



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 two decisions of the Second Circuit Court of Appeals, and two decisions from the Federal District Court in the Southern District of New York. Each of these decisions explores the importance of fully documenting the information contained in a student's IEP, including all sources of information – whether from an evaluation, report, or participant – and why it is critical to follow the meeting with well-written prior written notice letters.

The Second Circuit Court of Appeals recently issued two decisions illustrating the line where the Court ceases to defer to the specialized knowledge and expertise of the SRO and impartial hearing officers. In one instance, the Second Circuit overturned both administrative levels of review and a district court judge to find an autistic student was denied FAPE over multiple years. In the other, the Second Circuit upheld an SRO's refusal to consider the testimony from a student's unilateral placement teacher as to whether the IEP at issue offered FAPE. We look at a District Court decision which finds a school district's extensive documentation showing student progress and achievement under a 504 Plan sufficient to defeat an IDEA child find claim and a request for compensatory education and tuition reimbursement. In a second decision, the Southern District of New York clarified what postsecondary transition plans should contain, and how that information should be integrated into an IEP.

Second Circuit Court of Appeals

I. Failure to Include Evaluative Information in IEP Leads to a Collapsing House of Cards, Calling Into Question Each of the CSE's Recommendations.

***L.O. v. New York City Dep't of Educ.*, --- Fed.Appx. --- , No. 15-1019 (2d Cir 2016)**

SALIENT FACTS:

A student classified as autistic with a host of additional issues including pica (specifically, eating staples), asthma, and a mood disorder, had attended a 6:1:1 public school special classroom setting along with a host of related services since preschool. In December 2009, the CSE held an annual review for the 2009-2010 school year (with services to run from December 2009 to December 2010). The CSE recommended that the student – then aged 14 – receive a 12-month program similar to the one the student had previously received, be alternately assessed, and have speech and language therapy twice per week in a group of three, physical therapy, and occupational therapy. The CSE discontinued the student's counseling services. The 2009-10 IEP also included a behavior intervention plan ("BIP") and transition planning. The CSE did not conduct a functional behavior assessment ("FBA").

The following December, the CSE reconvened to develop an IEP for the 2010-11 school year. The IEP was identical to the prior year's plan but with updated goals and short-term objectives. Thereafter, the parent sought a reevaluation. The CSE convened March 2011 to consider the test results, but the student's IEP remained unchanged. While the IEP's comments section reflected that a new BIP had been developed, the body of the IEP reflected no new behavior plan information. The student continued to attend the recommended program, but began refusing to attend school in November 2011.

In December 2011, the parent filed a due process request alleging FAPE violations for the 2009-10, 2010-11, and 2010-11 school years and seeking either a residential placement or compensatory education as relief.

ADMINISTRATIVE DETERMINATIONS:

The Impartial Hearing Officer ("IHO") conducted a five-day hearing to consider the parent's specific claims that 1) the IEPs at issue failed to reflect reliance on evaluations or assessments; 2) the BIPs created for the student were crafted without an underlying FBA and led to the student's school refusal; 3) the district failed to provide appropriate speech and language therapy; 4) the goals and

short-term objectives were inappropriate for the student; and 5) the IEPs at issue failed to offer the parent counseling and training as a related service. The IHO dismissed the parent's claims. The parent appealed the IHO's decision to the State Review Officer ("SRO") who affirmed the IHO's decision. The SRO held that, while the district made a number of procedural violations in developing the student's IEP – such as failing to conduct an FBA or offer parent counseling and training – the procedural violations did not constitute a failure to offer FAPE.

DISTRICT COURT'S DECISION:

The parent appealed the SRO's decision to the Southern District of New York. Affirming the SRO's decision, the district court held that the BIPs included in each IEP were sufficient to address the student's behavior notwithstanding the absence of an FBA; the IEPs at issue were consistent with the evaluative materials available to the CSE at the time, despite not being reflected in the student's education plans; and the recent amendments to the Commissioner's regulations no longer required daily language instruction and therefore the therapy levels recommended were appropriate. The district court also found that the CSE's failure to recommend parent counseling and training did not reach the level of a FAPE violation. However, the district court did find that the CSE failed to 1) recommend any physical or occupational therapy goals for the student in the December 2010 IEP, or 2) indicate progress reporting frequency in the March 2011 IEP. In considering the cumulative effect of these violations, the district court found that FAPE was offered to the student for the years in question.

COURT OF APPEALS' DECISION:

The Second Circuit reversed the district court's decision, remanding the case back to the district court to fashion appropriate relief. In considering the extent school districts must include evaluative data in a student's IEP, the Court held that not only must evaluations and reports be available to the CSE, but the committee must actually consider them in fashioning an IEP. The Court noted that the student's special education teacher testified at the underlying impartial hearing that she could not recall whether the CSE reviewed any of the student's evaluative materials or whether the committee engaged in a discussion regarding the student's "skills or functioning." While affirming the SRO's determination that, standing alone, this procedural failure did not rise to the level of a FAPE violation, the Court held that, at the very least, the failure to consider evaluative materials "constituted a serious violation of the procedures of the IDEA in this case." *L.O.* at pg. 22.

Turning to the absence of an FBA, the Court reviewed the hearing record and found that the providers were wholly unaware of the antecedents of the student's interfering behaviors, and that such behaviors worsened over the years in question. Additionally, the Court noted that the March 2011 IEP contained no BIP whatsoever, but declined to consider whether the student's school refusal was

related to the BIP's absence, because the student ceased attending school eight months after the IEP was developed.

The Circuit Court acknowledged the district court's interpretation of the Commissioner's Regulations regarding speech therapy; however, the Court held that the school district failed to individualize its recommendations for the student, and that the CSE failed to discuss the student's failure to make progress in speech and language therapy during the December 2010 and March 2011 CSE meetings.

Concerning the student's goals, the Court affirmed the SRO's determination that the errors in the various IEPs – unexplained omission of OT goals; failure to indicate the frequency at which progress was to be reported; or an absence of goals addressing the student's pica – did not deprive the student of FAPE. Similarly, the Court deferred to the SRO's finding that the parent failed to explain how the omission of parent counseling and training deprived the student of FAPE.

WHY YOU SHOULD CARE:

It is very rare for the IHO, the SRO and a district court judge to be reversed on appeal. Typically, federal courts defer to administrative finders of fact unless there is a clear error of law.

Here, the error appears to be one of IEP construction: the Second Circuit found that the CSE's failure to demonstrate what evaluations the committee relied upon to reach its recommendation and the absence of such information from the IEP led the Court to doubt every recommendation made in the IEP. The Court stated that "this violation calls into question whether...the other errors in the IEPs were a result of oversight[,] because the CSE failed to review any of the evaluative materials available to it[,] or a result of a deliberate decision on the part of the CSE based on its specialized knowledge and educational expertise." (*L.O.* at pg. 21.) With this one error, the Circuit Court elected not to defer to the IHO and SRO on educational policy matters, which is, as discussed in the following case review, routinely relied upon by the judiciary.

To avoid this from happening, CSEs should document in the IEP each and every source of information: evaluations – including test results, observations, progress reports, and anecdotes. The contents of these sources should inform and populate the student's present levels of performance and needs. A measurable goal must be drafted to address each need. It is recommended that minutes be maintained and that you highlight all of the things you did right at the meeting, including evaluations reviewed, opportunities for parent participation, the fact that goals were reviewed individually, confirming that phone participants had copies of documents reviewed, etc.

The Court refused to consider testimony alleging that additional speech and language therapy was offered to the student in the classroom as impermissibly

retrospective; instead, such services should have been reflected in the IEP. It was irrelevant to the Court that the additional services appeared to be programmatic to the student's setting. When the CSE is considering a specific program, the IEP should include a description of the unique features of that program. This ensures that the IEP reflects how the CSE considered the individual needs of the child in making the recommendation, and that the district will get credit for providing "programmatic" services – such as speech and language instruction – should the IEP ever be challenged.

II. Contradictory Evidence Does Not Warrant Reversing Administrative Finders of Fact.

J.S., L.S., o/b/o D.S. v. New York City Dept. of Educ., 15-1827-cv, 116 LRP 18304 (2d Cir. May 4, 2016)

SALIENT FACTS:

An eighth-grade student with severe anxiety which impacted his learning had been receiving services in an integrated co-teaching ("ICT") setting. The parents disagreed with the IEP program and unilaterally placed the student. At the annual review following the unilateral placement, the parents invited the student's teacher from the private school, who advised the committee that the student needed more individualized instruction than could be offered in an ICT setting. The CSE recommended that the student continue to be educated in the ICT program, and the parents filed for due process.

ADMINISTRATIVE DETERMINATIONS AND DISTRICT COURT REVIEW:

At the hearing, the district presented its CSE witnesses, and the parents offered the testimony of the private school teacher and the results of an independent educational evaluation ("IEE") performed after the CSE met. In weighing the evidence, the IHO found that the district had met its burden of demonstrating that the student was offered FAPE. The parents appealed. The SRO affirmed the IHO's decision, finding that the private school witness failed to offer an opinion at the CSE as to whether the ICT program was appropriate. The SRO found that, overall, the weight of the evidence supported a finding that FAPE was offered in light of the student's needs and based on the information available to the committee at the time it made its recommendation. The matter was appealed, the District Court affirmed, and deferred to the decisions of the SRO and the IHO.

COURT OF APPEALS' DECISION:

On appeal to the Second Circuit Court of Appeals, the parents presented the question as to whether the SRO's decision should be given deference because the

SRO failed to consider the testimony of two additional witnesses who did not attend the CSE at issue, failed to give sufficient weight to the opinion of the student’s private school teacher, and failed to consider the results of the post-CSE IEE. The Court dismissed the parents’ claims.

In reviewing the hearing record and the SRO’s decision, the Court found that the SRO analyzed the testimony of all the witnesses who testified at hearing. Noting that the district and parental witnesses disagreed, the Court found that the SRO properly exercised its discretion in giving more weight to the testimony of the district’s witnesses. The Court ruled that while the SRO did not review the results of the IEE in the portion of the decision relating the appropriateness of the IEP, the SRO did review those results in discussing the student’s behavioral issues. Overall, the Court found the SRO’s decision to be well-reasoned and entitled to deference.

In distilling the parties’ dispute, the Court reasoned that the question of whether the student had made more than trivial progress in the ICT setting was exactly the sort of educational policy question on which the administrative finders of fact were entitled to deference. Instead of ignoring testimony, the Court found that the SRO grappled with conflicting testimony and assigned due weight based on the record as a whole.

WHY YOU SHOULD CARE:

This case illustrates the general trend of deference to the administrative finders of fact – the IHO and the SRO – on educational policy matters. Moreover, it describes the underlying difficulty CSEs have when presented with conflicting information regarding a student’s needs and abilities. The CSE Chairperson is the first stage of “grappling with conflicting evidence” because district teachers and evaluators and private evaluators and providers often have different opinions regarding a student’s needs. The Chairperson must balance the requirements of meaningful participation – by considering the parents’ and their invited participants’ input – with the obligation to ensure that the IEP appropriately reflects the student. Documenting each participant’s input in the IEP shows that the CSE considered the information, and is one more reason that complete CSE minutes and well-documented prior written notice letters (“PWNs”) are so important.

Federal District Courts

I. Documentation of Progress under 504 Plan Sufficient to Defeat Subsequent IDEA Child-Find Claim.

R.E. v. Brewster Central Sch. Dist., 67 IDELR 214, 15 Civ 04562 (RMB)(SDNY 2016)

SALIENT FACTS:

A student was diagnosed with Tourette's Syndrome in the Spring of 2010, and the district developed a 504 accommodation plan providing modified homework assignments, testing accommodations, preferential seating, and time to visit the nurse's office to "release tics" on an as-needed basis. The student was diagnosed with ADHD and OCD in November 2011, resulting in the parents making a referral to the CSE. The Committee met in January 2012, classifying the student as other health impaired and recommending an ICT program with speech and language therapy. The student's Tourette's symptoms worsened over the Spring of the 2012-13 school year, and the student began attending less and less school each day. By June 2013, the district began supplying home tutoring to the student. That summer, the parents notified the district that the student would be unilaterally placed at the Eagle Hill School ("Eagle Hill") for the 2013-14 school year.

In September 2013, the CSE reconvened to review the student's health needs following home instruction. Based on parental reports that the student had an adverse reaction to medication intended to control the student's Tourette's symptoms but had undergone positive adjustment to a new medical regimen, the committee recommended that the student continue to receive services in the ICT setting. The parents filed for an impartial hearing, alleging the district failed in its child find duties for the 2011-12 school year, failed to offer FAPE for the 2012-13 school year by failing to implement the student's IEP, and failed to offer an appropriate program for the 2013-14 school year. The parents sought tuition reimbursement for the student's attendance at Eagle Hill and compensatory education for the deprivations over the 2011-12 and 2012-13 school years.

ADMINISTRATIVE DETERMINATIONS:

After a seven-day hearing, the IHO dismissed the parents' claims. The IHO found that the student had continued to do well in school under his 504 plan as evidenced by his passing grades, state assessment results, and standardized test scores. Furthermore, the IHO found that the student had made progress during the 2012-13 school year in the ICT setting until the student had an adverse reaction to a new medication. The IHO found that the drug reaction, rather than the offered program, impeded the student's ability to benefit from the ICT program and attend school. Moreover, the IHO held that the IEP for the 2013-14 school year was reasonably calculated to confer educational benefit on the student, and was appropriate after the student had demonstrated an ability to progress in the same ICT setting in the previous school year.

The parents immediately appealed the IHO's decision to the SRO, who affirmed each and every finding and dismissed the parents' claims. The parents' appealed the SRO's decision to the Southern District of New York.

COURT'S DECISION:

The Court affirmed the decisions of the IHO and the SRO in their entirety, dismissing the parents' appeal. Regarding the parents' child find claim for the 2011-12 school year, the Court found there was no evidence that the student's grades and school performance was suffering after the implementation of the 504 plan. The Court put great weight on the testimony of the student's private evaluator who wrote that, some months after the initiation of the 504 plan, the student's reading, math, and writing abilities were consistently average compared to same-aged peers. In addition, the testimony of the student's mother indicated that the student was doing well in class during the Fall of 2011. Last, the Court found that objective measures of the student's abilities, including his consistently high grades and meeting the proficiency standards of the New York State Testing Program, indicated that the district had no reason to suspect during the course of the 2011-12 school year, and prior to the parents' referral, that the student required special education services under the IDEA.

Regarding the 2012-13 school year, the Court rejected the parents' argument that the student's regression was caused by the district's failure to implement the student's IEP, including 1) inconsistent provision of consultant teacher services; 2) failure to offer accommodations such as tests read aloud or checking for understanding; or 3) inconsistent provision of mandated speech and language services. The Court found that there was no evidence in the record of regression; instead, the student suffered a reaction to a medication change which impacted his ability to attend school. The student's response to the medication similarly impacted his ability to attend related services. The Court held that, to the extent the district did not follow the IEP "to the letter," IEP services were not provided in the Spring of 2013, was excusable under the circumstances. Furthermore, the Court found that the district provided services consistent with the IEP, and responded to the parents' concerns throughout the year to make on the fly adjustments, such as in the manner accommodations were offered, or shifting the provision of consultant teacher services to a different setting (such as during science labs which were not mandated by the IEP).

The Court held that the student's evidence of progress, along with the information that the student had stabilized to a new medication change over the Summer of 2013, supported the finding that the 2013-14 IEP was appropriate. The Court relied on later testing conducted by Eagle Hill – and not considered by the CSE – to show that the student had not regressed in reading or other skills at the start of the student's attendance at Eagle Hill.

WHY YOU SHOULD CARE:

A district must document everything. Here, the district was able to show through contemporaneous records how it responded to each of the parents' requests throughout the school years at issue. For example, the district documented that the parents asked the teacher to stop reading tests aloud to the class, and instead read the test alone to the student question by question, along with the teacher implementing the parents' request. Similarly, the district's 504 Plan reflected the parents' comments and concerns, which included how pleased the parents were with the district's rapid response to their 504 request and how the teachers had gone "above and beyond" to accommodate the student. Memories are short. Documentation serves to reflect the extent parents participate in the special education process, and also as an excellent memory aid to assist CSE participants to recall exactly what happened – be it three months or three years ago.

This case also serves as a reminder that while a student may be entitled to 504 accommodations, that does not immediately mean the student requires an IEP. For Section 504 of the Rehabilitation Act, a child whose disability "substantially" limits his ability to learn and participate in the general education classroom, requires the removal of barriers to support his or her educational experience, in a manner comparable to the education provided to students without disabilities. IDEA seeks to address the unique, individual needs of the child and offer FAPE. Section 504 levels the playing field to provide equal access. The IDEA specifically addresses the individual needs of a student required to benefit from education.

II. Underlying Parental Agreement to the General Idea of a Student's Postsecondary Transition Goals Saves an Otherwise Indefensible Transition Plan.

J.M. v. New York City Dep't of Educ., --- F.Supp.3d ---, 2016 WL 1092688 (VEC)(SDNY 2016)

SALIENT FACTS:

A student diagnosed with a pervasive developmental disorder had been unilaterally placed for a number of years at the Rebecca School ("Rebecca"), a day placement, with a very low student-teacher ratio, utilizing a Floortime/DIR – Developmental, Individual-difference, Relationship-based – methodology. The CSE met for the student's 2011-12 annual review. Staff from the Rebecca School participated and assisted in developing activities of daily living skills goals and discussed the student's post-high school transition goals at length. The CSE recommended a special class program with a host of related services, along with

transition planning that included goals to support the student's 1) integrating into the community independently; 2) exploration of VESID services; 3) independent living; and 4) search for employment in the student's area of interest. The CSE participants at the time agreed that the transition plan was appropriate for the student.

Following the CSE meeting, the district placed the student at the Hungerford School ("Hungerford"), a public school program. The parents toured the facilities, learning that Hungerford was a small program with approximately 60 classified students situated in a larger school building with a total population of 1500 students. The cafeteria is shared by all students in the building, but Hungerford maintains a separate dining room for students who find the integrated cafeteria too stimulating. Following the parents' tour, they rejected the CSE's recommendation for the 2011-12 school year, provided notice that the student would continue at Rebecca, and filed a request for an impartial hearing.

ADMINISTRATIVE DETERMINATIONS AND FEDERAL APPEAL:

The IHO found that the 2011-12 IEP was inappropriate for reasons other than the placement at Hungerford and issues surrounding transition planning, and awarded the parents tuition reimbursement at Rebecca. The district appealed to the SRO, who reversed the IHO's decision. On appeal to the Southern District of New York, the district court judge affirmed the SRO's determination, and found that Hungerford was capable of implementing the IEP. However, the court remanded the matter back to the IHO to make specific findings on transition and other issues not addressed in either the IHO's or SRO's decisions.

ADMINISTRATIVE DETERMINATIONS – ROUND TWO:

On remand to the IHO, no additional hearing dates were held; instead, the parties briefed the outstanding issues and the IHO issued a second decision on the papers. The IHO found that the transition plan was fatally vague to the extent that it denied the student FAPE. The IHO also considered a number of the parents' objections to Hungerford, finding that Hungerford was inappropriate because 1) it was too large; 2) the bells and the cafeteria noise was inappropriate in light of the student's auditory processing issues; and 3) the alternate dining room was too restrictive.

The district appealed to the SRO who reversed the IHO's decision. Concerning transition services and measurable postsecondary goals, the SRO found that the IEP's transition plan did not comport with the procedural requirements of IDEA. Nonetheless, the SRO found that, in reviewing the IEP as a whole, the student's transition needs were properly addressed. In particular, the SRO found that the IEP's goals and short-term objectives were aligned with the transition needs of the student. Regarding placement, the SRO held that the parents' challenges to Hungerford were impermissibly speculative and barred as a

matter of law. The parents appealed the SRO's decision back to the District Court of the Southern District of New York.

COURT'S DECISION:

Before a different district court judge the second time around, the court affirmed the SRO's decision and dismissed the parents' claim. At the outset, the court agreed that the transition plan was "plainly inadequate" under the regulations; however, the court could find no explanation as to how the inadequacy resulted in a denial of FAPE. The court noted that the transition plan included four postsecondary transition goals which were aligned with the goals the parents had for the student. The court also found that the goals and short-term objectives in the IEP supported the underlying skills which would assist the student in making progress towards achieving those transition goals.

Regarding the Hungerford placement, the court dismissed each of the parents' arguments. The court found that it was irrelevant whether Hungerford – or the building in which it was housed – was too large, as the issue had nothing to do with whether the placement could implement the IEP. Furthermore, the court found that the remaining issues raised by the parents had not been included in their initial impartial hearing request, but had been raised by the IHO on remand of the IHO's own volition. The court dismissed those claims as having been waived.

WHY YOU SHOULD CARE:

This case demonstrates the importance of parental participation in developing an IEP. Here, the CSE made almost every mistake possible in addressing the student's transition needs: the goals were overbroad and immeasurable, no services were offered, and no plan was developed to assist the student in meeting the transition goals. Notwithstanding these errors, the transition goals that *were* included in the IEP were the result of a lengthy discussion with the parents and the private school staff. A discussion that resulted in agreement by the parties. CSEs should, of course, follow the regulations when developing an IEP. But this is an imperfect process; mistakes happen and things are missed. An approach that seeks to promote parental participation consistently leads to more defensible results.

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