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MONTHS IN REVIEW: June 2013

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

On June 10, 2013, the U.S. Supreme Court declined to review the Second Circuit Court of Appeals' decision in R.E. et al v. New York City Department of Education, 694 F.3d 167 (2d Cir., 2012). As a result, the Supreme Court has preserved the "Retrospective Testimony" holding. No longer may school districts present testimony during the impartial hearing regarding "programmatic services" that are not included in the student's IEP. If the services are not enumerated in the IEP, the District cannot prove they would have been provided if the parents had sent their child to the District. All school districts within the jurisdiction of the Second Circuit must now be meticulous when including all programmatic special education services (i.e. services provided only to special education students, not those provided to all students) in each special education student's IEP.

U.S. Supreme Court

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1. By Declining to Review *R.E.*, the U.S. Supreme Court Preserves the Second Circuit Court's "Retrospective Testimony" Holding.

R.E. et al v. New York city Dep't of Educ., 694 F.3d 167 (2d Cir., 2012), cert. denied 2013 WL 1418840 (2013).

SALIENT FACTS:

In our August-September 2012 issue of the *Attorney's Corner*, we first reported on R.E., a landmark decision in special education which prohibits the use of retrospective testimony in Burlington-Carter tuition reimbursement cases. Retrospective testimony was defined as "testimony that certain services not listed in the IEP would actually have been provided to the child if he or she had attended the school district's proposed placement." See R.E. v. New York City Dept. of Educ., 694 F.3d 167, 185 (2d Cir., 2012). In R.E., the District sought to admit testimony regarding special education services the student would have received had he actually enrolled in the District's program, but which were not listed in the IEP. The Second Circuit Court of Appeals explained that when a parent is considering the District's recommended special education program and services, the parent must base her decision on the program identified in the IEP. According to the Circuit Court, unless the services are included in the IEP itself, a parent cannot know for certain that the District will provide those services. The Circuit Court wrote:

> By requiring school districts to put their efforts into creating adequate IEPs at the outset, [IDEA] prevents a school district from effecting this type of "bait and switch," even if the baiting is done unintentionally (at 186).

Accordingly, in Burlington-Carter tuition reimbursement cases, the District is prohibited from presenting retrospective testimony about those special education services not listed in the IEP that the District would have provided had the student actually enrolled in the District's program. By ruling this way, the Circuit Court sought to require that the CSE would review the entire proposed program and that the IEP would reflect that program. Parents would then be able to rely upon the program as it appears in the IEP and the school district would be able to prove the components of that program as it appears on the IEP.

COURT'S DECISION:

The U.S. Supreme Court declined to review the Circuit Court's decision. By doing so, the Supreme Court preserved the "Retrospective Testimony" holding. Therefore, school districts within the Second Circuit's jurisdiction must include in the IEP all special education supports and services the student will receive if enrolled in the District's program.

WHY YOU SHOULD CARE:

To ensure that your District does not find itself caught in the throes of the Retrospective Testimony web, your CSEs must ensure that each IEP includes all of the special education related services that the student will receive if the student enrolls in the district's program. Previously, districts declined to include in the IEP services that were thought to be "programmatic," and otherwise built into the special education program or particular class. If a student requires particular

special education services that are considered programmatic, these services must be listed in the IEP itself. IEPs must include all of the programmatic components of the proposed program, including, but not limited to, related services; parent counseling and training; supplementary aids and services; notations regarding FBAs and BIPs, where applicable; the amount of individualized instruction, where applicable; the type of instruction provided in the placement; and the number of personnel present in the classroom.

Second Circuit Court of Appeals

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1. A Child's Academic Progress Must be Viewed in Light of the Limitations Imposed by the Individual Child's Disability.

H.C. ex rel. M.C. v. Katonah-Lewisboro U.F.S.D., 2013 WL 3155869 (2d Cir., 2013)

SALIENT FACTS:

The parent of a student with a severe learning disability ("SLD") sought reimbursement of tuition paid to a private school. The parent argued that the increasing gap between the student's performance and that of her typical peers substantiated her claim that the district denied FAPE. The parent felt that the student's reading skills were unsatisfactory. According to the parent, the student's reading skills demonstrated a lack of progress from one year to the next. Additionally, the parent argued that the District's recommendation that the student be provided with a "Radium" FM device, despite the student's private audiologist recommending that she be provided with a "Phonak" FM device, denied the student FAPE.

COURT'S DECISION:

The court ultimately found that the District offered FAPE. The court wrote:

> To the extent that the Parents argue that the gap between [the student] and her peers was growing in terms of reading ability, [] "a child's academic progress must be viewed in light of the limitations imposed by the child's disability" (*citing* Mrs. B. v. M.M. v. Milford Bd. Of Educ., 103 F.3d 1114, 1121 [2d Cir., 1997]).

Accordingly, the court ignored the Parents' assertion that weight should be given to any alleged gap forming between the student's skill levels and that of her typical peers. Regarding the district's Radium FM device recommendation, the court noted that the parents offered no evidence to demonstrate that this device was inadequate. Because the AT device recommended by the District was capable

of providing the student with meaningful benefit, the court held that the recommended device offered the student FAPE.

WHY YOU SHOULD CARE:

Although parents may wish that their classified student progress at the same rate as the student's typical peers in order to "close the gap," this is not the standard under IDEA. It is important that CSEs remind parents that a child's academic progress must be viewed in light of the limitations imposed by the individual child's disability. Constantly comparing the progress of a disabled child to that of a typical peer may only serve to be detrimental to the disabled child's self-esteem. Additionally, doing so may create a misconception for the parents that their classified student's skill levels should be compared to those of typical peers. IDEA does not require that an IEP furnish every special service necessary to maximize each handicapped child's potential. Moreover, as explained here, a school district does not fail to provide FAPE simply because it has chosen to employ one AT device over another. As long as the AT device employed is reasonably calculated to provide the student with FAPE, the district will be found to have offered FAPE.

Federal District Courts

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1. Students Denied Related Services During the First Two Weeks of School Eligible for Class Action Lawsuit.

R. A-G. ex rel. R.B. v. Buffalo City Sch. Dist., 2013 WL 3354424 (W.D.N.Y., 2013)

SALIENT FACTS:

A district had a policy of delaying the commencement of the provision of related services to students with disabilities until the second or third week of school. The parents filed a motion seeking to certify a class of students between the ages of 5 and 21 who were denied related services during the two-week period. If the class was certified, the parents could pursue a class action against the school district. Ultimately, the parents sought a court declaration that the District's policy violated IDEA and Section 504 and sought an injunction prohibiting the District from continuing to exercise its policy. The District opposed the motion on the grounds that only those students who were denied FAPE by the two-week delay could be members of the class. As such, the District argued that the mandatory "commonality element" required for class action certification was lacking.

COURT'S DECISION:

To be eligible for a class action, the plaintiff must establish:

1. The class is so numerous that joinder of all members is impractical;
2. There are questions of law or fact common to the class (i.e. "Commonality Element");
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class. See Federal Rules of Civil Procedure 23(a).

The court rejected the District's argument that Prong 2 of the analysis was not satisfied because only students who were denied FAPE by the two-week delay could be members of the class. The court wrote: the mere "disparate impact of a challenged policy does not defeat class certification." Therefore, merely because a policy impacts individuals in the class differently (i.e.: some students might regress due to the absence of the services for the two to three week period, while others might not), this does not mean that the class does not have common questions of law and fact supporting class action status. Deciding that the proposed class met the required criteria, the court certified the class.

WHY YOU SHOULD CARE:

Most IEPs reflect the first day of school as the start date of the special education program, but often provide that related services will begin two to three weeks later to permit time for scheduling or proper grouping. Related service providers are often unavailable during the summer, and therefore, cannot finalize related service schedules until they return from the Summer break. The question of whether a two-week deprivation of related services would constitute grounds for compensatory education has not yet been litigated in the Second Circuit. It should be noted, however, that in this case, both the IHO and SRO found that the District's delayed implementation of the services listed in one student's IEP did not deny FAPE. It is anticipated that with the certification of the R. A-G class, Districts will receive clarification about whether the District will be found to have denied FAPE where it delays the commencement of related services for the first few weeks of school.

If the federal court sides with the parents (i.e.: finding that the two to three week delay denied FAPE), it would likely be based on the compensatory education analysis. Compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation. See Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n. 2 (2d Cir. 2008). In the Second Circuit, it is well established law that, compensatory services "may be awarded if there has been a *gross violation* of the IDEA resulting in the *denial of, or exclusion from*, educational services for a *substantial period of time*" (emphasis added) Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990). Whether a two or three week delay in the provision of related services meets this standard is not yet known. However, we will report on any updates we receive about this case.

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2. Private School's Failure to Provide Services at the Frequency Mandated by the District's IEP Did Not Defeat Parents' Entitlement to Reimbursement.

M.F. ex rel. C.F. v New York City Bd. Of Educ., 2013 WL 2435081 (S.D.N.Y., 2013).

SALIENT FACTS:

The parent of a student diagnosed with PDD-NOS rejected the CSE's recommendation for the 2010-11 school year and unilaterally enrolled him in the Aaron School ("Aaron") located in New York City. The CSE recommended a 12:1 special class with the following related services:

Counseling: One 30 minute session per week in a group of 2
OT: One 30 minute session per week in a group of 2
One individual 30 minute session per week
PT: One individual 30 minute session per week
Speech Therapy: One individual 30 minute session per week
One 30 minute session per week in a group of 2
APE: In a group of 12:1

At Aaron, the student was placed in a 12:1:1 class and received the following related services:

Counseling: One individual 30 minute session per week
OT: One 30 minute session per week in a group of 2
Speech Therapy: One 30 minute session per week in a group of 2
APE: Three times weekly for 30 minutes
Social Skills Program: One 30 minute session per week

The district argued that it offered FAPE and Aaron was inappropriate because it did not provide the student with the frequency and level of related services mandated by the IEP. Although the CSE found the student ineligible for ESY services, the IEP included a notation that the student required counseling, OT, PT and speech therapy during the summer "to prevent regression." Notwithstanding the District's failure to provide these services, the District argued that Aaron was inappropriate because it failed to provide these services. The IHO found in favor of the Parents and ordered the District to reimburse the parents for the Aaron tuition and make-up the "Summer Services" the District failed to provide. The SRO agreed that the District failed to offer FAPE and affirmed the IHO's order that the District make up the "Summer Services" it failed to provide. However, the SRO reversed the IHO's order that Aaron was appropriate. The SRO held, "the amount and frequency of [the Aaron] related services were insufficient to meet the student's needs."

COURT'S DECISION:

Without conducting any analysis, the Court concluded that the District failed to provide FAPE. As such, the court moved to the second prong of the Burlington-Carter inquiry - whether Aaron was appropriate. When determining whether to award reimbursement of tuition in unilateral placement cases, the question is "whether a placement…is reasonably calculated to enable the child to receive educational benefits." As the Second Circuit has held, "no one factor is necessarily dispositive [when making this inquiry]….Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit…."(*citing* Frank G. v. Board of Educ. Of New Hyde Park, 459 F.3d 356, 364 (2d Cir., 2006). The court pointed out that a private placement is appropriate if its program is likely to produce progress, not regression.

The court held that the SRO erred when he "ignored the Second Circuit's instruction that a private placement need not offer every service listed in an IEP." The Court cited to Frank G., where that court wrote:

> To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. See Frank G., 459 F.3d at 365.

While Aaron did not provide the student with the number of related service sessions listed in the IEP, the court found that this was not fatal. The court pointed out that "there [was] significant overlap between the services listed in the IEP and the services that [the student] received." Aaron provided the student with additional services not listed on the IEP (e.g. social skills class). The court concluded that the structure of Aaron's 12:1:1 class (which included 12 students, 1 Head Teacher and 1 Assistant Teacher) was "superior to the 12:1 ratio specified in the IEP" (which included 12 students and one Teacher). The court pointed out that the student "made strides" in his expressive and advocacy skills, his speech skills improved, and he was capable of engaging in conversations more appropriately with a peer on a consistent basis without teacher intervention. Based on this, the court concluded, "it is both apparent and undisputed that [the student] made significant progress at Aaron []…in line with his IEP goals."

Finally, the court reviewed whether there were any equitable considerations weighing against reimbursement. In determining that there were not, the court concluded that the parent "fully cooperated with the DOE, communicated her concerns about [the student's] IEP, and acted reasonably at all times." According to the court, the parent cooperated by:

- Attending the CSE meeting to develop the IEP and asking a number of questions about the IEP;
- Contacting the proposed placement to arrange a visit once she received the final recommendation;
- Visiting the proposed school on the first day of school;
- Observing the proposed class; and
- Promptly notifying the District that she was rejecting the placement.

Although the parent signed a re-enrollment contract with Aaron prior to her visit to the District's proposed school, the court held that this action did not weigh against reimbursement. Rather, the court concluded that this action was "necessary to ensure that [the student] would have a spot at Aaron." Moreover, the Aaron contract permitted the student to withdraw if the DOE offered FAPE.

Accordingly, the court reversed the SRO's decision and granted the parent reimbursement of tuition paid to Aaron for the 2010-11 school year.

WHY YOU SHOULD CARE:

In Burlington-Carter cases, the test for the appropriateness of a parent's private placement is that it is appropriate, not that it is perfect. See R.E. v. New York City Dep't. Of Educ., 785 F.Supp. 2d 28, 44 (S.D.N.Y., 2011). A private placement that meets the standard of "reasonably calculated to enable the student to receive educational benefits" is one that will be considered "likely to produce progress, not regression." See Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 (2d Cir., 2007). To this end, because the standard for appropriateness of a private placement is lower than that applied to school districts, CSEs must be sure that they are crossing all "T's" and dotting all "I's" during IEP development. Otherwise, where there are no equitable considerations weighing against reimbursement, a parent may be successful in recovering reimbursement of tuition paid to a private school that provides an arguably lukewarm special education program.

As articulated by this court, when a student has been parentally placed, the private school need not provide the same level or frequency of related services as those mandated by the IEP. Rather, as long as the private program is reasonably calculated to enable the student to receive educational benefits (i.e. is tailored to meet the student's unique needs), the private school will likely be deemed appropriate.

It should be noted, however, that where there is evidence that in order for the student to benefit from the private school program, the parent must supplement the services provided by the private school with services provided outside of school, the parents may be unsuccessful in arguing that the private program was appropriately tailored to meet the student's needs. See C.L. v. Scarsdale Union Free School Dist., 2012 WL 6646958 (S.D.N.Y., 2012) (Because

the student received limited counseling for his anxiety needs at Eagle Hill, which was supplemented by outside counseling, the court concluded that this factor evidenced that Eagle Hill was not tailored to meet the student's special anxiety needs. See K.S. v. New York City Dept. of Educ., 2012 WL 4017795 (S.D.N.Y., 2012) (Finding that the services provided by the Rebecca School, without being supplemented by services provided by the District pursuant to pendency, were insufficient to meet the student's special education needs); M.B. ex rel. L.C. v. Minisink Valley Central School Dist., Slip Copy, 2013 WL 1277308 (2d Cir., 2013) (while the private school offered the student counseling sessions, the parents failed to provide sufficient evidence to determine whether the number of sessions were appropriate to meet the student's needs).

However, the IHO, SRO or court will only reach this issue if it has been determined that the district denied FAPE. If there are equitable considerations (e.g. the Parents' failure to cooperate) indicating that the parents have frustrated the District's attempts to provide FAPE, reimbursement of tuition may be denied.

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3. Student's Off-Task Behavior Rendered Continued Placement in a General Education Class Inappropriate.

V.M. v. North Colonie Cent. Sch. Dist., 2013 WL 3187069 (N.D.N.Y., 2013)

SALIENT FACTS:

For her seventh and eighth grade years, a student with Down Syndrome was placed in a general education class with daily CT-direct services provided for 30 minutes during reading, math and social studies. Despite this support, the student continued to struggle to comprehend instruction and began demonstrating increasing emotional and behavioral issues, including crying and falling asleep in the classroom, refusing to comply with directions, and engaging in general off-task behavior (e.g. putting her head on her desk, looking around the room, observing other students, poking peers, and playing with her shoe laces).

Since the student's third grade year, the parent withheld consent for the district to reevaluate the student. Since the district did not have updated information, the student's IEPs during this period were developed without the benefit of new evaluative material. Without the benefit of updated evaluations, the CSE convened on three or four occasions to develop the student's ninth grade IEP. The CSE determined that the student required self-contained classes for reading, math and social studies, but should remain in a general education class for English and Science, the two classes that kept her most engaged. However, because she insisted that the student participate in a full-time general education, Regents level program, the parent objected to this recommendation. The IHO concluded that

the District failed to offer FAPE for the student's ninth grade year. Because the student's ninth grade year had concluded as of the time of the hearing, the SRO dismissed the appeal as moot.

COURT'S DECISION:

The court found that as a result of the parents' repeated refusals to consent to the District's reevaluation of the student, the parent was precluded from arguing that the district failed to provide FAPE. The court pointed out that, the district had no obligation to obtain updated evaluations after the parent refused consent to a reevaluation and cognitive testing.[1] Further, the court agreed with the SRO's conclusion that because the student's eighth grade year had expired, the claims relevant to that school year were moot. Nevertheless, the court continued to consider the merits of the case. The court wrote:

> While [] IDEA expresses a preference for educating students in the regular education classroom, a child may be removed from the regular education environment "when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" (*citing* Mavins v. Sobol, 839 F. Supp. 968, 982 n.25 [N.D.N.Y., 1993]).

Applying this standard here, the court pointed out that during the various CSE meetings, the student's teachers reported that the mainstream instruction she received during her eighth grade year was "far beyond" her comprehension level and that her presence in those classes was detrimental to her." In fact, the student's consultant teacher reported that the student needed "curriculum modifications to a second-grade level for concepts." The court noted the Fifth Circuit Court of Appeals' against mainstreaming when doing so would fundamentally alter the general education program "beyond recognition." See Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir., 1989). As the Fifth Circuit wrote:

> [M]ainstreaming would be pointless if we forced teachers to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to

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[1] It should also be noted that early in the 2009–2010 school year, the parent requested a program review of the student's reading program. The District offered to have an independent reading evaluation conducted by local reading consultant. However, the parent withheld consent for the evaluation.

such an arrangement would be that the child is sitting next to a nonhandicapped student.

The court pointed out that the record demonstrated that the student struggled significantly in her mainstream classes, even when the curriculum was modified to the second grade level and extra CT-direct services were provided. Moreover, although the CSE did not have the benefit of updated evaluations, numerous faculty who had worked with the student reported that "exposing her to a mainstream curriculum that was well beyond her learning capabilities actually caused [the student] to regress both behaviorally and academically.

WHY YOU SHOULD CARE:

Districts are required to reevaluate a student with a disability at least once every three years to ensure that educational programs are well-suited to the student's evolving needs. See Schaffer v. Weast, 546 U.S. 49, 53 (2005). IDEA also requires that parents consent to evaluations of their children. The Regulations of the Commissioner of Education provide that:

> Parental consent need not be obtained for a reevaluation *if* the school district can demonstrate that it has made reasonable efforts to obtain that consent, and the student's parents failed to respond. 8 NYCRR §200.5(b)(1)(i)(b).
>
> However, the Regulations continue:
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> If the parents of a student with a disability refuse to give consent for an initial evaluation *or* reevaluation or fail to respond to a request to provide consent for an initial evaluation, the school district *may, but is not required to*, continue to pursue those evaluations by using the due process procedures. 8 NYCRR 200.5(b)(3).

As the court explained here, after consent is withheld, the district cannot be held liable for denying FAPE.

When considering whether a student with a disability can be educated in the regular setting with supplemental aids and services, the CSE should consider:

- Whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
- The educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and
- The possible negative effects on the education of the other students caused by the inclusion of the child in the classroom.

See P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ., 546 F.3d 111, 120 (2d Cir.2008).

CSEs must remember that IDEA does not require teachers to devote all or most of their time to one classified student. Similarly, IDEA does not require the general education program to be modified beyond recognition. As pointed out by the Fifth Circuit Court of Appeals (and noted by the V.M. court), if a regular education teacher must devote all of her time to one disabled child, she will be acting as a special education teacher in a regular education class. Moreover, the teacher will be focusing her attention on one child to the detriment of her entire class, which may include other students with special education needs.

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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.

