NYSE Directors
Centris Group

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MONTHS IN REVIEW: November-December 2013

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

As you approach annual review season, this issue of Attorney's Corner may prove to be particularly useful. With the increased number of IEPs to review at the end of the school year, many of you may be finding it difficult to hold annual reviews in May and June. One District held an annual review meeting in January, and despite the parents' challenges to the timing, the Federal Court concluded that based on the circumstances, there was no error in convening the annual review five months prior to the end of the school year. IDEA has only two timing requirements - (1) that all IEPs be reviewed at least annually, and (2) that CSEs have IEPs in effect for all children prior to the start of the school year.

Federal District Courts

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1. Districts Are Not Required To Conduct Annual Reviews At A Particular Time Of The Year.

J.M. v. New York City Dept. Of Educ., 2013 WL 5951436 (S.D.N.Y., 2013)

SALIENT FACTS:

For three years prior to 2011-12, a student with autism had been parentally placed at the Rebecca School ("Rebecca"). In preparation for the 2011-12 annual review, the CSE chairperson observed the student at Rebecca in November 2010, during one of her thirty minute counseling sessions. The CSE convened for the student's annual review on January 24, 2011. During the meeting, the CSE, including the Chairperson, psychologist, a parent member, the student's Rebecca teacher and social worker, the Parents and their advocate, reviewed various materials concerning the student, including the report from the November observation and a December 2010 Rebecca Progress Report. The SPAMs and corresponding goals were developed based on information reviewed by the CSE as well as input from the student's parents and Rebecca teachers. The Chairperson and District psychologist frequently read aloud portions of the draft IEP and solicited, from those present during the meeting, modifications to the language of the IEP. The CSE recommended a 12-month 6:1:1 special class at an SED-approved special school, a 1:1 aide and related services. The Parents rejected the recommendation, maintained the student at Rebecca and sought tuition reimbursement on the grounds that the CSE failed to convene in a timely manner.

The IHO held that the IEP was defective because it was developed five months prior to the end of the school year and the student's levels could have changed during these months. As such, the IHO held that the IEP was not reasonably calculated to provide FAPE. Holding that the timing of the CSE meeting did not result in an IEP that was either procedurally or substantively deficient, the SRO reversed the IHO's decision.

COURT'S DECISION:

As a preliminary matter, the court noted:

> IDEA does not require that an IEP be generated at any particular time. Rather, the CSE is required to review a "child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved" (*citing* 20 USC §1415[d][4][A][i]). In addition, there must be an IEP in place "at the beginning of each school year for each child with a disability.

More fundamentally, the court noted, was that the Parents had "ample opportunity" to participate in the development of the IEP, and indeed took advantage of this opportunity. For example, the parents proposed several goals for the student's academic and transitional skills, each of which were considered by the CSE. Finally, and perhaps most importantly, the parents did not object to the IEP, and when asked at the end of the meeting whether there was anything they wanted to add or change, the parents replied, "no." The court also found persuasive that there was no evidence that the parents objected to the timing of the CSE meeting, requested to meet later in the year or were denied a request to

convene a subsequent CSE meeting. Moreover, the parents did not present any evidence that the student's needs actually changed from the time the CSE met and the end of the school year.

Next, the Court addressed the Parents' argument that the SRO erroneously applied the mandates of R.E. v. NYC Dept. Of Educ.,694 F.3d 167 (2d Cir., 2012) when rejecting their challenges to the substance of the IEP. The SRO held that, "an IEP must be evaluated prospectively as of the time it was created." The parents argued that this analysis frames the issue as whether the IEP is appropriate as written, not whether it is appropriate when written. The parents sought to use a May 2011 report to establish that the January 2011 IEP was inappropriate. However, to allow the parents to "undue the 2011-12 IEP on this basis would conflict with R.E.'s basic proscription against using retrospective evidence to undue what was an appropriate IEP at the time it was written." Based on the foregoing, the court granted the District's motion for summary judgment with respect to the issues concerning the time of year when the CSE convened for the annual review.

WHY YOU SHOULD CARE:

IDEA provides only two timing requirements for IEP development: (1) the IEP must be reviewed and developed at least once a year (34 C.F.R. §300.324[b][1][i]), and (2) an IEP must be in place for each student with a disability prior to the start of each school year (34 C.F.R. §300.323[a]). There is no requirement that all IEPs be reviewed and developed at a particular time during the year. Although this court found that, based on the particular circumstances of this case, no procedural violation resulted from the CSE convening for the student's annual review in January, CSEs should use caution when convening annual reviews this early in the school year. After all, the CSE will likely only have the benefit of one progress report and the student would have only been in school for three or four months, with the first six weeks being used as a "refresher." In this case, the student had been unilaterally placed for the past three years and there was anticipation that the parents would maintain the student's placement out-of-district. Additionally, in December, the private school provided the district with a report on the student's progress. Based on the timing of the observation and updated information regarding the student's progress received by the District, the CSE determined, and both the SRO and court agreed, that the CSE had sufficient information on the student's current functioning levels that it could develop an accurate and complete IEP. Nevertheless, to the extent possible and practical, CSEs should use their best efforts to convene annual reviews toward the end of the school year.

Otherwise, you run the risk of building an IEP on outdated and unreliable data. If a student has mastered his annual goals, it may necessitate new goals for the following year. If the student has not mastered his goals, it might impact continuation or revision of next year's goals.

1. Lack of Evidence Regarding How The Private Program Is Tailored To Meet The Student's Specific Needs Is Insufficient To Warrant Reimbursement.

***Application of a Student Suspected of Having a Disability*, Appeal No. 13-179 (2013)**

SALIENT FACTS:

The Parent of an eighth grade student with diagnoses of Asperger's Disorder, PDD, major depressive disorder, PTSD, and "mild" Tourette syndrome, unilaterally enrolled him in the Ridge School ("Ridge") for 2012-13 and sought tuition reimbursement. While enrolled in the District, the student functioned below grade level in reading comprehension, writing and math, acted inappropriately with peers and often needed prompting to complete his work. In July, the CSE convened for the student's 2012-13 annual review, determined to explore out-of-District placements and proposed that the Parent visit two BOCES programs. The District never recommended a program. The Parent unilaterally placed the student at Ridge and sought tuition reimbursement. The hearing record described Ridge as an "accredited day school for students in grades kindergarten through 12, whose population consists of students [with] Asperger's syndrome or are considered high functioning students with autism." Because the District conceded its failure to develop an IEP for 2012-13 denied FAPE, the IHO did not need to address Prong 1 of the Burlington/Carter test for tuition reimbursement.

Characterizing the evidence concerning Ridge as "principally anecdotal," the IHO determined that Ridge was not reasonably calculated to enable the student to receive meaningful educational benefit. Ridge failed to conduct any formal assessments of the student to determine his SPAMs or the program he needed. Ridge-produced report cards based only on the student's effort and class participation, but lacked any numerical grades or description of the student's performance.

SRO'S DECISION:

The SRO agreed with the IHO that there was very little evidence describing how Ridge was modified and tailored to address the student's particular special education needs, with respect to reading comprehension and his speech and language ("S/L") deficits.

Although Ridge staff recognized the student's difficulties with reading comprehension, his curriculum was not modified. Ridge staff testified that because the student was an "auditory learner," materials were read aloud to the entire class. However, there was no testimony regarding how, if at all, this "accommodation" was specially designed to meet the student's special education needs. Regarding S/L, the SRO noted testimony that at Ridge, the student received twice weekly "direct service" in a group of two to four students, depending on who was included in the group that particular day. Again, there was little information regarding the nature of the S/L therapy or the benefits the student received from it. Further, Ridge failed to present session notes or any type of assessment of the student's progress. Regarding his social/emotional functioning, it was noted that the student acted inappropriately with peers (e.g. teasing and provoking others), did not initiate conversations, tended to daydream when a concept became too challenging for him, and exhibited a depressed mood and fascination with death. However, he only received group counseling, where he worked on conversational skills. There was no evidence regarding how these group sessions were tailored to meet the student's specific needs, or how Ridge addressed the student's other social/emotional needs.

The SRO held, "while the hearing record offers anecdotal information regarding the student's progress, there is no objective evidence that supports the parent's assertion that the student has progressed in his areas of need during his enrollment in Ridge" (emphasis added). Accordingly, the SRO denied the Parent's tuition reimbursement request.

WHY YOU SHOULD CARE:

On numerous occasions, the SRO noted that it would have been helpful if the private school provided session notes, reports on the student's progress, or test results. Absent this information, the IHO and SRO were only provided with anecdotal information from Ridge staff about the student's progress. Anecdotal reports alone may be insufficient to enable an IHO or SRO to make a thorough determination regarding whether the private school was specifically tailored to meet the student's needs.

Although this case concerned the evidence produced at the hearing concerning the private school, the decision provides an important lesson for Districts - document, document, document! Generally, teachers and related service providers should provide data-driven, written progress reports for the CSE's consideration during the annual review. Written reports and test scores will provide a potential hearing officer with an objective measure of the student's progress rather than merely testimonial evidence.

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2. The Third Time's the Charm.

***Application of the NYC Board of Education*, Appeal No. 13-183 (2013)**

SALIENT FACTS:

The District appealed an IHO's decision awarding the parents tuition reimbursement for the Churchill School ("Churchill"). The SRO reversed on the grounds that the DOE offered an appropriate program offering FAPE in the LRE. After receiving the parents' March 2012 request that the CSE convene to consider a full-time special education class, the CSE met in May. During the May meeting, the CSE reviewed the student's progress in the 2011-12 ICT class, and recommended that the student remain in the ICT class with related services of S/L therapy and OT. The Parents challenged the DOE's recommendation, and alleged among other things, that in order to be measurable, all of the annual goals should specify that the student was on a second grade level, and that the student should have been classified as LD rather than as having an S/L impairment. In response to these concerns, the CSE reconvened in July, changed the student's classification to LD and recommended a 12:1+1 special class. After visiting the proposed school, the parents requested that the CSE reconvene to recommend a special school. The CSE reconvened for a third time, and this time recommended an ICT program and special education teacher support services ("SETSS") for Math (once per week in the classroom) and SETSS for English (twice weekly in the classroom and once weekly individually). The IHO granted the parents' tuition reimbursement request.

SRO'S DECISION:

On appeal, the District argued that the IHO's decision should be reversed, because the District did not predetermine the student's placement, the CSE's recommendation was consistent with the private evaluations, and the CSE was not required to consider other programs on the continuum, because its recommendation was reasonably calculated to enable the student to receive educational benefits in the LRE.

The SRO dismissed the predetermination argument. Even if the ultimate recommendation had been discussed by the CSE in advance of the meeting, the consideration of possible recommendations prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur during the course of the meeting and all members of the CSE come to the meeting with an "open mind." Regarding the CSE's consideration of the private evaluations, the SRO pointed out that the IEP incorporated aspects of the private evaluation in the July 2012 IEP. For example, the July IEP referenced the September 2011 neuropsychological evaluation for the notation that the student presented with "average working memory and processing speed abilities." The SRO noted, "[e]ven if the July 2012 CSE did not actually discuss the private evaluations during the

course of the meeting, the requirement that the CSE consider such evaluations does not necessitate substantive discussion."

Addressing the parents' argument that the District failed to consider their concerns, the SRO pointed out that the CSE convened on several occasions at the parents' request and during each of these meetings, the parents' requests were considered and addressed. For example, in response to the parents' request that the annual goals specify that the student would work on second grade material, some of the goals were modified to reflect this. Moreover, the SRO noted that the parents' attorney testified that the CSE reviewed and discussed the student's goals "piece by piece." The SRO found persuasive that, although the parents did not actually reject the IEP, but objected only to the assigned public school site, the CSE nevertheless reconvened in July to further address the parents' concerns. The SRO concluded that the District attempted to respond to many of the parents' identified concerns and held several CSE meetings to do so. According to the SRO, "[w]hile the parents may not agree with the ultimate recommendations made by the July 2012 CSE, mere parental disagreement does not amount to a denial of meaningful participation."

Finally, the SRO also reminded districts that simply because a student has not made progress under a particular IEP does not automatically render that IEP inappropriate. Similarly, just because an IEP offered in a subsequent school year, which is the same or similar to a prior IEP, does not render it inappropriate, provided that it is based upon consideration of the student's needs at the time the IEP is formulated. Thus, a parent's argument that because a student has failed to make progress in the preceding year's program, an IEP that recommends a similar program is inappropriate, may not automatically render that IEP inappropriate. Rather, where there is evidence that the student made some progress under the previous IEP and the new IEP provides additional supports to enable the student to make progress in the LRE, the new IEP may be deemed appropriate. The SRO wrote, "the fact that a student may make greater academic progress in a more restrictive setting does not dictate the conclusion that a less restrictive setting is therefore inappropriate under IDEA."

WHY YOU SHOULD CARE:

In an effort to afford parents with opportunities for meaningful participation in the development of their child's IEP, the CSE may convene on several occasions. This is usually the case where parents have expressed concerns about the CSE's initial recommendations. The parents may present evaluations, reports, or other anecdotal information for the CSE's consideration. When presented with such information, the CSE must consider it. As parents serve a vital role in the CSE, the Parents must be encouraged to actively participate in the meeting. Although districts are encouraged to work together with parents to develop their child's IEP, there may be times when parents do not agree with the CSE's recommendations. Parents who disagree with the CSE's recommendation

may thereafter argue that they were denied a meaningful opportunity to participate in the development of their child's IEP simply because the CSE did not recommend everything they requested. However, as we are reminded by this SRO decision, "[w]hile the parents may not agree with the ultimate recommendations made by the July 2012 CSE, mere parental disagreement does not amount to a denial of meaningful participation."

Family Policy Compliance Office

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1. Nonconsensual Disclosure of Student's Information to Potential Placement Under IDEA May Fall Within A FERPA Exception.

***Letter to Anonymous*, 113 LRP 35724 (FPCO, 2013)**

SALIENT FACTS:

The Parents of a child with a history of violent behaviors, including grabbing and hitting his teacher, filed a complaint with the Family Policy Compliance Office ("FPCO") challenging the District's disclosure of personally identifiable information from their son's education records without their consent. Following an incident wherein the student hit teachers and aides, the District's Director of Special Education and other members of the IEP team met with the Parents to discuss out-of-district placements. The District was concerned that it was unable to meet the student's needs as a result of the increase in his physically aggressive behaviors. Without having first obtained the Parents' consent to discuss personally identifiable information with other schools, the Director of Special Education discussed the student with several potential programs.

FPCO'S OPINION LETTER:

FPCO acknowledged that, generally, districts must have written parental consent prior to sharing personally identifiable information about a student with a third party. However, FPCO also acknowledged that there are certain exceptions to this requirement. One exception permits a district to disclose information from a student's education records, without parental consent, to another school where the student seeks to enroll. 34 CFR §99.31(a)(2). FPCO wrote:

> The sending school may make the disclosure if it includes a statement in its annual notification of rights that it discloses education records for this purpose, **or** if it makes a reasonable attempt to notify the parent in advance of the disclosure (emphasis added).

Although the student in this case was not applying to the out-of-district school, and therefore, did not personally seek to enroll in the out-of-district school, FPCO interpreted 34 CFR §99.31(a)(2) to permit nonconsensual disclosure of information from education records in connection with educational placements under IDEA. Based on its interpretation of its own Regulations, FPCO concluded that:

> [A]n educational agency or institution that is subject to FERPA may disclose personally identifiable information from a student's education records to a third party (such as another school) in order to make an educational placement under [IDEA]. Based on the information you provided, it appears that [ ] disclosed information from the Student's education records in an attempt to make an educational placement for the Student under [IDEA]. Accordingly, there is no basis for this office to investigate your allegation that the District improperly disclosed personally identifiable information from the Student's education records.

WHY YOU SHOULD CARE:

Generally, districts must obtain written parental consent prior to sharing personally identifiable information from a student's education file with a potential school placement. 34 CFR §99.30. However, there are certain limited exceptions. As illustrated here, districts do not need parental consent to share personally identifiable information about a student enrolled in the district if the disclosure is:

> [T]o officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer. 34 CFR §99.31(a)(2).

When making a disclosure pursuant to 34 CFR §99.31(a)(2), certain conditions apply. Specifically, the sending school district must:

1. Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student of the disclosure, unless:

    a. The disclosure is initiated by the parent or eligible student; or

    b. The sending district's annual notification of rights includes specific notice that the district forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is

already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

2. Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

3. Give the parent or eligible student, upon request, an opportunity for a hearing. 34 CFR §99.34(a).

It is unclear, based on FPCO's decision, whether in this case, the District sent applications to potential placements, or whether the Director of Special Education merely spoke to potential placements about the child. However, FPCO wrote, "[t]he sending school may make the disclosure if it includes a statement in its annual notification of rights that it discloses education records for this purpose, or if it makes a reasonable attempt to notify the parent in advance of the disclosure." Thus, FPCO has clarified that, under limited circumstances, when seeking an out-of-district placement pursuant to IDEA, parental consent is not required prior to disclosing a student's personally identifiable information to the placement. While FPCO has taken this position, neither the SRO nor any federal or State court decision has adopted the same position. Despite FERPA's exception, as a rule of thumb, Districts should always obtain parental consent prior to sending applications under IDEA to out-of-district placements. Otherwise, your District may find itself the "test case" for this issue.

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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.

