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MONTHS IN REVIEW: September-October, 2011

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

The common theme this month is that mere procedural deficiencies will not result in a violation of IDEA unless they actually deny FAPE. Specifically, the Southern District held that one district's failure to mention the student's diagnosis in an IEP did not result in a denial of FAPE. The court reasoned that the IEP provided strategies to address the student's specific needs, and thus, did not violate IDEA. Further, the SRO found no violation of IDEA resulting from one CSE's failure to have copies of a private report physically present at the meeting. The SRO reasoned that this defect was cured when the child's father discussed the private evaluator's concerns at the CSE meeting.

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Federal District Court

1. District's Refusal to Place Student in Special School Rather Than Recommended CTT Class Did Not Deny FAPE.

D.B. ex rel. K.B. v. New York City Dept. of Educ., Slip Copy, 2011 WL 4916435 (S.D.N.Y., 10/12/2011)

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SALIENT FACTS:

Prior to 2008-09, a student with ADHD and unspecified learning disabilities attended the private Manhattan Day School, where she received instruction in classes of no more than 10 students. For 2008-09, the CSE recommended a 13:1 Collaborative Team Teaching ("CTT") class. The proposed class would consist of 13 disabled students and 18 non-disabled students. The parents rejected the IEP, unilaterally placed their daughter in the Parents for Torah for All Children program of Yeshiva University High School for Girls ("P'TACH"), and requested reimbursement for tuition and transportation. In concluding that the district denied FAPE, the IHO relied upon the fact that the IEP did not include a number of recommendations made in private psycho-educational or private speech/language evaluations. The SRO reversed and concluded that the recommended CTT class was appropriate, as it provided the student with the resources she needed in the LRE.

COURT'S DECISION:

The court rejected the parents' argument regarding the failure of the IEP to include every recommendation made by the private evaluators. The court wrote, "[w]hile the Plaintiffs are correct that the IEP did not include every recommendation mentioned in [the private] reports, the DOE correctly argues that omitting some recommendations of privately retained experts does not render an IEP procedurally deficient." Next, the court concluded that, notwithstanding the IEP's failure to mention the student's specific disability, this error was not fatal, because the IEP "provided strategies to address [the student's] educational needs." Specifically, the IEP provided various testing accommodations including extended time, having directions read and reread aloud, taking exams in a separate location, and eight pages of goals devoted to the student's specific need areas.

Regarding the substantive adequacy of the proposed program, the court wrote, "[a]lthough the class size of 30 students is larger than the Plaintiffs preferred class size, the CTT class met the IDEA's objectives of fulfilling [the student's] educational needs while mainstreaming [her] in a regular education class to the maximum extent possible." The court also found persuasive that "the CTT class used the 'workshop model' where students were often placed in smaller groups and 'learning situations' according to their needs and abilities." Therefore, the court held, "the IEP provide[d] [the student] with a FAPE in the [LRE], a classroom with both special needs and non-special needs children and additional services and accommodations to address [the student's] particular strengths and weaknesses."

WHY YOU SHOULD CARE:

IDEA requires that districts place students in educational programs, which meet each student's special education needs in the LRE. Although a parent prefers that the student be placed in a more restrictive setting, it is the CSE's legal

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obligation to ensure that the student will be integrated to the maximum extent possible with non-disabled peers. If the student is able to benefit from an education in a placement that is less restrictive than the parents' preferred placement, the district must recommended the less restrictive option.

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State Review Officer

1. To Be Classified as OHI, The Disability Must Adversely Affect the Student's Education.

Application of a Student Suspected of Having a Disability, SRO Appeal No. 11-084 (Sept. 26, 2011)

SALIENT FACTS:

Previously, the CSE had declined to classify the student on two different occasions. The student is diagnosed with Type 1 Diabetes Mellitus, Hypothyroidism, and celiac disease. In the social history, the father reported that the student injected herself with insulin approximately 10 times daily and was responsible for monitoring her blood glucose levels. In a private psycho-educational evaluation, it was reported that the student had a FSIQ of 114. Further, the student achieved scores of 112 in word reading, 100 in reading comprehension, and 103 in numerical operations and spelling on the WIAT-II.

During the CSE meeting for the third referral, the special education teacher conducted a classroom observation of the student in her private school's history class. The teacher opined that the student functioned at grade level and did not require intervention strategies to learn. Ultimately, the CSE determined that the student did not meet the criteria for classification as a student with OHI because of her high grades, passing exam scores, and because she did not exhibit significant academic delays. The IHO agreed.

SRO'S DECISION:

The SRO affirmed the IHO determination that the CSE correctly found the student ineligible. The SRO noted that, while the private endocrinologist stated that wide fluctuations in the student's blood glucose levels *might* create problems with memory and concentration, he could not establish that fluctuations *actually* affected the student's academic performance. Further, despite evidence that the student's reading comprehension grade equivalent was approximately one year behind, the SRO relied upon the student's WIAT II score of 100 in reading comprehension. The SRO reasoned that the WIAT II, which was conducted almost one year prior to the CSE's ineligibility determination, "had greater reliability as a measure of ability than grade equivalence."

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Notwithstanding the determination that the CSE's recommendation was appropriate, the SRO addressed the parent's procedural contentions regarding the CSE meeting. The SRO concluded that the absence of the student's private school special and regular education teachers from the CSE meeting did not deny FAPE. The SRO reasoned that both teachers were invited, but the private school director determined who would attend and for what length of time. Therefore, any violation was not the district's fault. Second, the parents alleged that the CSE failed to consider the endocrinologist's report at the meeting. However, the SRO concluded that, "although the CSE did not have the report, the student's father detailed to the CSE the concerns raised by the endocrinologist, such that the CSE's failure to have the report present for consideration did not deprive the student of a FAPE."

WHY YOU SHOULD CARE:

CSEs must remember that to find a student eligible for special education programs and services with an OHI classification, the identified disability must have an adverse affect on the student's education. It is not enough that the student has a diagnosis.

In this decision, the SRO declared that an evaluation or assessment, which was conducted one year before the CSE's meeting, may hold more weight regarding the student's academic abilities than anecdotal reports issued by the student's teacher in preparation for the CSE meeting. Although a CSE must consider any and all private evaluations obtained by the parents, the failure to have the report physically present before the CSE may not result in a denial of FAPE. Rather, this procedural error may be cured by having someone familiar with the parents' private report present at the CSE meeting describing the content of the evaluation. This practice is not one that CSEs should follow as a matter of course. However, if a CSE is faced with such circumstance, it can cure the defect by having a reliable summary presented to the committee. Ideally, CSE members should review the actual evaluation report before making its recommendations.

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2. Where Parent Failed to Complete Intake Process, No FAPE Denial Although No Seat Available at Recommended Nonpublic School at Beginning of School Year.

Application of the Board of Education, SRO Appeal No. 11-096 (Sept. 12, 2011)

SALIENT FACTS:

With the parents' consent, the district applied to a number of nonpublic schools on behalf of a student with autism for 2010-11. Despite being accepted into a nonpublic school pending completion of the intake interview process, the parents refused to make the student available to complete the intake process. At

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an August 2010 meeting, the CSE recommended a 6:1+3 class in the nonpublic school contingent upon the parents' completion of the intake process. Although the parents expressed their disagreement based upon the distance, they agreed to pursue the intake process. However, rather than complete the intake process, the parents emailed the CSE chairperson that they wanted the student to be placed on an "interim home-based program." In response to this email, the CSE chairperson advised the parent that the "district decided that [a home program] would not be appropriate."

The IHO concluded that the district denied FAPE. Specifically, the IHO held, among other things, that the FAPE denial resulted because there was no seat available to the student at the beginning of the 2010-2011 school year at the nonpublic school recommended by the CSE.

SRO'S DECISION:

First, the SRO made a number of determinations regarding the IEP's alleged procedural deficiencies. Specifically, the SRO held, that because the representative of the nonpublic school was present, and previously participated at a CSE meeting, her absence at a subsequent CSE meeting did not deny FAPE. Next, the SRO held that the record was equivocal regarding whether there was a seat available for the student at the beginning of the 2010-11 school year. Nevertheless, the SRO concluded that the parents's failure to cooperate with the intake interview process undercut their claim of a FAPE denial.

The SRO wrote, "[w]here, as here, the district was precluded from placing the student in the nonpublic school due to both its obligation to implement the student's pendency placement and the parents' non-cooperation, I find the IHO's conclusion that the district failed to offer the student FAPE was incorrect."

WHY YOU SHOULD CARE:

Oftentimes, after parents have consented to applications being sent to nonpublic schools, they fail to comply with the mandatory intake interview requirement. Given that there are a limited number of seats available at these schools, one parents' failure to make the student available for a screening may result in another student occupying the seat. Because districts must have a complete IEP in place at the start of the school year, districts must be careful not to make placement recommendations without having completed the application process. If this action does not occur prior to the start of the school year, the district will be left with no placement or program to defend. However, as illustrated here, where the failure of the district to have an IEP with a placement recommendation in place is a result of the parent's failure to cooperate, the district will likely survive a claim that FAPE was denied.

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3. Pendency Claim Fails to Survive Dismissal on Ground of Mootness.

Application of the Board of Education, SRO Appeal No. 11-085 (Sept. 16, 2011) (*cross-reference* Application of the Board of Education, SRO Appeal No. 11-082 [Sept. 7, 2011])

SALIENT FACTS:

An IHO awarded parents of a student with a speech and language impairment tuition reimbursement for the Rebecca School and related services including ABA. The IHO concluded that the district denied FAPE because it failed to conduct an FBA, develop a BIP, provide a transition plan, and was late in mailing its related services authorization ("RSA") to the parents for services provided at the Rebecca School. The RSA was to be provided for 12 hours of weekly ABA services based upon the IHO's interim pendency order. The IHO determined that the Rebecca School was pendency based upon the special education program and services provided in an unappealed 2009 IHO decision. Ultimately, the IHO awarded the parents partial tuition reimbursement for the Rebecca School because the Rebecca School "'shifted the academic burden' to the student's after school providers in speech-language therapy and OT, and the 'economic burden' to the district."

SRO'S DECISION:

Although the 2010-11 school year had expired, the district argued that the issues were not moot as a decision in its favor would impact pendency going forward. In rejecting this argument, the SRO held that any decision in the matter would have no actual effect because 2010-11 had expired and the parents were entitled to and received all the relief they wanted through pendency. Although the district cited New York City v. V.S., 2011 WL 3273922 (EDNY, 2011) for the principle that the issue of future pendency resulted in the issues in dispute being "live," the SRO declined to follow the district court's decision. The SRO noted that in V.S., the court reviewed the issues despite the expiration of the school year, because the parties required resolution of the merits to establish the student's pendent placement in future proceedings. Here, the SRO declined to follow the V.S. holding, on the grounds that doing so would have an unreasonably broad affect on all IDEA proceedings.

Second, the SRO expressed concern about adjudicating claims unnecessarily, especially where there is no effect on claims alleged at the outset of the proceeding, and because under IDEA, students are entitled to annual reviews. The SRO further reasoned that, based upon the automatic nature of pendency proceedings, and the speed with which parties obtain state-level pendency placement reviews, there is little need to establish pendency placements for future years. Moreover, the SRO held that the "capable of repetition yet evading review"

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exception to the mootness doctrine does not apply where it is only speculated that the incident might happen again.

WHY YOU SHOULD CARE:

Although it is uncommon, it is not "unheard of for a student to remain in a pendent placement for years, even after administrative and court decisions have been issued multiple times." at 6, fn. 6. Where a District has had to pay private tuition on the grounds of pendency year after year, it may anticipate that for the subsequent year, the parent will again appeal and it will again be obligated to pay the tuition under pendency. However, notwithstanding V.S., the SRO has decided that under the circumstances of this case, the District's speculation that the parents will file for due process again, is not sufficient to warrant an exception to the mootness doctrine.

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4. Failure to Provide Parents with Meaningful Opportunity to Participate in IEP Process Denied FAPE.

Application of the Board of Education, SRO Appeal No. 11-095 (Oct. 6, 2011)

SALIENT FACTS:

For a student transitioning from preschool, the CSE recommended a 12:1+1 class with related services including S/L, O/T, and counseling. The student's special education teacher, who participated by phone, only participated for a portion of the meeting, did not participate in the discussion concerning the proposed related services, and was not provided with any of material reviewed at the meeting. In the final notice of recommendation, the district identified the specific school. However, the parent alleged that she did not receive the IEP until after the start of the school year. Nevertheless, the parent visited the identified school. In an October 24, 2010 letter, the parent rejected the proposed placement, and requested tuition reimbursement and transportation to the private school.

The IHO held that the lack of the special education teacher's participation in the CSE meeting denied the parent of a meaningful opportunity to participate. Moreover, the IHO determined that the CSE advised the parent that it was the district's "standard practice" to change a student's services when entering public school. Therefore, the IHO concluded that the district denied FAPE, and awarded reimbursement.

SRO'S DECISION:

Because the District did not challenge the IHO's decision that it denied FAPE based upon its denying the parent a meaningful opportunity to participate, the IHO's decision was final and binding. Further, because the district failed to challenge the IHO's decision that the private program met the student's

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individualized needs, the only issue on appeal was whether the private placement was the LRE. In the private school, the student was placed in a special class of 12 with three teachers in the classroom. Although the student could be educated appropriately with some exposure to nondisabled peers, LRE considerations did not weigh so heavily as to preclude an award of reimbursement. As such, the SRO affirmed the IHO's award.

WHY YOU SHOULD CARE:

Although the SRO did not offer an opinion regarding the denial of a meaningful opportunity to participate, this decision should act as a reminder to all CSEs. Where the CSE is aware that a member's attendance will be limited, the CSE must make appropriate accommodations to ensure that member's adequate participation. For example, if the member is unable to be physically present, the CSE must offer alternative means of participation (e.g. teleconference). Where the member participates by an alternative means, the CSE must ensure that (s)he has copies of all of the documents which will be reviewed at the meeting. If a document, which was not previously shared with the district is presented at the meeting, the CSE should send the telephone participant a copy of this document by email or fax, confirm receipt, and resume the meeting. If a CSE member's participation is limited because of time, any reports or contributions from this member should be made, to the extent practical, at the beginning of the meeting. If impractical, the CSE should reconvene at a time when the member can fully participate.

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