



ATTORNEY'S CORNER

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MONTHS IN REVIEW: November-December 2015

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A Monthly Synopsis of Salient Cases in Special Education

In this installment of the Attorney's Corner, we review two district court decisions and several Office of State Review ("SRO") decisions. In one decision, the district court issued an interim order describing the standard by which additional evidence not reviewed during the impartial hearing may be considered. We also review a case in which, after the district court judge upheld the appropriateness of a district's IEP, the CSE was nonetheless found to have failed to offer FAPE for its failure to consider the student's medical needs.

In one decision, the SRO held that the annual goals in an IEP do not need to be expressed in terms of a specific baseline or grade level. In another decision, the SRO concluded that a school district should have found a student eligible for special education after the student continued to perform below grade level standards following two years of RtI. We also review a case where the SRO deemed a district's physical therapy and occupational therapy evaluations inadequate because the evaluations did not contain information on the student's weaknesses or activities of daily living. In a similar decision, we discuss the holding of the SRO that a district should have provided speech-language and occupational therapies because, even though the student displayed some strengths in those areas, the student also displayed major weaknesses and deficits. In another case, the SRO instructed that a private evaluation qualifies for reimbursement only when the parent disagrees with the district's evaluation and the evaluation provides information that was not previously available to the CSE. Finally, we review a decision where the SRO found that a parent's preference for a

nonpublic school is not a determinative factor in whether a proposed public school placement is appropriate.

Federal District Courts

I. Additional Evidence Not Introduced at an Impartial Hearing May Only be Considered if the Admitting Party Shows it is Relevant, Non-cumulative, and Useful

M.B. v. New York City Dep't of Educ., 2015 WL 6472824 (SDNY 2015)

SALIENT FACTS:

The following is from an interim decision of the U.S. District Court, Southern District. The facts and procedural background are, so far, limited because the case has not yet been argued before the Court. A student with a diagnosis of spastic cerebral palsy was classified by the CSE as other health impaired, and an IEP was developed for the 2013-14 school year. The parent disagreed with the recommendation, unilaterally placed the student at Henry Viscardi School for the remainder of the school year, and filed a due process complaint seeking tuition reimbursement.

UNDERLYING ADMINISTRATIVE DECISIONS:

The IHO found that the student had been denied a FAPE and ordered the district to reimburse the parent for a private placement. The SRO reversed the IHO, holding that the IHO had exceeded his authority. The parent appealed the SRO's decision to federal court, and moved to supplement the administrative record with two letters from the student's healthcare providers, which stated that the student should have been placed in a specialized school due to her disability.

DISTRICT COURT'S DECISION:

The District Court issued an interim decision in recognition of the fact that the Second Circuit had not adopted a standard for admitting additional evidence. The Court adopted the First Circuit's rebuttable presumption against admitting evidence that was not admitted in the administrative proceedings. Under that standard, additional evidence must be relevant, non-cumulative, and useful to be admitted. A party seeking to admit additional evidence bears the burden of showing that the evidence is probative and must explain why the evidence was not presented at the administrative level. Here, the court concluded that the additional evidence should not be admitted. First, the court noted that the letters did not specify: (1) the school year to which their advice pertained; (2) the medical qualifications of the writers; or (3) the source or basis of the writer's

recommendations. In addition, the court found that the parent had admitted similar letters with similar recommendations during the hearing. Further, nothing prevented the parent from calling the two healthcare providers as witnesses during the impartial hearing. As a result, the court held that the additional evidence was not relevant and that it could have been offered during the administrative proceeding.

WHY YOU SHOULD CARE:

While the underlying action is not yet complete, and no final decision has been issued, the Second Circuit is expected to provide clarification on this issue should it ever be presented the opportunity. When an appeal is presented to a federal district court, the parties have the option to offer additional evidence not presented at the hearing. The tests for determining admissibility are the probative value of the proposed evidence, its relevance to the matters on appeal and the reasons the evidence was not presented at the hearing. If you are considering the proposal of evidence not previously presented, you should be prepared to meet the burden of proof on these issues. If you are opposing the offer of evidence, these are the standards your adversary must meet.

II. Failure to Recommend Appropriate Medical Accommodations Renders an Otherwise Appropriate IEP Inappropriate.

G.B. & D.B. v. New York City Dep't of Educ., 2015 WL 7351582 (SDNY 2015)

SALIENT FACTS:

The student was diagnosed with autism, a seizure disorder and a neurological disorder, ("PANDAS"), brought on by bacteria which caused heightened anxiety and obsessive compulsive disorder. Because of the seizure disorder, the student needed to remain well-hydrated and be in a climate-controlled environment. The student attended the Rebecca School ("Rebecca"), where his neurological and seizure disorders were kept under control and he made steady progress. In February 2014, the CSE convened and recommended a 12 month program in a 6:1+1 special class at a specialized public school, in addition to S/L therapy, OT and counseling. The parent asked for an approved private school placement or placement at Rebecca. In June, the parents executed an enrollment contract with Rebecca for the 2012-2013 school year. They informed the district that the student would be placed in Rebecca and that they would seek tuition reimbursement. The district then notified the parents of the proposed public school placement. After visiting the proposed placement, the parent reiterated that the student would be placed at Rebecca unless the district offered an appropriate placement.

IHO'S DECISION:

The parent then filed a due process complaint, alleging denial of a FAPE and seeking tuition reimbursement. The IHO found the district failed to ensure that the parents had a copy of the IEP before the start of the school year and that the IEP was deficient, failed to address the student's medical issues, failed to appropriately describe the student's present levels of performance or articulate appropriate annual goals or short-term objectives, failed to develop an FBA or BIP, failed to account for or adequately identify and provide for the student's transition needs, and failed to include parent counseling or training, and that the district's recommended placement was inappropriate and predetermined. The IHO awarded reimbursement to the parents, but declined to award compensatory education or an order to conduct additional evaluations. The district appealed the IHO's decision to the SRO.

SRO'S DECISION:

The SRO reversed the IHO's FAPE findings and held that the district's recommended placement was appropriate. While there was no disagreement among the parties that the district failed to ensure the parents had a copy of the student's IEP prior to the start of the twelve-month school year, the SRO found that such a procedural violation did not rise to the level of a FAPE violation. Instead, the parents had a copy of the CSE meeting minutes, actively participated in the CSE meeting, and received a description of the program and recommendation in the district's Final Notice of Recommendation. Furthermore, the SRO noted that the parents appeared to have enough information concerning the recommended placement to reject it before receipt of the IEP. The parents appealed the SRO's decision in federal court.

COURT'S DECISION:

The district court first held that there was no evidence that the district's failure to provide an IEP before the start of the school year prevented the parents from participating in the student's education. Rather, the district court noted that the parents actively participated in the CSE meeting and received information on the district's recommended program before the school year began. Next, the court held that the district had not predetermined its recommended program. While the parents complained that the CSE had explored options available in the public school prior to the meeting, the court rejected this argument out of hand, noting that "predetermination is not synonymous with preparation." The court also found that the IEP sufficiently addressed the student's sensory processing needs because, although the IEP did not detail every issue, "[e]very aspect of a student's specific educational issues does not need to be detailed in the IEP."

However, the district court found that the IEP did not adequately address the student's medical needs, specifically his seizure and neurological disorders. The IEP contained no information about the student's need to remain hydrated

and free from bacteria. In addition, the court noted that the proposed public placement was inappropriate on its face because it did not have air conditioning in most of the building. Because these health issues would cause a regression in the student's educational progress, the court found that the district had denied FAPE. Finally, the district held that the parents were entitled to reimbursement because: (1) Rebecca was an appropriate placement for the student; and (2) the parents consistently and promptly cooperated with the district and gave notice to the district of all developments.

WHY YOU SHOULD CARE:

When defending a recommended placement, you must be prepared to prove that it meets the child's needs. Moreover, it is often necessary to provide specific details in the IEP of how such needs will be met. Here the student's neurological disorder required that his classrooms be air conditioned. The district's recommendation of a school that could not provide that accommodation rendered it inappropriate.

If the District's recommendation had included the provision of air conditioned classrooms, or even if the student's classes could all have been conducted in one of the few air conditioned rooms in the building, the district might have prevailed. The absence of any reference to the accommodation in the student's IEP strengthened the Parents' argument that the placement was inappropriate.

Office of State Review

I. District's OT and PT Evaluations Were Insufficient Because They Did Not Focus on the Student's Weaknesses and Ability to Perform Activities of Daily Living.

Application of the Board of Education, Appeal No. 15-005 (2015)

SALIENT FACTS:

The student had been diagnosed with cerebral palsy and received PT, OT, and other special education services. The student had deficits in motor skills, reading, writing, listening, and math. During the 13-14 school year, the district conducted a reevaluation of the student, including a PT and OT evaluation. The student's parent then requested PT, OT, speech-language therapy (S/L), and neuropsychological IEEs. The district approved the parent's request for IEEs in PT, OT, and S/L therapy.

After a lengthy back and forth between the district and the parent over evaluators to perform the IEEs, the district filed a due process complaint to defend its evaluations. The IHO found that the PT and OT evaluations were not appropriate, but that the S/L evaluation was. However, since the district had approved the request for a speech language IEE, the IHO ordered the district to provide such an IEE. Although dismissing the parents' counterclaims seeking a neuropsychological and assistive technology IEEs, the IHO nonetheless ordered the district to conduct its own neuropsychological and assistive technology evaluations of the student. Neither party appealed this portion of the IHO's ruling.

SRO'S DECISION:

The SRO held that the district's PT evaluation was not appropriate because it did not include the impact of the student's strengths and weaknesses on his daily functioning and independence. In addition, the evaluator did not observe the student moving from classroom to classroom and never indicated where or how many times she observed the student.

The SRO also concluded that the district's OT evaluation was insufficient because the evaluator did not assess the student's abilities related to activities of daily living. The evaluator did not include in her evaluation any information regarding the student's ability to function during the school day, such as tie his shoes, change his clothing, open his locker, or carry books. In addition, the SRO found persuasive the fact that the district had agreed to provide IEEs for PT and OT before it had indicated any intention to defend the appropriateness of its evaluations.

WHY YOU SHOULD CARE:

This case highlights the importance of conducting a thorough evaluation. Here, the PT evaluator did not consider the student's strengths or weaknesses when analyzing the student's needs. Similarly, the OT evaluator did not include any information on the student's activities of daily living in the written evaluation. In this case, the fact that the district agreed to reimburse for OT and PT IEEs before it decided to stand by its own evaluations worked against the District. Thus, it is important to perform evaluations that the district will feel confident defending. In order to craft such an evaluation, the district should ensure that the evaluations cover all essential details that are relevant to the particular area being evaluated.

II. District Should Have Included Speech-Language Therapy and OT in IEP Due To Student's Weaknesses In Both Areas.

Application of a Student with a Disability, Appeal No. 15-010 (2015)

SALIENT FACTS:

The student attended a charter school as a regular education kindergarten student in an ICT class in 2012-2013. In February 2013, the student began receiving Tier I RtI. When the student continued to show no progress the district began providing Tier II RtI. In March 2013, the district informed the parent that the student was at risk of being retained in kindergarten, but the parent disagreed and requested counseling for the student. The parent then requested independent evaluations of the student in several areas, including OT, assistive technology, speech-language, and PT. The parent also requested tutoring in reading, counseling, and certain accommodations. In April, the parent gave consent to evaluate the student and also obtained two private evaluations in speech-language and neuropsychology. The district conducted a psychoeducational and OT evaluation. The parent disagreed with the OT evaluation and requested an IEE. In June 2013, the CSE found the student eligible for special education and recommended a general education class placement with ICT services, plus several supports and annual goals. The district consented to an OT IEE. The parent obtained private PT and OT evaluations.

The parent filed a due process complaint, alleging that: the district violated its child find obligations, there were problems with the CSE and IEP process, and the IEP was inappropriate. The parent requested a placement in a nonpublic school at district expense, in addition to other relief. The IHO concluded that the district had denied the student a FAPE in the 12-13 and 13-14 school years. However, the IHO denied much of the requested relief, awarding reimbursement only for the OT evaluation obtained by the parent.

SRO'S DECISION:

The SRO found that the district had met its child find obligations because it was not unreasonable for the district to provide response to academic intervention services before referring the student to the CSE. In addition, the district referred the student to the CSE within a month of the student beginning Tier II RtI and conducted evaluations of the student within 60 days of receiving consent from the parents.

The SRO also held that the district considered sufficient evaluative information for the June 2013 IEP, noting that the district had considered information from the student's parents and teachers, a social history report, OT, psychoeducational, neuropsychological, and speech language evaluations. Despite the absence of information on the student's PT or assistive technology needs, the SRO found that the evaluative information was sufficient to develop an IEP.

Next, the SRO concluded that the IEP should have included speech-language therapy because the student, despite some areas of strength, overall

showed “notable weaknesses” in the area of language processing. For similar reasons, the SRO held that the IEP should have included OT services.

Finally, the SRO found that the IEP recommendation of ICT was proper, because it addressed the student’s strengths (academics) and deficits (focus and attention), while providing accommodations to support the student’s delays and management needs. The SRO held that the district’s denial of FAPE was tied to its failure to recommend speech-language therapy and OT. Consequently, the SRO denied the parents requested relief of tutoring, because it was unrelated to the district’s denial of a FAPE.

WHY YOU SHOULD CARE:

This decision reiterates the fact that a district must provide services or supports when a student shows a major weakness or cognitive deficit. Here, the district failed to provide S/L and OT even though the student showed significant deficits in both areas. While the student showed some strengths in S/L and OT, such information was not enough to obviate the need for supports and services, especially in light of the major weaknesses that the student displayed.

Another important lesson learned is that the relief requested by the parent must be related to the district’s denial of FAPE. In this case, the parent sought reimbursement for private tutoring services, which was wholly unrelated to the district’s failure to provide OT and S/L services. Accordingly, the SRO denied the request for reimbursement.

III. In Order to Qualify for Reimbursement of the cost of an IEE, the Parents Must Disagree with the District’s Evaluation and the Private Evaluation Must Offer New Information Not Previously Available to the CSE.

Application of a Student with a Disability, Appeal No. 15-011 (2015)

SALIENT FACTS:

The student was diagnosed with autism and impulse control disorder. The student attended a 9:1+3 special class in a state-approved nonpublic school (NPS), with speech-language and occupational therapy. The student also received ABA and speech-language therapy at home through an outside agency. In March 2013, the CSE recommended a 12-month program of 9:1+3 special class placement with a placement to be later identified, plus speech-language, occupational, and physical therapies. The CSE also recommended a BIP to address the student’s disruptive behaviors. The CSE did not recommend ABA services at home because it felt that the ABA goals were being addressed in school.

In July 2013, the district acknowledged that it had not timely offered a public school placement and informed the parents that they could place their child in an appropriate state-approved nonpublic school. The parents were unable to find a program that utilized ABA principles, and therefore, kept the student at the NPS.

The parents filed a due process complaint, seeking a placement at an ABA-based school, as well as compensatory education, additional services, several IEEs, and reimbursement for a private educational evaluation. The IHO concluded, and the district conceded, that the district did not offer a FAPE for the 13-14 school year. The IHO ordered compensatory education and services, as well as a speech-language therapy IEE. The IHO denied reimbursement for the private educational evaluation.

SRO'S DECISION:

The SRO upheld the denial of reimbursement for the private educational evaluation because the evaluator's findings were consistent with previous reports and evaluations that were available to the district and offered no new or additional information regarding the student's needs. In addition, there was no indication that the parents disagreed with the district's evaluation or had requested an IEE.

Further, the SRO found that, because the district conceded that it denied FAPE, the parents were entitled to one hour of 1:1 ABA instructional services for each day that school was in session during the 2013-14 school year. The SRO came to a similar conclusion regarding parent counseling and training. Finally, the SRO ordered the CSE to consider whether ABA services, parent counseling and training, and assistive technology would be required going forward to enable the student to receive educational benefits.

WHY YOU SHOULD CARE:

This decision highlights the rule that a district does not have to reimburse a private evaluation where it offers no new information and the parent neither disagrees with nor requests an independent educational evaluation. A parent must first disagree with an existing evaluation before requesting an IEE. Here, the parent had not expressed disagreement with the district's previous evaluations and never asked for an IEE. Further, the private evaluation provided no new information to the district. For these reasons, the SRO found that the private evaluation was not eligible for reimbursement. Accordingly, school districts, in addition to ensuring that the parent disagrees with the district's evaluation, should carefully scrutinize private evaluations to determine whether the evaluation offers new information or insight to the CSE before agreeing to pay for it.

IV. An IEP's Annual Goals May Not Have to Be Expressed in Terms of a Specific Baseline or Grade Level.

Application of a Student with a Disability, Appeal No. 15-020 (2015)

SALIENT FACTS:

The student had attended a nonpublic general education preschool program since the 2012-13 school year. Prior to 2014 and pursuant to the CPSE's recommendation, the student had been receiving 12 hours of 1:1 SEIT services, three 45-minute speech-language therapy sessions, and two 30-minute OT sessions per week. In May 2014, the CSE recommended that the student be placed in a general education kindergarten class with ICT services for ELA, math, science, and social studies, plus two 30-minute OT sessions and three 30-minute speech-language therapy sessions per week. The district also identified the public school site to which the student had been assigned.

The parents filed a due process complaint, arguing that ICT was not appropriate, the program was not sufficient to meet the student's management needs, and speech-language therapy sessions had been improperly reduced. The IHO found that the district had offered a FAPE and that the ICT placement was appropriate. However, the IHO ordered the District to fund the costs of the student's related services recommended in the challenged IEP

SRO'S DECISION:

The SRO upheld the IHO's determination that the IEP's annual goals were appropriate, and rejected the parents' argument that the goals lacked baseline or grade-level performance standards. The SRO noted that "neither the IDEA nor State or federal regulations require a CSE to develop goals that are expressed in terms of a specific baseline or grade level." Instead, the SRO found that the CSE drafted measurable goals specifically addressing the student's needs as both described in the IEP and supported in the hearing record. The SRO further found that the goals properly identified "age-appropriate" instruction. Similarly, the SRO found that the record supported the finding that the student demonstrated no academic deficits necessitating the inclusion of academic goals.

The SRO further declined to overturn the IHO, holding that the CSE's ICT program recommendation was appropriate, as the student presented with no academic deficits, instead requiring only management support. Therefore, the strategies that the CSE incorporated into the ICT placement (redirection, focusing prompts, warnings about routine changes, and 1:1 support), were reasonably calculated to provide educational benefit to the student. The SRO found this supported a conclusion that the regular and special education teachers in the ICT classroom would have been able to implement the IEP and provide an appropriate level of support.

The SRO also found that the shorter speech-language therapy sessions were appropriate because nothing, other than the parent's speculation, indicated that the student would not receive benefits from a 30-minute session as opposed to a 45-minute session. Finally, the SRO reversed the IHO's order directing the District to fund additional related services for the student, holding that since the District had offered FAPE, no award was warranted.

WHY YOU SHOULD CARE:

The SRO stressed that annual goals must meet the student's individual educational needs by being measurable and sufficiently specific to guide instruction and evaluate progress. Although the SRO found that IEP goals need not include baselines or grade levels, it would be a mistake to let this guide future district decisions. Such information provides instructional staff with critical information needed to implement a student's IEP. Furthermore, there is a string of case law in this circuit directing that grade level mastery is necessary for appropriate, academic goals. The absence of math, ELA, and reading baselines or grade levels will render them incapable of measurement for mastery. In this case, the student required **no** academic goals, instead requiring goals to address related services and management needs. Possibly, those goals required no grade level mastery information to be appropriately implemented. Rather, a more reasoned interpretation of this decision would suggest that a failure to include grade level mastery in an IEP's goals is not a *per se* violation of the IDEA.

The decision also confirms that FAPE is the cornerstone of a student's entitlement, and any award of additional services is reserved for those situations where a deprivation is first determined.

V. A Parent's Preference for a Nonpublic School over a Public School Is Not Relevant in Deciding Whether a Proposed Placement is Appropriate.

Application of the Board of Education, Appeal No. 15-034 (2015)

SALIENT FACTS:

The student was accepted to a private school, Holy Childhood (HC), in May 2012 and the parents requested that the district approve the student's attendance at HC. In July 2012, the CSE modified the IEP to allow the student to attend HC for the summer of 2012. For the 2012-13 school year, the CSE recommended a 12:1+4 special class placement in a district high school, with a 1:1 aide and related services. The parent disagreed and kept the child at HC for the remainder of the year. In June 2013, the CSE recommended HC for the summer of 2013. For the

2013-14 school year, the CSE made the same recommendation it had made for the 2012-13 year. The student attended HC for the entire 2013-14 school year.

The parents filed a due process complaint, alleging a denial of FAPE and seeking tuition reimbursement for HC. The IHO found that the district had not offered FAPE in 2012-13 or 2013-14, holding that the district's recommended placement was not appropriate. The IHO found that HC was an appropriate placement and ordered the district to reimburse the parents for the tuition for the 12-13 and 13-14 school years.

SRO'S DECISION:

The SRO concluded that the district's recommended placement was appropriate because it offered a small, highly structured environment, as well as a 1:1 aide to assist the student during the day. In addition, the student's BIP addressed the student's management issues. The SRO noted that the parents did not really object to the recommended placement itself; but rather, they preferred to have the student attend a nonpublic school. The SRO instructed that such preferences are irrelevant in determining whether a recommended placement is appropriate.

Next, the SRO held that the 12:1+4 placement satisfied LRE because it would have allowed the student to grow socially, have vocational opportunities, and interact with nondisabled students, while also meeting the student's special education needs. Finally, the SRO concluded that HC was not an appropriate unilateral placement because HC staff did not believe that the student required full-time 1:1 supervision and generally believed only in maintaining a line of sight with the student. The SRO noted that, based on the student's aggression, wandering, and dangerous behaviors, close supervision of the student was needed to prevent and respond to the student's behaviors.

WHY YOU SHOULD CARE:

In this case, the parent and the district essentially agreed on the district's recommended placement. However, while the district offered a public school placement, the parent wanted the placement to be in a nonpublic school. The parent argued that a public school placement was inappropriate. The SRO confirmed that a parent's preference for a nonpublic school is irrelevant to a determination of whether a district has offered a student an appropriate placement. The relevant question is whether the placement meets the child's needs. Therefore, while a district may consider a parent's preference for a nonpublic school, the law does not require the district to treat that preference as determinative.

VI. District Should Have Found Student Eligible for Special Education When Student Continued to Perform Below Grade-Level After Nearly Two Years of RtI.

Application of a Student with a Disability, Appeal No. 15-037 (2015)

SALIENT FACTS:

The student initially attended general education classes in the district, but received tier 2 RtI services in 2010-11 and 2011-12. In October 2012, the parent expressed concern about the student's academic struggles and began sending the student for private tutoring in reading. That same month, the parent requested that the district immediately evaluate the student for a learning disability.

At the end of November, the district's student support team developed an intervention plan to address the student's academic weaknesses. After the parent requested an evaluation in December, the district evaluated the student in January and February of 2013. Based on these evaluations, the district found the student ineligible for special education.

The parent disputed this finding and requested an IEE at public expense. The district offered reimbursement for an IEE for achievement testing. The parent also procured a private neuropsychological evaluation. After considering the neuropsychological evaluation, the CSE again found the student ineligible for special education, but referred the student to the §504 Committee, which developed a §504 plan for the student.

The parent filed an IDEA due process complaint. The IHO found that the district had not denied a FAPE, but ordered the district to provide 1:1 reading services based on the district's delay in evaluating the student.

SRO'S DECISION:

The SRO initially found that the district had failed to timely evaluate the student, since the district did not request consent to evaluate the student until more than a month after the parent had requested that the student be tested for a disability. The SRO next concluded that the February 2013 CSE had sufficient evaluative information because it had conducted a psychoeducational evaluation of the student, which consisted of social and educational histories, classroom observation, assessments, school reports, and medical information. The SRO did note that it was unclear whether the CSE considered assessments of the student's progress during RtI.

Next, the SRO concluded that the CSE should have found the student eligible for special education based on the student's performance below curriculum and grade level standards in reading and math. In addition, the student continued

to struggle even after RtI. Finally, the SRO noted that the student received RtI for two years even though state guidance suggests that a student should not spend more than 30 weeks in RtI. For these reasons, the SRO found that the parent acted reasonably in securing private reading tutoring and ordered the district to reimburse the parent for such tutoring.

WHY YOU SHOULD CARE:

An important lesson from this case is that school districts must carefully monitor a student's progress in RtI to determine whether the student is making identifiable progress. In this case, the district kept the student in RtI for nearly two years due to lack of progress, but the CSE repeatedly found that the student was ineligible for special education. State guidance recommended that students be provided with RtI for no more than 30 weeks. Yet here, even after more than a year of Tier II RtI, the student continually performed below grade level. The SRO concluded that the lack of progress in light of the RtI should have led the CSE to classify the student. Therefore, school districts should carefully consider a student's progress, or lack thereof in RtI when determining whether that student qualifies for special education. A student who continues to perform below grade level after a substantial amount of RtI may very well be eligible for special education.

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