



# ATTORNEY'S CORNER

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**MONTH IN REVIEW: November 2014**

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

In this installment of the Attorney's Corner, we review a decision from the Second Circuit that affirms the propositions stating that a CSE is not required to conduct updated evaluations or identify a Parent's preference for teaching methodology on a student's IEP. Rather, as long as evaluations fall within the three year reevaluation period and absent a specific request for updated evaluations from Parents or District staff, CSEs may use available information to develop a student's IEP.

We also review several Office of State Review ("SRO") decisions. In one decision, the SRO determined that the amount of reimbursement to be awarded to Parents for ABA services is based on what the Parents can demonstrate is "appropriate" rather than what is "necessary." In another decision, the SRO discussed the limitations in awards it may provide. An IHO or SRO may not order the immediate enrollment of a student in a New York State Education Department ("SED")-approved non-public school. Rather, it may award compensatory services and order the development of an IEP.

***Second Circuit Court of Appeals***

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## **1. District Did Not Deny FAPE When CSE Did Not Conduct Updated Evaluations And IEP Did Not Specify Teaching Methodology.**

**R.B. v. New York City Dept. of Educ., 2014 WL 5463084 (2d. Cir., 2014)**

### **SALIENT FACTS:**

A 12-year-old child with autism was educated in a 6:1:1 special class and received related services at the Rebecca School (“Rebecca”). Rebecca is a private school that is not approved by SED for placement by public school CSEs. The CSE recommended a 6:1:1 special class in an in-District program for the following school year. The Parents rejected the District’s recommendation and unilaterally enrolled the child in Rebecca.

The Parents requested a due process hearing and sought tuition reimbursement. They argued that the CSE erroneously failed to conduct updated evaluations regarding the student’s current abilities and needs. The Parents also claimed that the IEP was inadequate because it did not explicitly recommend the Development, Individual-Difference, Relationship-Based Model methodology for the student. The Parents’ expert witness, a private psychologist, testified that the District’s 6:1:1 program was not appropriate because it included other students with more emotional and behavioral difficulties than the student. The witness did not observe the specific classroom where the child was to be placed; the witness based his opinion on observations conducted of other children in other 6:1:1 District programs.

The IHO found that the District failed to provide the student with FAPE and awarded tuition reimbursement. The basis of this decision was the testimony provided by the Parent’s expert witness. The SRO reversed and the district court affirmed the SRO’s decision.

### **COURT’S DECISION:**

The Circuit Court affirmed the district court’s decision. It held that the record did not clearly indicate whether the student was due for a reevaluation. However, the IEP stated that the meeting was an annual review and the Parents did not contest the purpose of the meeting either before or during the meeting. The Parents and/or District staff could have rescheduled the annual review CSE meeting if either party believed updated evaluations were necessary. As such, the Court concluded that the District was not required to conduct updated evaluations and that the review of records by the CSE and gathering of information from individuals who were familiar with the child (e.g., Parents and teachers) was sufficient to prepare the child’s IEP. Further, the specific methodology requested by the Parents was not required to be on the IEP. The Parents did not provide evidence that this was the only methodology from which the student could receive

an educational benefit. There was also evidence that the student benefited from another educational methodology, applied behavior analysis (“ABA”), in the past. The Court also held that the expert witness’ testimony regarding the appropriateness of the District’s recommendation was not valid because speculation regarding the appropriateness of a recommended program that was not observed “is not an appropriate basis for unilateral placement.” Finally, the IEP was substantively appropriate, because it was reasonably calculated to allow the student to receive educational benefit.

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

This decision confirms prior holdings regarding the consideration of updated evaluations and educational methodologies when creating a child’s IEP. Specifically, Districts are not required to conduct updated evaluations prior to a CSE meeting in the absence of the request of the Parents or District staff when the student is not due for a three-year reevaluation. It is sufficient for the CSE to identify a student’s abilities and needs by conducting a thorough review of the student’s records and obtaining information from the student’s Parents, teachers and service providers. Moreover, there is no requirement for an IEP to include the educational methodology of the Parent’s choice in the absence of considerable evidence indicating that a child can only receive an educational benefit from that methodology.

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## ***Office of State Review***

### **1. Student Granted Compensatory Services When District Concedes It Denied FAPE.**

#### ***Application of a Student with a Disability, Appeal No. 13-168 (2014)***

### **SALIENT FACTS:**

A student classified with a learning disability received a variety of supports, including integrated co-teaching in English, push-in special education teacher support in math and writing, and a variety of related services. The student also received a 1:1 crisis intervention paraprofessional for half of the school day and her behavior was managed with a behavioral intervention plan (“BIP”) based on a functional behavioral assessment (“FBA”). She began to exhibit behavioral difficulties mid-year, including not attending class, leaving school grounds, and becoming verbally aggressive with teachers. The Parent requested a complete reevaluation to assist the CSE meeting the student’s needs.

After the reevaluation was completed, the CSE changed the student’s classification to other health impairment and recommended placement in a 6:1:1

special class in a specialized school within the District. The student remained in her previous special education program while the CSE searched for an appropriate class. When the CSE was unable to identify an in-District program for the student, it applied to SED-approved nonpublic schools. The Parent requested home instruction after the CSE was unable to secure an appropriate program and the student continued to have behavioral difficulties in school.

The Parent filed a due process complaint and alleged that the District did not provide the student with FAPE. The Parent argued that the District did not develop an appropriate IEP for the student, did not conduct a manifestation determination regarding a number of class removals the student received, and did not conduct an adequate FBA or implement an appropriate BIP. They requested an order for home instruction until a placement could be found in a non-public school at District expense. They also requested independent educational evaluations (“IEE”), including neuropsychological, occupational therapy, auditory processing, physical therapy, vision skills, visual perceptual skills, and dyslexia evaluations. The Parent requested compensatory services as part of the relief they sought.

The District conceded at the impartial hearing that it did not provide the student with FAPE. The IHO found that the student was not improperly removed from class by District staff because the student refused to attend class. Further, the IHO found the District recommended appropriate services for the student that were not delivered only because of the student’s truancy. As such, the student was not entitled to compensatory services. The IHO also did not find evidence to support the claim that the District did not develop an appropriate IEP or implement a BIP. The IHO ordered a psychiatric evaluation at District expense and indicated that the CSE reconvene to develop an IEP based on the psychiatric evaluation.

#### **SRO’S DECISION:**

At the time of the SRO appeal, the student was attending a non-public school at District expense. The SRO reversed the IHO’s decision in part. First, the SRO agreed that there was no evidence to support the need for the number of IEEs that the Parent requested, because they did not request those evaluations during the CSE process, and only brought them up at the impartial hearing. However, the SRO reversed the IHO’s ruling requiring a psychiatric evaluation because neither party had requested such relief. The Parent’s request for an FBA was not considered because there was no indication that the student required such an evaluation at her current non-public school setting. As such, the SRO determined that if the Parent wanted an FBA, he could put the request in writing and provide it to the District. The Parent’s request for 301 hours of compensatory services was granted because the District conceded that it did not provide the student with FAPE. Further, the District did not argue that the number of hours was unreasonable. Finally, the SRO found the student was not entitled to home

instruction because she was already attending a non-public school and receiving special education services at the time of the appeal.

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

A District must implement the most recent IEP that was developed by the CSE. Failing to identify an appropriate program for a student as per his/her IEP results in a denial of FAPE. Districts that do not provide FAPE may be ordered to provide compensatory services to make up for the missed time. When Parents make a specific demand for compensatory hours, a school District should remember that a student is not automatically entitled to the number of hours missed or the number of hours demanded by the Parents. Rather, a student is only entitled to those hours that would be required to make up for missed work, and this is frequently less than the amount requested by the Parents. If a District does not argue this point, the amount of services awarded could be the amount requested by the Parents.

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## **2. Amount of Services Awarded Based On Parent's Demonstration Of "Appropriate" Services For Student.**

### ***Application of a School District, Appeal No. 13-078 (2014)***

#### **SALIENT FACTS:**

A student classified with deafness was educated in an SED-approved non-public school for the deaf during the 2011-12 school year. He received a special education program and related services at District expense. The CSE convened in June 2012 to plan for the student's 2012-13 program. However, an IEP was not developed at this meeting. The Parents notified the District of their intention to enroll the student in the same non-public school. They filed for a due process hearing to obtain additional services for the student. The Parents argued that the District failed to offer FAPE because the student required 20 hours per week of ABA services, one hour per day of Prompts for Restructuring Oral-Muscular Phonetic Targets ("PROMPT") therapy, one hour per week of ABA supervision, one hour per week of parent counseling and training, and transportation costs to community programs. The Parents paid for 8.5 hours of ABA per week and 1 hour of ABA supervision per week until the impartial hearing.

The IHO awarded the student pendency services based on his 2011-12 IEP. This included placement in the 6:1:1 special class at the non-public school for the deaf and related services. The IHO found that the District failed to offer the student FAPE and that the Parents established that the student required 10 hours of ABA services per week with two hours of weekly ABA supervision. The Parents

were also awarded transportation services because the student was unable to communicate. However, the Parents were denied reimbursement for PROMPT therapy.

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

The District appealed the IHO's decision regarding the 10 hours of weekly ABA services, two hours of weekly ABA supervision, and transportation expenses. The District argued that the student made adequate progress with five hours of ABA services per week during the previous school year. Further, the student was only receiving 8.5 hours of ABA services per week at the time of the impartial hearing and was making meaningful progress.

The SRO stated that the student was able to make progress with 5, 8.5, and 10 hours of ABA services per week. The Parents provided 8.5 hours of ABA services per week to the student at their own expense and the SRO applied the unilateral placement analysis to determine whether the services were appropriate. In such situations, the standard for determining whether the parents are entitled to reimbursement is "whether the services are 'appropriate'" to make meaningful progress. Similarly, the SRO cited case law indicating "a finding of progress is not required for a determination that a student's private placement is adequate." Further, the Parents submitted documentation from two private evaluators who recommended 10 hours of ABA services in school and 10 hours of ABA services at home per week. The SRO determined that 8.5 hours of weekly ABA services were appropriate due to the evidence that the student made meaningful progress with such services. The Parents were awarded reimbursement for 8.5 hours of weekly ABA services and one hour of weekly ABA supervision at the hourly rate of \$160 that was determined by the IHO.

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

Parental unilateral placements are not held to the same standard as Districts when determining whether Parents are entitled to tuition reimbursement. The student's progress and ability to receive educational benefit are always important considerations. The SRO indicated that the current level of services provided by the Parents would be dispositive in determining the amount of reimbursement to be provided. Even though the Parents requested more services, the student made adequate progress with what the Parents provided. As such, the Parents were entitled to tuition reimbursement for the amount of services that they were providing. It was not relevant that the District was able to demonstrate that the student could make meaningful progress with fewer home hours.

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### **3. District Permitted To Conduct CSE Evaluation Over Parent's Objection.**

## ***Application of a Student Suspected of Having a Disability, Appeal No. 13-055***

### **SALIENT FACTS:**

A non-classified student was attending his third year of first grade after being retained twice. The District implemented a number of remedial interventions during the student's three years of first grade to assist him to improve his reading skills. The District requested the Parent's consent to conduct a CSE evaluation when the student did not make adequate progress as a result of the interventions. The Parent refused to provide consent for the evaluation.

Specifically, the IHO determined that the District showed "an adequate basis to suspect the existence of a disability." The District attempted to support the student's academic needs through a variety of interventions and the student did not demonstrate adequate improvement. As such, the IHO found for the District and authorized the District to conduct an evaluation without the Parent's consent.

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

On appeal, the Parent argued that, although the student required assistance with reading, his difficulties did not rise to a level requiring a CSE evaluation. The Parent stated that the District provided "false evidence" at the hearing. The Parent argued that the District did not provide adequate pre-CSE referral interventions, and instead, had directed the Parent to pay for private tutoring, because the District did not have the funds to address the student's reading needs. Finally, the Parent claimed that the student missed class time because he was frequently removed due to his behavioral difficulties that were not addressed by the District.

An SRO will grant a District's request to override a Parents' refusal to consent to an evaluation if the District can "establish an 'adequate basis' to suspect the existence of a disability requiring the provision of special education services." The District must also provide evidence that it attempted remedial interventions with the student to address his difficulties prior to the referral. Here, the SRO agreed with the IHO, and held that the District met its burden of proving the need for an evaluation due to the student's lack of response to remedial interventions. There was also an indication that the student did not comply with the District's interventions, as the student refused to attend remedial services, and did not return a permission slip to enroll in a District sponsored extended day program. As such, there was adequate evidence that the student could be suspected of having a disability and the SRO authorized the District to conduct the evaluation without the Parent's consent. The SRO also noted that the Parent retained the authority to refuse special education classification and services for her child after the evaluation was completed. The SRO recommended that the Parent and District "engage in a collaborative process" to best support the student.

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

Districts may bring a Parent to an impartial hearing if the Parent refuses to consent to a CSE evaluation. In such cases, districts should be prepared to demonstrate a strong argument that the student requires an evaluation. This includes proof of the unsuccessful implementation of pre-referral strategies and interventions designed to remediate the student's difficulties. The District should be prepared to provide data that indicate that the student did not adequately improve in his areas of deficits. In such situations, the SRO will allow the District to conduct the evaluation to determine special education eligibility. However, even when an evaluation is conducted in the absence of Parent consent, the Parent still has the authority to refuse consent for special education classification and services. Once the evaluation is completed and a determination is made that the child is eligible for classification and services, Parents may refuse and the district cannot override this refusal through due process. As the SRO noted, it is always best for districts and Parents to work together in such situations to support a student's academic needs.

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### **4. Parent Must Prove Her Unilateral Placement Is Appropriate To Receive Tuition Reimbursement When District Denies FAPE.**

#### ***Application of a School District, Appeal No. 13-0008 (2014)***

### **SALIENT FACTS:**

A student with autism began to receive special education services during the 2009-10 school year and attended an in-district program through the 2010-11 school year. During the annual review CSE meeting to plan for the 2011-12 school year, the CSE recommended an in-district regular education program with a social skills group, individual counseling, occupational therapy, and individual skilled nursing services. The Parent unilaterally enrolled her son at Woodstock Day School ("WDS") for the 2011-12 school year. The CSE convened in March 2012 to develop an IEP for the student's 2012-13 school year, but an IEP was not generated as a result of this meeting. An individualized educational services program ("IESP") was developed for the student's 2012-13 school year in June 2012. Although the Parent requested that the CSE recommend WDS at this time, the District informed the Parent that this was not possible, because WDS was not an SED-approved non-public school. However, the student received one occupational therapy consult per month per his IESP.

The Parent requested a due process hearing and alleged that the student was not provided with FAPE during the 2011-12 and 2012-13 school years.

Specifically, the Parent alleged that for the 2011-12 school year, the CSE did not consider appropriate documentation related to the student's abilities and needs and did not develop an IEP that addressed the student's needs. The Parent alleged that during the 2012-13 school year, the CSE did not provide an "appropriate program and placement," did not consider adequate evaluations, and did not have the appropriate members at the CSE.

The IHO held that the District failed to offer FAPE during both the 2011-12 and 2012-13 school years. The IHO found numerous procedural violations for the 2011-12 school year, including the failure to: review a psychoeducational evaluation at a CSE meeting, adequately address the student's social-emotional needs, and conduct an FBA and develop a BIP despite the District's recommendations. The District conceded that it did not provide the student with FAPE during the 2012-13 school year.

Despite these FAPE violations, tuition reimbursement was not awarded to the Parent because she did not demonstrate that WDS was an "appropriate unilateral placement for the student." WDS did not provide the student with "specially designed" instruction to meet the student's individual needs. Further, the student "continued to experience the same social, emotional, and behavioral issues" at WDS that he did in the District program, thus indicating that the student did not make adequate educational progress at WDS.

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

The SRO upheld the decision of the IHO. The SRO applied the Burlington/Carter test to determine whether the Parent was entitled to tuition reimbursement. (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)). First, it considered whether the District could demonstrate that it provided the student with FAPE. The SRO agreed that the District did not provide FAPE during 2011-12 due to a number of procedural violations and that the District conceded that it did not provide FAPE during 2012-13. The SRO then determined whether the Parent could demonstrate that the private school program was "proper under the Act." The SRO considered whether WDS was "reasonably calculated to enable the child to receive educational benefits" and if it provided individualized instruction designed to meet the student's needs.

The SRO noted that the student made academic progress while enrolled in the District prior to being enrolled in WDS, but that his special education needs were in the areas of social, emotional, and behavioral functioning. The student continued to demonstrate the same difficulties at WDS, but there was no evidence to demonstrate that WDS "offered any strategies or services" to assist the student with his difficulties. Although the student made academic progress at WDS, "progress alone cannot compensate for the lack of evidence that WDS provided the student with specially designed instruction." The student's greatest areas of need

were his social, emotional, and behavioral skills, and WDS did not address these on an individual or specialized basis. As such, the Parent did not demonstrate that WDS was an appropriate placement for the student. The SRO did not consider the third part of Burlington/Carter regarding a balancing of the equities, because it determined that the private placement was not appropriate.

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

Districts bear the burden of proof in first demonstrating that the CSE-recommended program is appropriate. If the District fails to fulfill this, the burden of proof shifts to the Parent to demonstrate that the parentally-placed unilateral placement is appropriate for the student. In such situations, the SRO will look to the specially designed instruction provided to the student at the private school. The student's needs related to his disability should continue to be individually addressed in a private school. A Parent will not be awarded tuition reimbursement even if the District did not provide FAPE if the Parent is unable to demonstrate that the unilateral placement appropriately meets the student's needs.

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### **5. District's Obligation To Pay For Pendency Services Does Not Begin Until Parents File For Impartial Hearing.**

#### ***Application of a School District, Appeal No. 13-003 (2014)***

#### **SALIENT FACTS:**

The CSE developed an IEP for the 2011-12 school year for a student with a learning disability. The Parents' rejected the CSE recommendations and unilaterally enrolled the student at PTACH, a private religious school. The Parents requested an impartial hearing and requested tuition reimbursement for the 2011-12 school year, asserting that the District failed to provide the student with FAPE. The IHO awarded the Parents tuition reimbursement for the child's secular education at PTACH in addition to related services and transportation. The decision was not appealed.

The CSE convened to develop an IEP for the 2012-13 school year and recommended a 15:1 special class in-District. The Parents rejected this placement and again enrolled the child at PTACH. They filed a due process complaint on November 13, 2012, and requested pendency services, tuition reimbursement, and transportation costs. The IHO made an interim determination and awarded pendency services based on the impartial hearing decision for the 2011-12 school year. The IHO found that the District's obligation to provide pendency began at the start of the 2012-13 school year. The District appealed and argued that, although the student was entitled to pendency, this obligation should not begin

until the date the Parents filed for due process, rather than from the beginning of the school year.

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

The SRO considered the issue of when the District was required to provide pendency services. The decision cited case law stating that pendency is based upon the student's "then current" placement. See Mackey v. Bd. Of Educ., 386 F.3d 158 (2d Cir. 2004). However, this is determined at the time the due process demand is filed. As such, the SRO agreed with the District and held that the student was entitled to pendency services beginning at the time the impartial hearing commenced. Although the Parents notified the District of their intention to unilaterally enroll the student at PTACH on August 16, 2012, they did not actually file for a due process hearing until November 15, 2012. The SRO determined that the Parents were entitled to tuition reimbursement as pendency beginning on November 15, 2012, rather than from the beginning of the school year.

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

A student is entitled to pendency services whenever a Parent challenges a CSE's recommendations through an impartial hearing. Pendency places an obligation on the District to provide the student with last agreed upon placement. In situations with previous litigation, the pendent placement would be the placement found to be appropriate by an impartial hearing officer if it was not timely appealed. In other situations, pendency refers to the services provided for by the last agreed upon IEP. However, a student is not automatically entitled to pendency just because the Parents state their disagreement with the CSE's recommendations and unilaterally enroll the student in a private school placement. Rather, the right to pendency is implicated only when the Parents file for an impartial hearing.

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