the student's placement because the IHO "did not have the authority to direct the [District] to identify a non-approved, non-public school as a potential placement." The SRO stated that the Parent could unilaterally place the student in a non-approved, non-public school and request a due process hearing for tuition reimbursement; however, the District could not be compelled to secure such a placement on its own.

#### **COURT'S DECISION:**

The District Court agreed with the SRO and held that it was inappropriate to direct the District to seek out a non-approved non-public school for the student. Further, although a Parent may receive tuition reimbursement for a non-approved unilateral private school placement due to a denial of FAPE, a District cannot be compelled to actually contract with non-approved schools. Districts must use the

SED-approved schools list when looking for private school placements for students. New York defines an approved private school as:

A private school which conforms with the requirements of Federal and State laws and regulations governing the education of students with disabilities, and which has been approved by the commissioner for the purpose of contracting with public schools for the instruction of students with disabilities.

### **WHY YOU SHOULD CARE:**

Districts are not permitted to apply to and/or enroll students in private schools that are not SED-approved. Rather, a District must use the list of SED-approved schools when applying for non-public placements. A Parent may only receive tuition for a non-approved non-public school at public expense by first enrolling the child in the school and then requesting tuition reimbursement from the District through a due process hearing. However, an exception to a prospective award of tuition occurs when the student has been enrolled in a private school, but the Parents have not made tuition payments due to a lack of financial resources.<sup>1</sup> A District may also agree to reimburse a Parent for non-approved private school tuition in settlement of a potential or actual due process claim of a denial of FAPE. The IHO, SRO or federal court could order a District to reconvene the CSE to include certain programs and services on a student's IEP or to apply to SED-approved non-public schools when it has denied FAPE.

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## **2. Parent Bears The Burden of Proof When Speculating That District Would Not Adequately Implement The Student's IEP.**

**J.S. v. New York City Dept. of Educ., 2015 WL 2167970 (SDNY 2015)**

### **SALIENT FACTS:**

A 15-year-old student diagnosed with Tourette syndrome and generalized anxiety disorder, performed on grade-level in reading and one grade level behind in math. He was unilaterally enrolled by his Parent in the Lang School ("Lang"), a private school that is not SED-approved. Lang enrolled "twice exceptional" students who were "academically promising" and also had a disability or "learning challenge." The student was enrolled in a 10:2 class, which included one special education teacher and one general education teacher. By an agreement between the parties, the District funded the student at Lang during the 2010-11 and 2011-12 school years.

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<sup>1</sup> See Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp 2d 403, 406 (SDNY 2011).

In June 2012, the District convened a CSE meeting to develop the student's IEP for the 2012-13 school year. The CSE considered input from the student's teachers at Lang and recommended an in-District integrated co-teaching class. The Parent stated that the District's integrated co-teaching class with 25 students would be too large for the student and would trigger his anxiety. The Parent requested a special class of 12 students, which was denied by the CSE, as the student was "higher functioning" than the other students in that class. The Parent continued the student at Lang and requested a due process hearing, alleging that the District denied FAPE.

The IHO found the integrated co-teaching class to be appropriate for the student. However, the District failed "to establish that the recommended placement could implement the IEP" because it did not include witnesses at the hearing who were staff members at the recommended school. The IHO found Lang to be appropriate but that the equities only partially favored the Parent, because she "made up her mind prior to the CSE meeting" regarding the student's continued enrollment at Lang. Based upon this predetermination, the Parent was awarded approximately half of the annual tuition at Lang.

The SRO agreed that the integrated co-teaching placement recommended by the District was appropriate. Further, he held that it was speculative to find that the District would not have been able to adequately implement the IEP. Thus, the SRO reversed the IHO's decision, finding that the District offered FAPE and denying the Parent's claim for tuition reimbursement.

### **COURT'S DECISION:**

On appeal, the Parent raised a number of procedural challenges. First, she indicated that the District's staff members were not adequately prepared for the CSE meeting because they were not able to recall the documents they reviewed prior to the meeting when testifying at the hearing. The Court found this argument to lack merit, as the minutes reflected that the CSE conducted a thorough review of all relevant documentation during the meeting. Second, the Parent claimed that the CSE did not consider a psychoeducational evaluation submitted by the Parent. The Court determined that the District committed a procedural error by failing to review the evaluation; however, this did not result in a FAPE denial because the CSE considered a more recent evaluation, in addition to a number of reports submitted by the student's then-current teachers and service providers. Further, the Parent was an active participant in the meeting. Third, the Parent argued that the CSE should have conducted a functional behavioral assessment ("FBA") and developed a behavioral intervention plan ("BIP"). The Court determined that this was not a FAPE denial because the student's anxiety was "not the type of serious conduct that necessitates an FBA." Moreover, even if the student required an FBA, the IEP adequately addressed the student's behavioral and social-emotional needs and negated any FAPE denial.



The Parent made a number of substantive challenges to the IEP. She argued that the integrated co-teaching class would not provide the student with adequate individualized attention. Both the IHO and the SRO found the integrated co-teaching class to be appropriate, and the Court here found their conclusions to be “well-reasoned, persuasive, and worthy of deference.” The IHO and SRO found that the recommended class would meet the student’s social-emotional needs while also providing the least restrictive setting. The Parent also argued that the District offered the integrated co-teaching class only because a class with a smaller student-to-teacher ratio was not available. The Court found that the CSE considered a smaller special class for the student, but rejected this as an option because the student’s cognitive ability and behavioral functioning were at a higher level than the students in the special class. The District demonstrated that it considered the continuum of services and used a logical rationale for recommending the integrated co-teaching program. The Court also observed that the District was “not required to offer [the student] the best possible placement; it was required only to provide him with an appropriate education.” Finally, the Parent argued that the “conditions at the assigned school would have denied [the student] a FAPE.” The Court disagreed with the SRO’s conclusion that this argument should be dismissed as speculative, but held that the Parent had the burden of proving that the proposed building was inappropriate. The Parent argued that the proposed school had too many students who were English Language Learners and that the student’s anxiety would be exacerbated by the “heightened noise level” in the proposed school’s common areas. The Court dismissed this argument due to evidence that the student made progress at Lang, despite evidence that it too was noisy and included students with varied language needs. As such, the Court denied the Parent’s request for tuition reimbursement.

#### **WHY YOU SHOULD CARE:**

The District bears the burden of demonstrating that it offered FAPE when a Parent seeks tuition reimbursement for a unilateral placement. A Parent may argue that even if the IEP provides FAPE, the District will not be able to adequately implement that IEP as written. In such situations, the Parent has the burden of demonstrating that the District would not have been able to adequately implement the IEP. Courts consider these arguments to be speculative because the student never actually attended the proposed placement. The Court will examine the Parent’s argument in deciding whether the District denied FAPE when such arguments are speculative, but the burden is significant.

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### **3. Parents Not Entitled To Pendency When Court Finds Placement Is No Longer Appropriate For Subsequent School Years.**

**A.W. v. Board of Educ. Wallkill Central School Dist., 2015 WL 3397936 (NDNY 2015)**

**SALIENT FACTS:**

In a previous due process hearing, the Parents prevailed and were awarded tuition reimbursement for the unilateral placement of their child with autism. However, although the SRO found that the unilateral placement for the student was appropriate for the 2011-12 school year, he found that it was not appropriate for subsequent school years. The SRO considered three years of educational records to make this determination. In this case, the Parents requested tuition reimbursement for subsequent years for the same placement. The Parents argued that they were entitled to this payment under pendency.

**COURT'S DECISION:**

The Court held that the unilateral private placement was not the pendency placement because the SRO determined that the school was no longer appropriate for the student after his first year of attendance. The Court noted that the "Parents could not 'cling to a discrete portion of a comprehensive decision' to demonstrate their right to reimbursement." The Court examined the totality of the circumstances to determine whether the SRO's original decision established that the private school was the pendent placement. Ultimately, the Court denied the Parents' request for pendency.

**WHY YOU SHOULD CARE:**

A student is entitled to remain in his or her pendent placement (i.e., the last agreed-upon placement) while a matter is in the impartial hearing process. Pendency is either the last agreed-upon placement or the placement deemed appropriate by the most recent final decision made by an IHO, SRO or federal court. However, there are situations where rulings are not entirely in the Parents' or the District's favor. In such situations, pendency is determined based upon whether the previous decision found the most recent placement to be appropriate. If such a placement was not appropriate, pendency reverts back to the last-agreed upon IEP between the parties.

***Office of State Review***

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**1. Transportation Provided At Non-Public School Based On Similarity Of Special Education Services Compared To In-District Program.**

## ***Application of a School District, Appeal No. 14-154 (2014)***

### **SALIENT FACTS:**

A student was unilaterally placed at a non-public school during the 2013-14 school year. In May 2014, the District's CSE convened to develop the student's Individualized Education Services Plan ("IESP") for the 2014-15 school year. The student was classified with deafness and the CSE recommended two 30 minute sessions of hearing services per week in addition to various program modifications and accommodations. The non-public school was located within the District's geographic boundaries prior to the 2014-15 school year and the District provided transportation. The nonpublic school moved outside of the District for the 2014-15 school year and the District denied the Parent's request for transportation. The District argued that the school was more than 15 miles from the student's home and that the student was not entitled to special transportation because she did not attend the non-public school to receive special education services.

The IHO held that the student was entitled to receive transportation services pursuant to Education Law §4402(4)(d). The student had a disability, the non-public school was located within 50 miles of the student's home, and the student received special education services at the non-public school similar to those she would have received if she attended the District's program.

### **SRO'S DECISION:**

The SRO examined whether the student attended the non-public school for purposes of receiving special education programs and services that were similar to those recommended by the CSE. The District argued that the student did not attend the non-public school for this reason, as it was not a school that specialized in providing special education services. Moreover, the District reasoned that any services the student did receive were delivered pursuant to an IESP. The SRO found that the student received special education services at the non-public school in the form of hearing services and the extensive program modifications that were implemented by her teacher on a regular basis. The modifications included copies of class notes, repetition, verbal cues and checks for understanding. The District did not recommend a more restrictive program, such as integrated co-teaching or a special class, when determining the student's special education service needs. The District also did not argue that such program would need to be implemented within a District program to provide the student with FAPE. As such, the SRO upheld the IHO's decision, finding that the student received special education services through the IESP at the non-public school similar to those she would have received in an in-District program.

### **WHY YOU SHOULD CARE:**

Education Law §4402(4)(d) allows non-public students to receive District transportation if the non-public school is located within 50 miles of the student's



home and if the student attends that school “for the purpose of receiving services or programs similar to special education programs recommended” by the CSE. This case indicates that a student does not need to attend a school that provides special education services as part of its regular program in order for a student to qualify for transportation services. Rather, a District’s obligation to provide transportation will depend on whether the student receives services at the non-public school which are similar to what he or she would have received at an in-District program. Districts are required to provide transportation when the two programs are similar.

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## **2. Equitable Considerations Favor the Parents Provided That They Cooperate With The CSE Process.**

### ***Application of a Student with a Disability, Appeal No. 14-129 (2014)***

#### **SALIENT FACTS:**

The District’s CSE convened in April 2013 to develop an IEP for the 2013-14 school year. The CSE found the student eligible for special education services due to a speech or language impairment and recommended an in-District 12:1:1 special class with related services. In August 2013, the Parents informed the District of their intention to enroll the student at Gan Yisroel, a private school that is not SED-approved. The Parent requested a due process hearing, alleging that the District denied FAPE.

The IHO found that the District failed to offer FAPE and that Gan Yisroel was an appropriate unilateral placement. However, the IHO denied the Parents’ request for tuition reimbursement, finding that equitable considerations did not weigh in their favor. The IHO ruled the Parents “never intended” to place the student in public school, as the student attended Gan Yisroel in previous years and the Parents never visited the proposed in-District placement.

#### **SRO’S DECISION:**

On appeal, the District conceded that it did not offer the student a FAPE. The SRO determined that Gan Yisroel was an appropriate placement because it provided the student with an appropriate functional grouping, the teachers were adequately qualified and it provided the student with individualized instruction designed to meet the student’s special education needs. Further, evidence submitted by the Parents indicated that the student made progress at Gan Yisroel.

The SRO reversed the IHO’s determination that equitable considerations did not favor the Parents because there was “no indication that the Parents engaged in conduct to obstruct the CSE process or its ability to provide the student with a FAPE.” The SRO also quoted a recent Second Circuit opinion that stated

that equitable considerations favored the Parents even if they did not intend to enroll the student in the District's program, provided that the Parents fully cooperated with the CSE process. As such, the SRO awarded tuition reimbursement to the Parents, but reduced tuition by 9% to account for religious instruction that is part of Gan Yisroel's program.

#### **WHY YOU SHOULD CARE:**

When conducting a Burlington/Carter analysis, the District must first demonstrate that it provided the student with a FAPE. If the District fails to demonstrate this, the burden shifts to the Parent to prove that the unilateral placement appropriately meets the student's needs and that equitable considerations favor the Parent. It is unusual for a case to hinge on the equitable consideration issue. Here, the SRO rejected the notion of predetermination based upon the Parents' cooperation, including attending and participating in the CSE meetings, when developing the IEP.

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### **3. Procedural Violations May Not Rise To A FAPE Denial When IEP Adequately Addresses Student Needs.**

#### ***Application of a Student with a Disability, Appeal No. 14-041 (2015)***

#### **SALIENT FACTS:**

The CSE recommended an in-District special education program for a student for the 2013-14 school year. The program included integrated co-teaching services with a 1:1 paraprofessional. The Parent notified the District of his disagreement with the recommendation and his intention to continue the student's most recent special education program, including 25 hours per week of 1:1 special education itinerant teacher ("SEIT") services in the home. The student was unilaterally placed in the same parochial school he attended the previous school year. The Parent requested reimbursement for the special education services through a due process hearing.

The IHO found that the District failed to offer FAPE, but found that only 10 hours per week of 1:1 SEIT services were appropriate. This is because five hours per day was "overly restrictive." As such, the IHO awarded reimbursement for 10 hours of 1:1 SEIT services for a 12 month program.

#### **SRO'S DECISION:**

Both the Parent and the District appealed the IHO's decision. The SRO found that the District offered FAPE. Although the CSE should have conducted an FBA/BIP, the IEP adequately addressed the student's social-emotional and

behavioral needs. The CSE also appropriately reviewed the evaluative information and updated reports, including input from the student's then-current classroom teacher, when developing the IEP. The recommended IEP goals were also appropriate. Further, the recommended program adequately addressed the student's needs, and there was no indication that the student required a continuation of SEIT services. The integrated co-teaching class would provide the student with appropriate peer models in the least restrictive environment. However, there was no indication that the student required a 12-month program, and the District's 10-month recommendation was appropriate. As such, the SRO reversed the IHO's decision and denied the Parent's request for reimbursement.

### **WHY YOU SHOULD CARE:**

A School District must design a special education program that addresses the student's abilities and needs. Although the CSE must take the Parent's concerns into account, it has no obligation to actually adopt the program requested by the Parent. An IHO, SRO or district court may find that procedural violations, such as failing to conduct an FBA/BIP, do not result in a FAPE denial when the IEP adequately addresses the student's needs. However, best practice mandates that Districts should develop IEPs that are both procedurally and substantively adequate. If behaviors are interfering, conduct an FBA and develop a BIP. If the student needs related services, make sure they are in the IEP with appropriate, measurable goals. Follow the rules for developing a bulletproof IEP and do not leave things to fate or your lawyer's good fortune.

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

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

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