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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

In this issue of the *Attorney's Corner*, we review seven cases from the Second Circuit Court of Appeals and federal District Courts. In response to a group of parents' allegations that a private school's use of electric shock on their children was necessary to afford them educational benefits, the Second Circuit analyzed whether the State's regulatory ban on aversive interventions was in violation of IDEA, Section 504 and the U.S. Constitution. Additionally, in a landmark decision, the Second Circuit Court of Appeals set a new standard for how District IEPs are reviewed in Burlington-Carter tuition reimbursement cases. Now, when attempting to prove that the District would have provided the student FAPE had he or she participated in the District's recommended placement, the District may not present "retrospective" testimony about the services it would have provided, unless these same services are enumerated in the IEP at issue. Consequently, in tuition reimbursement cases, Districts will be precluded from presenting retrospective testimony regarding, for example, programmatic services, which are included in the District's recommended program, but omitted from the IEP.

Second Circuit Court of Appeals

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1. Regulatory Ban on Aversive Interventions Does Not Violate IDEA, Section 504 or The U.S. Constitution.

Bryant et al. v. New York State Education Department, 2012 WL 3553361 (2d Cir., 2012)

SALIENT FACTS:

The parents of a group of students with severe behavioral problems appealed a district court's order dismissing their claim that the State's Regulatory ban on the use of aversive interventions ("aversives") violates IDEA, Section 504, and the U.S. Constitution. The State Regulation prohibits schools, including approved out-of-state day or residential schools from using aversive interventions on the State's students who are placed in these programs. 8 NYCRR §19.5(b)(1). The regulation defines an "aversive intervention" as one which is "intended to induce pain or discomfort of a student for the purpose of eliminating or reducing maladaptive behaviors." Id.

The students were placed by their respective CSEs at the Judge Rotenburg Educational Center, Inc. ("JRC"), an SED approved out-of-state residential school located in Massachusetts. JRC caters to students with severe behavioral disorders who have proven resistant to other forms of psychological and psychiatric treatment. While most JRC students are subjected to positive-behavior reinforcement, JRC may employ negative-consequence interventions (i.e. aversives) for other students. JRC's principal form of aversive intervention is electric skin shock, which lasts approximately two seconds. The shock consists of a low-level electrical current, applied to a small area of the student's skin. According to the Parents, "aversives [] have helped many JRC students to participate in activities with peers and helped some attend college, join the armed forces, obtain employment, and go on extended family visits." The parents contended that, unlike most other students at JRC, their children's behavior could not be managed with positive behavioral interventions and aversive intervention was necessary.

COURT'S DECISION:

The District Court dismissed the Parents' claim. In refusing to second guess the State's policy, the Second Circuit affirmed the decision. As to alleged IDEA procedural violations, the court wrote, "[the] regulation prohibits only consideration of a single method of treatment without foreclosing other options. Nothing in the regulation prevents individualized assessment, predetermines the children's course of education, or precludes educators from considering a wide range of possible treatments." Regarding the alleged IDEA violation, the court noted that IDEA guarantees only an appropriate education, not one that provides everything that might be thought desirable by "loving parents". Despite the fact that the parents agree that these interventions have essentially helped maximize their children's potential, the court held that IDEA does not require such measures.

Regarding the parents' Section 504 claim, because the Regulation applies to all students regardless of disability, the parents did not argue that the Regulation denied the student benefits on the basis of their disability. Rather, they alleged that the Regulation was promulgated in bad faith or was the result of gross misjudgment. However, because SED investigated the matter prior to offering the regulation for public comment, and received the public's comments before promulgating the regulation, the Court rejected this argument.

Finally, the Court rejected the parents' allegation that the Regulations violated the students' constitutional rights to substantive and procedural due process. Laws that discriminate on the basis of disability are subject to rational-basis review. Thus, the Court ruled that the law must be *rationally* related to a *legitimate* government objective. Because the Regulation was rationally related to the legitimate government purpose of protecting the safety of students, the court held that the parents could not prevail on this claim. To state a claim of a violation of substantive due process, a property or liberty interest must be deprived and such depravation must be without due process. Because the allegation of a violation of the students' procedural due process rights duplicated the procedural IDEA claim, this claim failed for the same reasons. Specifically, the parents contended that the students have an interest in individualized assessments, supports and services, and that this interest is undermined by the Regulation, which bans the use of interventions the students need. However, the court concluded that the prohibition merely removes one possible form of treatment from the range of possible options. For the foregoing reasons, the Court affirmed the lower court's dismissal of the parents' complaint.

WHY YOU SHOULD CARE:

The State's ban on aversive interventions prohibits all public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State- supported schools in this State, approved out-of-state day or residential schools, or registered nonpublic nursery, kindergarten, elementary or secondary schools from employing the use of aversive behavioral interventions to reduce or eliminate maladaptive behaviors. See 8 NYCRR §19.5(b). However, the Regulations carve out an exception to its ban on the use of aversive interventions. See 8 NYCRR §200.22(e). Specifically, where the CSE determines that the use of aversive interventions for a student who displays self- injurious and/or aggressive behaviors that threaten the physical well-being of the student or that of others, the CSE may include such interventions on the student's IEP, but only to address such self-injurious or aggressive behaviors. However, prior to finalizing an IEP which permits the use of aversive intervention, the CSE must submit an application to the Commissioner, requesting a review of the student-specific information. If the application is approved, and if the CSE decides to incorporate the use of aversive interventions into the IEP, the District must then notify the Commissioner. Under these circumstances, the IEP must identify the

specific targeted behavior, the aversive intervention to be used and, if applicable, the device to be utilized. The parent must provide informed written consent for the use of the aversives.

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2. A Landmark Decision In Special Education Modifies How District IEPs Are Reviewed In Tuition Reimbursement Cases.

R.E. ex rel J.E. v. NYC Dept. Of Educ., et al., 2012 WL 4125833 (2d Cir., 2012)

SALIENT FACTS:

In a tandem decision, the court reviewed three separate cases involving students with autism (R.E. v. NYC Dept. Of Educ. [11-1266-cv]; R.K. v. NYC Dept. Of Educ. [11-1474-cv]; and E.Z.-L v. NYC Dept. Of Educ. [11-655-cv]). The main issue in all three cases was whether the District offered FAPE such that the Parents' tuition reimbursement claims should be denied. In each case, the District offered retrospective testimony regarding the services the students *would have* been provided in order to overcome the omission of such services from the IEPs. In each case, the IHO granted the parents' reimbursement claims on the grounds that the District failed to offer FAPE. In relying upon the retrospective testimony to varying degrees in each case, the SRO reversed each IHO decision.

In R.E. and R.K., the federal district court reversed the SRO's decisions. In R.E., the court adopted the rule that "the sufficiency of the IEP is determined from the content within the four corners of the IEP itself." As such, the court held that the SRO erred in basing his conclusion on "after-the-fact testimony" as to what the special education teacher would have done had the student attended his class. However, in E.Z-L, the district court affirmed the SRO's denial of tuition reimbursement. Although the District appealed the district court decisions in both R.E. and R.K., while the Parents appealed the district court decisions in E.Z-L, the Second Circuit addressed all three cases in one decision as they involved common issues of law.

COURT'S DECISION:

As a preliminary matter, the Second Circuit Court of Appeals, the federal appeals court with jurisdiction over school districts in the State of New York, noted that when an IHO and SRO reach conflicting conclusions, it "defer[s] to the final decision of the state authorities [] that is, the SRO's decision." However, such deference "depends on the quality of [the SRO's] opinion" (*citing* M.H. v. NYC Dept. of Educ., 685 F.3d 217 [2d Cir., 2012]). The Court wrote, "a court must defer to the SRO's decision on matters requiring educational expertise unless it

concludes that the decision was inadequately reasoned, in which case a better-reasoned IHO opinion may be considered instead." In applying this reasoning, the Court declined to afford due deference to the SRO in any of the cases before it.

As to the substance of the case, the Court rejected what it referred to as "retrospective testimony" relied upon by the SRO in each case. The Court held, "the use of retrospective testimony about what *would have* happened if a student had accepted the [District's] proposed placement must be limited to testimony regarding the services described in the student's IEP." The Court explained:

> Testimony may not support a modification that is *materially different* from the IEP, and thus a deficient IEP *may not* be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP (emphasis added).

As such, the Court adopted the majority view that:

> [T]he IEP must be evaluated prospectively as of the time of its drafting, and therefore h[eld] that retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a *Burlington/Carter* proceeding.

Despite the Parents' urging, the Court declined to adopt a rigid four corners rule, which would prohibit any testimony about services beyond what was written in the IEPs. Rather, the Court held, "testimony regarding state-offered services may only *explain or justify* what is listed in the written IEP." To illustrate the difference between retrospective testimony being offered to remedy a deficient IEP and testimony offered to explain or justify what is listed in the IEP, the court provided examples. Most troubling was the Court's example regarding teaching methodology:

> [I]f an IEP states that a specific teaching method will be used to instruct a student, the school district ***may*** introduce testimony at the subsequent hearing to describe that teaching method and explain why it was appropriate for the student. The district, however, ***may not*** introduce testimony that a different teaching method, ***not*** mentioned in the IEP, would have been used (emphasis added).

Generally, teaching methodology had been thought to be within the purview of the individual teacher, or service provider, not the CSE. However, according to the Second Circuit, the determination of appropriate teaching methodology may now be considered a CSE decision.

Based upon its holding, the Second Circuit found that the IEPs were deficient as written, and awarded the parents tuition reimbursement.

WHY YOU SHOULD CARE:

Traditionally, school districts would not include in the IEP services which were programmatic. Oftentimes, programmatic services include counseling; specialized reading instruction; ABA or TEACCH, and various other methodologies. Because these services are included in the program, CSEs may be inclined to omit them from the IEP. However, now, despite how a student's program will be implemented, where the programmatic services are omitted from the IEP, the District may not present retrospective testimony at the due process hearing to recover tuition reimbursement, to prove that the services would have been provided or the particular methodologies used. Retrospective testimony may be used to explain or justify what is already listed in the written IEP. Therefore, only where programs and services are actually listed on the IEP, may testimony be provided at the due process hearing regarding how these programs and services would be implemented had the student attended the District's program.

Until now, it has been well-settled among SRO and federal district courts within the Second Circuit that "the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher." See Application of the New York City Bd. of Educ., Appeal No. 11-086, fn 7 (2011); E.S. ex rel. B.S. v. Katonah-Lewisboro Sch. Dist., 742 F.Supp.2d 417 (S.D.N.Y. 2010). However, according to this Second Circuit decision, where, for example, a CSE has specified the teaching methodology that would be used with the student, the District will be precluded at the impartial hearing, from presenting testimony regarding different teaching methodologies, not specified in the IEP, which would have been employed. What is most disconcerting is that an inference can be made from this decision that where the precise teaching methodology is not specified in the IEP, the District may be precluded from presenting testimony at the impartial hearing in a tuition reimbursement case regarding the teaching methodology that would have been implemented with the student. You should consult with your school attorneys about whether methodologies should now be enumerated in IEPs.

Although not addressed by the Court, this decision raises questions regarding the importance of the prior written notice ("PWN"). Generally, the PWN provides further descriptions and explanations regarding the CSE's recommendations. The PWN serves as an opportunity for the District to elaborate on the recommendations appearing or omitted from the IEP. Moreover, because it is prepared contemporaneously with the IEP, and before the IEP is implemented, its contents may not be viewed in the same light as the Court's spurned "retrospective" testimony. It would appear that this decision results in the PWN being an even more important document than before. It is possible that the more detail you provide in the PWN, the less likely it is that a reviewing Court will view

its details as being retrospective. The IEP includes only those programs and services recommended by the CSE. However, the PWN will include those programs and services, which are recommended by the CSE, rejected by the CSE, and should also include information regarding descriptions of those programs and services which are programmatic. For example, although the CSE may consider an elementary student's need for reading services, it may decline to recommend specific IEP-mandated specialized reading as a related service because the recommended program is language-based with a reading component. Generally, the IEP would not include these programmatic services; however, the PWN should elaborate on these services. It is unclear from this decision whether under these circumstances, the PWN would be accepted as a supplement to the IEP.

While the Second Circuit has clearly stated that retrospective testimony may not be relied upon in Burlington-Carter tuition reimbursement cases, CSEs should err on the side of caution. At the time of developing the IEP, the CSE may not know whether the parent will pursue due process for tuition reimbursement or services only. As such, each IEP should be a comprehensive document including a full list of programmatic components; 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 (e.g. 15:1:1). CSEs must remember - if it isn't in the IEP, you won't be able to argue that it is a part of the student's recommended program at the impartial hearing!

Federal District Courts

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1. Private School's Failure to Provide Services with the Frequency the Student Required to Make Progress Bars Parents' Claim for Tuition Reimbursement.

K.S. and S.S. v. New York City Dept. Of Educ., 2012 WL 4017795 (S.D.N.Y., 2012)

SALIENT FACTS:

For a student with Angelman Syndrome,[1] the CSE recommended a 12:1:4 class in a specialized school on a 12-month basis; a 1:1 aide; and related services of OT; PT and speech language therapy. The OT and PT services were recommended

[1] The court described Angleman Syndrome as "a neuro-genetic disorder characterized by intellectual and developmental delays, sleep disturbance, seizures, jerky movements - especially hand-flapping, frequent laughter or smiling and a usually happy demeanor."

to be provided individually, four times weekly for thirty minutes per session. The speech services were to be provided individually, five times weekly for 6.5 hours per week. The District did not have a final placement recommendation in effect at the start of the school year. The parents rejected the recommended services, unilaterally placed the student in the Rebecca School, sought reimbursement of tuition and payment for home based services, and the services of a 1:1 aide provided at Rebecca.

Per the terms of the IHO's pendency order, the District provided the student with home services, which included, among other things, three 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual OT, four 30-minute sessions per week of individual speech and language therapy. In addition, the district was ordered to provide the student with a 1:1 aide at Rebecca. Ultimately, the IHO found that the district did not offer FAPE and ordered the district to reimburse the parents in the total amount of $76,750.

On appeal, the District did not challenge the IHO's ruling of a denial of FAPE, presumably because the District did not have a final placement recommendation in effect at the start of the school year. However, the District challenged the IHO's ruling that Rebecca was appropriate. The District argued that without the OT, PT and speech language services it provided the student (albeit pursuant to an interim order), the student would not have been able to make meaningful progress at Rebecca. The SRO agreed. Although the SRO noted that Rebecca incorporated OT, PT and speech services into the student's program to address his needs, he credited the testimony of District witnesses that the duration and frequency of services provided by Rebecca were insufficient to meet the student's needs. As such, the SRO held that without the District-provided services supplementing those Rebecca provided to the student, he would have been unable to make meaningful progress. Further, the SRO noted that the absence of the 1:1 aide from Rebecca's program made Rebecca inappropriate given the student's motor difficulties. Specifically, at Rebecca, the student navigated his environment by crawling, cruising along the wall, and walking with assistance. As such, the SRO reversed the IHO's award of reimbursement.

COURT'S DECISION:

The court affirmed the SRO's decision. The court held that the SRO properly concluded that in light of the student's limited motor skills, the private school, which did not employ a full-time 1:1 aide, would have failed to adequately address the student's physical needs.

Further, the court held that it "should not consider [the services] provided by the [District pursuant to the IHO's pendency order] as a part of the private placement in determining whether the parents met their burden of proof that the unilateral placement...was appropriate." The court found that the services provided by Rebecca, standing on their own, were insufficient to meet the

student's special education needs, and as such, the private placement was inappropriate. In light of this finding, the SRO did not reach the equitable considerations.

WHY YOU SHOULD CARE:

Oftentimes, private schools will provide related services to students attending its schools. However, these services may be supplemented by District-provided related services. Although a District may have failed to offer FAPE, where there is evidence that without the District-provided related services, the student would not have been able to make meaningful progress, the private school may be deemed inappropriate and a District may avoid liability for tuition reimbursement.

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2. A Student's Failure To Earn Course Credits Or Otherwise Make Progress In The Private School Rendered It Inappropriate.

M.C. ex rel. W.C. v. Lake George Central School Dist., 2012 WL 3886159 (N.D.N.Y., 2012)

SALIENT FACTS:

The CSE of the DOR recommended a 12:1+1 special class, speech and language therapy, and support for reading and writing. The parents rejected the recommendation, withdrew their LD student in October of 2007 and placed him in the Waldorf School ("Waldorf") for the remainder of the year. The district in which Waldorf is located ("DOL") developed an IESP for the balance of the 2007-08 school year, which recommended consultant teacher ("CT") services and speech and language therapy. Waldorf did not provide the student with any special education services or supports. Further, while at Waldorf, the student did not earn letter grades or course credit. Rather, the student's transcript noted that he "participated in class", "put forth his best effort", and "contributed positively to the classroom". For 2008-09, the DOL developed an IESP, which recommended CT services only. The DOR did not convene an annual review or develop an IEP for 2008-09. The parents sought reimbursement for tuition paid to Waldorf for 2007-08 and 2008-09. The SRO reversed the IHO's award of reimbursement on the grounds that the private school program was inappropriate to meet the student's special education needs.

COURT'S DECISION:

As the court concluded that the second prong of the Burlington-Carter test (i.e. whether the private school is appropriate) was dispositive, without addressing the appropriateness of the District's program, it was implicit in the decision that the court found that the district denied FAPE for 2007-08 and 2008-09.

Nevertheless, the court denied the parents' request for reimbursement, as it held that Waldorf was inappropriate to meet the student's special education needs. The court pointed out that the student was unable to follow along during his classes, had a limited understanding of the material presented, and was placed in classes that were beyond his abilities. There was "insufficient evidence in the record that [Waldorf] adapted its program to address [the student's] specific and unique needs". The Waldorf teacher testified that despite CT services being mandated in the IESP, she did not did not discuss strategies for the student with the consultant teacher. Despite the student's difficulties in class, Waldorf did not modify the curriculum for the student. The court observed that the student's teacher did not provide the student with any support beyond that provided to the other students in the general education program. Accordingly, the court denied the parents' request for tuition reimbursement.

WHY YOU SHOULD CARE:

Although a District may fail to provide FAPE, parents cannot recover tuition reimbursement unless they can demonstrate that the private school provided educational instruction that was specially designed to meet the student's unique disability-related needs. On a claim for tuition reimbursement, the parents need not show that the private placement furnishes *every* special service necessary to *maximize* their child's potential. Rather, they need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of the student, supported by such services as are necessary to permit the child to benefit from instruction. Where the unilateral placement fails to make any effort to provide the student with a program which is specially designed to meet his unique needs, and fails to provide any support beyond that which is provided to the other general education students, the parents may be denied reimbursement of tuition.

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3. Failure to Conduct an FBA Does Not Result in a Denial of FAPE When the District Has Successfully Managed The Behaviors in the Past.

K.L. v. New York City Dept. Of Educ., 2012 WL 4017822 (S.D.N.Y., 2012)

SALIENT FACTS:

When not engaged in a structured activity, a student with autism who had been parentally placed in a private school, had a tendency to chew and shred her clothes. Without conducting an FBA, the District developed a BIP, which described the student's chewing behaviors, distractibility, frequent out of seat behaviors, hitting and kicking. The BIP outlined strategies for managing the

student's behaviors and the IEP contained annual goals targeted toward addressing these behaviors. According to the school psychologist, the District did not conduct an FBA because they already had a relatively solid understanding of the functions of the student's behaviors, specifically the student's difficulty in communicating and feeling overwhelmed.

In advance of the student's annual review for 2009-10, the District's psychologist prepared a draft of certain pages of the IEP and brought the draft to the CSE meeting. At the CSE meeting, the psychologist read the draft pages aloud and the CSE discussed the proposal. In addition, the CSE reviewed documents describing the student's functioning, which included a 2008 multi-disciplinary report of the student's progress from the private school she attended and a March 2009 classroom observation of the student at her private school. The CSE discussed how the student's behaviors, including her aggression and attention difficulties, seriously interfered with her instruction, thus requiring one-to-one support. Consequently, the CSE recommended a 6:1:1 special class with related services of speech, OT, PT and a 1:1 crisis management paraprofessional. The parents rejected this recommendation, maintained the student's unilateral placement and sought reimbursement of tuition. The SRO reversed the IHO's finding that the District denied FAPE.

COURT'S DECISION:

The court acknowledged that the District failed to develop an FBA. However, the court concluded that this failure did not rise to the level of a denial of FAPE, where the District had successfully managed the student's behaviors in the past. Specifically, the court noted that there was substantial evidence that a 1:1 aide had, in the past, "significantly helped" the student's behaviors and the recommended 1:1 crisis paraprofessional would have been able to do the same. Further, the student's IEP and BIP identified that anxiety and communication difficulties were the problem behaviors and included goals to increase the student's use of words to express her feelings. The court pointed out that the student's IEP contained goals geared toward addressing the student's chewing behaviors. Accordingly, the District's failure to prepare an FBA was not fatal.

Regarding the District's use of a draft IEP, the court acknowledged that the psychologist read several pages from the draft at the CSE meeting. However, the court rejected the parents' assertion that they were denied a meaningful opportunity to participate in the development of the student's IEP. The court found persuasive testimony that after reading pages from the draft IEP aloud, the psychologist invited all of the CSE members to contribute, participating in modifying or changing the draft. In fact, the parent admitted that she agreed to the related-service recommendations. As such, the court found no violation of IDEA and denied the parents' request for reimbursement.

WHY YOU SHOULD CARE:

A functional behavioral assessment ("FBA") is the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. See 8 NYCRR §200.1(r). The FBA must include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors), the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (Id) and data to support these conclusions. The resulting behavioral intervention plan ("BIP") is usually based on the results of the FBA. See 8 NYCRR §200.1(mmm). At a minimum, the BIP includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior. As such, to develop a BIP, an FBA must first be conducted. However, in the event that a District skips straight to the BIP without first conducting an FBA, this procedural violation may be found not to have denied FAPE where the District has successfully managed the student' behaviors in the past; the IEP and BIP properly identify the student's problem behaviors along with strategies and supports to address same; and District staff responsible for implementing the student's IEP have a solid understanding of the functions of the student's behaviors.

Members of the CSE are permitted to bring drafts of the IEP to the CSE meeting as long as they come to the meeting with an open mind and the CSE engages in a full discussion at the meeting. The parents must have the opportunity to participate in the CSE's discussion. CSEs should remember that the development of the IEP is a collaborative process and each member should participate. There may be times when District-staff support the CSE's recommendations and the parents do not. During these meetings, it is especially important that District-staff members adequately voice their positions regarding the appropriateness of the District's program and that the CSE Chair afforded the parents an opportunity to voice their opinions and concerns. Doing so will strengthen the District's case that it afforded the parents a meaningful opportunity to participate in the development of the IEP. In addition, it is helpful to mention in the prior written notice or the CSE meeting minutes the extent of the parents' participation in the discussion.

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4. District Had No Obligation To "Maximize" A Student's Potential By Offering Five Weekly Sessions Of 1:1 Reading Instruction.

E.W.K. and B.K. ex rel. B.K v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 2012 WL 3205571 (S.D.N.Y., 2012)

SALIENT FACTS:

The Parents of a student with a speech language disability requested reimbursement of tuition paid to Windward, the parental placement, on the ground that the District allegedly violated IDEA. Specifically, the parents argued that the CSE's refusal to increase the student's reading services from two sessions per week in a small group, to five sessions per week individually denied FAPE. The parents were unsuccessful in convincing the IHO or the SRO on appeal that the district denied FAPE either for the 2007-08, 2008-09 or 2009-10 school years. Because the SRO concluded that the district offered FAPE, he did not reach the issue of whether IDEA's 2-year statute of limitations barred the parents' claims regarding the 2007-08 IEP.

COURT'S DECISION:

In affirming the SRO's decision, the court deferred to the SRO's well-reasoned conclusions. As the parents did not allege any procedural deficiencies with the IEP or its development, the court considered only the parents' substantive challenges.

Although the 2007-08 IEP did not recommend any reading services, both the 2008-09 and 2009-10 did. The court credited testimony from the District's witnesses that, based upon the student's progress with the consultant teacher ("CT") services previously provided to address the student's written expression and reading comprehension deficits, IEP-mandated reading services were not warranted during 2007-08. Further, the court pointed out that most of the standardized tests before the 2007-08 CSE indicated that the student was in the average range. Specifically, the student scored in the 32nd and 37th percentile (average range) on the WIAT-II reading subtests, scored in the average range on the WJ-III subtests of written expression and overall reading ability, received a Level 3 on his 2006 ELA and a Level 2 on his 2007 ELA (the student missed the minimum of 650 by one point and was therefore classified as a Level 2). Further, the CSE reviewed data, which showed that the student was progressing under previous IEPs, which did not include separate reading instruction. Given the objective evidence of the student's success and progress under similar IEPs with no reading instruction, the court held that the 2007-08 IEP was reasonably calculated to enable the student to receive educational benefits.

Next, the court pointed out that the 2008-09 and 2009-10 IEPs added four annual reading goals as well as two 40-minute sessions of reading instruction per week in a small group. The court credited testimony from the District's witnesses that this change was made after reviewing reports from Windward indicating the student's decrease in his standardized reading comprehension score. At both CSE meetings, the parents requested that the CSE recommend five sessions of

individual reading instruction. In considering this request, the court pointed out that the CSE had an extensive conversation about the reading recommendation, and as a committee, determined that daily reading instruction "would be too much, because it would take too much time away from [the student's] general education classes". Further, the student's reading instruction was not limited to his two 40-minute sessions per week. Rather, the student would have received reading instruction "throughout the day" in his other classes. The court wrote:

> While it is understandable that [the parents] may have wanted more for their child, the law did not require the District to do more than it did for [the student]...Judge Ginsberg has observed, because public resources are not infinite, federal law "does not secure the *best* education money can buy; it calls upon government, more modestly, to provide an *appropriate* education" (emphasis in the original) (*citing* Lunceford v. D.C. of Bd. Of Educ., 745 F.2d 1577, 1583 [D.C. Cir., 1984])

As such, the court concluded that the District properly took into consideration all available data when formulating the 2008-09 and 2009-10 IEPs, and developed appropriate IEPs, which offered FAPE.

Finally, the court addressed the Parents' argument that the SRO impermissibly gave undue credit to the District's witnesses, while dismissing or ignoring testimony from the Parents' witnesses. In rejecting this argument, the court noted that the SRO discussed the Parents' private psychologist's evaluations at "some length," discussed in detail why he had chosen not to rely on her assertions; and discussed the parent's testimony throughout his opinion. Further, the court pointed out that the IHO discussed the testimony of the student's teacher and one of the private psychologists as well as his reasons for affording less weight to the testimony of the student's teacher. Specifically, the IHO noted that the teacher was a certified guidance counselor, not a certified reading teacher or certified special education teacher. Further, the private school teacher knew nothing about the District's program and she was unfamiliar with a term commonly associated with the student's particular reading disorder (i.e. double dyslexia). On these bases, the court declined to "second guess" or "re-weigh" competing testimony of the parents' and district's experts and deferred to the SRO and IHO's credibility determinations.

WHY YOU SHOULD CARE:

Although parents may demand that CSEs recommend an increased level of services, where the provision of these services is not warranted based upon the student's special education needs, the CSE has no obligation to recommend them. Rather, the CSE must recommend an IEP, which "is likely to produce progress, not regression and affords the student an opportunity greater than mere trivial advancement". See E.S. ex rel. B.S. v. Katonah-Lewisboro School Dist., 2012 WL

2615366 (2d Cir., 2012). The IEP need not furnish *every* special service necessary to *maximize* each handicapped child's potential. See M.H. v. New York City Dept. Of Educ., 685 F.3d 217 (2d Cir., 2012). In determining what services afford a student an opportunity greater than mere trivial advancement, a CSE must consider recent progress reports, report cards, results of standardized assessments, evaluations, teacher reports, and concerns from the parents. If the student has been unilaterally placed, the CSE must be sure to request any progress reports, report cards, standardized assessments and teacher reports from the private school.

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5. Exorbitant Attorneys' Fees Request Results in Significant Reduction of Award.

S.M. v. Taconic Hills Cent. Sch. Dist., 2012 WL 3929889 (N.D.N.Y., 2012)

SALIENT FACTS:

Upon prevailing at the administrative level, the Parents sought attorneys' fees in the amount of $146,148.48. During the hearing, the parties entered into a consent decree, which the district argued was "virtually identical" to that which the district offered before the hearing commenced. As such, the district argued that any fee award should be significantly reduced because the parents only received a *de minimus* benefit from their attorneys.

COURT'S DECISION:

In accepting the district's *de minims* argument, the court pointed out that the consent decree was substantially similar to the district's settlement proposal made prior to the commencement of the hearing. The court acknowledged that the consent decree provided specific obligations on the district and set forth details omitted from the district's proposal. However, the court concluded that these details were not so specific that the parties could not have negotiated them in a more efficient manner and without requiring significant testimony at the hearing. As such, the court agreed that a reduction in attorneys' fees was warranted for the *de minims* additional benefit obtained.

Further substantiating a downward adjustment of attorneys' fees was the court's agreement with the district's argument that the parents' attorneys unnecessarily protracted the matter through the administrative process in an effort to obtain an administratively sanctioned consent decree. Oftentimes, parties enter into a settlement agreement either prior to or during the hearing. However, to be entitled to an award of attorneys' fees, the parents must be the prevailing party. The parents may be considered the "prevailing party" for the purposes of obtaining an award of attorneys' fees where they have obtained an administratively

sanctioned consent decree. The court pointed out that "without the administratively sanctioned consent decree, a plaintiff cannot turn to the school district for attorneys' fees". However, because the court found that the matter could have been concluded earlier, it determined that a reduction in attorney's fees was warranted.

Next, the court addressed the reasonableness of the hourly rate. The court pointed out the Second Circuit's position that, "the reasonable hourly rate is the rate a paying client would be willing to pay and the court should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively" (*citing* Arbor Hill, 522 F.3d at 190). The court reasoned that the rate of $250 as indicated in the retainer agreement signed in 2009 rather than the rate of $275 as established by the law firm in 2010 was a reasonable rate for the senior partner. However, the court reduced the rate of $250 to $150 for an associate who had been practicing law for less than one year and was not claimed to have any specialized experience or knowledge in special education.

In light of the court's adjustments, the court drastically reduced the attorney fees from $146,148.48 to a total of $50,736.08, including costs.

WHY YOU SHOULD CARE:

The prevailing party parent at an administrative hearing is entitled to seek attorneys' fees from a federal court of competent jurisdiction. These fees must be reasonable and consistent with the prevailing rate in the community for similar services. Where the benefit afforded to parents by their attorneys is *de minims* (i.e. in this case, where the benefit of their attorneys did not afford the parents a greater outcome than what the district had already proposed), a request for attorneys' fees may be reduced.

The Second Circuit Court of Appeals held that "parents are entitled to 'prevailing party' status if they obtain a '[]consent decree' from an IHO, even where 'the terms of such order arise out of an agreement between the parties, rather than out of the wisdom of the IHO". See V.G. v. Auburn Enlarged Cent. School Dist., 349 Fed.Appx. 582 (2d. Cir., 2009) (*citing* A.R. ex rel. R.V. v. New York City Dept. Of Educ., 407 F.3d 65 (2d Cir., 2005). Without an administratively sanctioned consent decree, a plaintiff cannot turn to the school district for attorneys' fees. In contrast to a consent decree, regardless of the terms of a stipulation of settlement, where the parties have entered into a stipulation of settlement, the parents will not be considered the "prevailing party." As such, they will not be entitled to seek attorneys' fees. Although a District may feel compelled to settlement in order to avoid several days of hearing; and responsibilities for the costs associated with IHO, court reporter, and legal representation; to avoid claims for the parents' attorney's fees, Districts should consider entering into legally binding stipulations of settlement rather than administratively sanctioned consent decrees.

CAVEAT: It should be noted that it is anticipated that the Regulations of the Commissioner of Education will be revised to limit the IHO's authority to so-order a settlement agreement only to those issues that were raised in the due process, complaint or amended due process complaint.[2] Thus, where a parent has challenged a district's IEP for the 2011-12 school year through due process and the parties agree to enter into a consent agreement to be signed by the IHO, this agreement may only cover the issues relating to the 2011-12 IEP and therefore will cover only a single year. However, the terms of a stipulation of settlement contain no such restriction. Thus, on the same complaint, the parties may agree to a stipulation of settlement that covers multiple issues and multiple years regardless of what issues and years are implicated in the Complaint.

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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.

[2] See SED Public Comment Announcement, *Proposed Amendment to Sections 200.1 and 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Impartial Hearings* (June 8, 2012) (*available at*: http://www.regents.nysed.gov/meetings/2012Meetings/June2012/612p12d1.pdf).

