NYSE Directors
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MONTH IN REVIEW: March 2013

Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

This month, we learn that microwaving a student's lunch, although a preferred rather than medically necessary accommodation, is not reasonable; it is within the scope of the responsibilities of a 1:1 classroom aide or paraprofessional working under the supervision of a certified teacher to record discrete trial data, that $1,800 is a reasonable cap for IEEs; and that the Second Circuit Ruling in R.E. regarding Retrospective Testimony applies to the substance of IEPs as well as to the District's implementation of the IEP.

Second Circuit Court of Appeals

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1. Requiring Staff to Heat Student's Homemade Lunch In The Microwave is Not a Reasonable Accommodation Under Section 504 - *REVISITED*

A.M. v. New York City Dept. Of Educ., et al., 840 F.Supp.2d 660 (E.D.N.Y., 2012), *aff'd* 2013 WL 906110 (2d Cir., 2013)

SALIENT FACTS:

In our January 2012 issue of the "Attorney's Corner", we reviewed the parent's federal court ("lower court") appeal concerning the District's refusal to microwave her child's homemade lunches. The student had recently been diagnosed with Type I Diabetes and the parent alleged that heating up the student's food was a necessary accommodation under Section 504 because he

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would skip lunch if his food was not hot. The lower court pointed out that the Parent's request was not based on a medical necessity. Rather, it was because the student was more likely to eat food that he found appetizing. The lower court wrote, "though it is understandable that [the student] – like others with or without diabetes – would prefer to eat food intended to be eaten hot while hot, or eat lunches other than 'cold sandwiches' … this does not mean the school district was obligated under the applicable disability statutes to accommodate this preference."

COURT'S DECISION:

The Second Circuit Court of Appeals ("Court") concluded that, while heating the student's food may have helped him adjust to his disability, Section 504 requires that "an otherwise qualified handicapped individual be provided with meaningful access to the benefit that the guarantee offers." Section 504 does not require "'optimal' accommodations". The Court wrote:

> It is undisputed that diabetics do not need to eat hot food in order to manage their diabetes successfully. Therefore, even if [the student] sometimes skipped lunch and disliked the food on the school menu, that did not warrant a further accommodation in addition to what the school had already provided [i.e. lunch menu options and monitoring the student's blood glucose levels].

Accordingly, the High Court affirmed the lower court's decision that the District's refusal to microwave the student's lunch did not result in a violation of Section 504.

WHY YOU SHOULD CARE:

As we reminded you in our January 2012 issue of the "Attorney's Corner", although parents may request that the District provide certain accommodations, pursuant to Section 504, the District is only obligated to provide reasonable accommodations necessary to enable the student to receive meaningful access to educational programs.

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2. Evidence of Progress at Unilateral Placement Without More is Insufficient to Warrant Reimbursement of Tuition.

M.B. v. Minisink Valley Central School District, 113 LRP 13330, 2013 WL 1277308 (2d Cir., 2013)

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SALIENT FACTS:

The parents of a student with behavioral and academic difficulties appealed a federal court decision, which denied their request of tuition reimbursement at the Family Foundation School ("FFS"), a therapeutic boarding school. The federal court was unpersuaded that evidence of the student's behavioral and academic gains substantiated an award of reimbursement, and as such, denied the Parents' request for reimbursement.

COURT'S DECISION:

The Second Circuit Court of Appeals ("Court") explained that the appropriateness of a district placement turns on whether it is reasonably calculated to enable the child to receive educational benefits. In contrast, the appropriateness of a unilateral placement turns on whether it provides education instruction specifically designed to meet the unique needs of a handicapped student. Academic and behavioral progress alone does not demonstrate the appropriateness of a private placement. Rather, the parents must demonstrate that the school offered specially designed instruction to meet the student's unique needs as identified by the District's CSE. The Court pointed out that while FFS offered counseling, there was insufficient evidence regarding whether the sessions were appropriate to meet the student's specific needs. Moreover, FFS did not offer specific services to address the student's difficulties with organization, executive functioning and fine motor skills. Additionally, the court found that FFS's behavioral program, which involved the use of time-outs and other sanctions was inappropriate. Accordingly, the Court affirmed the federal court's denial of reimbursement of tuition.

WHY YOU SHOULD CARE:

In order for parents to obtain reimbursement, they must prove the district failed to provide FAPE and the unilateral placement is appropriate. In order to be found appropriate, the private school must provide educational instruction specifically designed to meet the unique needs of the child. Evidence of progress alone through the presentation of report cards, progress reports or other means will be insufficient to sustain this burden. Rather, the unilateral placement must offer instruction and support services designed to meet the student's unique needs. Moreover, if the IEP provides for a level of services that are appropriate and the private school does not provide a comparable level of services, a court may find that the private school is inappropriate.

Federal District Court

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1. District's $1,800 Cap on IEEs Upheld as Reasonable.

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M.V. ex rel. G.V. v. Shenendehowa Central Sch. District., 2013 WL 936438 (N.D.N.Y., 2013).

SALIENT FACTS:

The parent of a child with a speech and language impairment alleged that the district denied FAPE by imposing a District-wide cap of $1,800 on a previously approved independent educational evaluation ("IEE"). At the 2010-11 CSE meeting, the parent requested that the district pay for a neuropsychological evaluation prepared by Dr. Alison Curley as an IEE to assess their child's progress in academics. The parent never expressed disagreement with any district evaluation. Nevertheless, the district approved the parent's request up to an $1,800 limit pursuant to the district's recently adopted Regulation concerning IEEs. Thereafter, the parent learned that Dr. Curley's evaluation would cost between $2,300 and $2,500 and requested that the District increase its $1,800 cap to accommodate the fee. The district refused and the parent filed for due process.

COURT'S DECISION:

The court dismissed the parent's appeal on several grounds including, but not limited to that, (1) the parent failed to disagree with an district evaluation prior to requesting the IEE, and (2) the district's cap of $1,800 was reasonable. As to the $1,800 cap, the court pointed out that the district provided the parents with a list of six different independent evaluators willing to conduct the evaluation for no more than $1,800. However, between the time that the district provided the parent with this list and the start of the 2010-11 school year, the parent made no attempts to contact any of the evaluators. The court opined that the reason for this failure was that the parent desired to obtain an IEE only from Dr. Curley. The court wrote, "[t]he fact that [the parent] perfunctorily attempted to contact (without success) various other doctors after that [the start of 2010-11] does not render the $1,800 cap unreasonable." (after the start of the school year people aren't available)

WHY YOU SHOULD CARE:

Parents are entitled to an IEE at public expense when they disagree with an evaluation conducted by the District. See 34 CFR 300.502(b); 8 NYCRR §200.5(g)(1). When a parent requests an IEE at public expense, the District has two options - (1) grant the request or (2) pursue due process to prove why the District's evaluation is appropriate and further evaluations are unnecessary. As illustrated here, it is permissible for districts to establish reasonable cost parameters for IEEs. However, the district would need to provide the parent with the opportunity to demonstrate that unique circumstances exist to justify selection of an evaluator whose fees fall outside the district's IEE cap. See 71 Fed. Reg. 46690 (2006). If the District provides the parents with a list of evaluators willing to conduct an IEE within the district's cost parameters, and the parents refuse to explore this list of evaluators without providing proof that the district's cap is

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unreasonable, these actions may weigh against the parents' claim that the district should expand its cap. In setting such a cap, school districts should be mindful of the average cost of similar evaluations by reputable individuals with credentials at least equal to those of district evaluators.

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2. Parents' Preferred 1:1 ABA Placement With No Exposure To Typical Peers Rejected as Overly Restrictive.

E.C. and M.W. v. Board of Educ. of the City School Dist. Of New Rochelle, 2013 WL 1091321 (S.D.N.Y., 2013)

SALIENT FACTS:

The parents of a 6-year-old student with autism and severe developmental delays challenged the district's recommendation of a 6:1+2 class for 2010-11. The parents argued that the student's developmental delays which often resulted in toileting difficulties and biting himself and others necessitated 1:1 ABA instruction during the entire school day. During 2009-10, the student was placed in the district's 8:1+2 special class as recommended by the parents' private psychologist, Dr. Salsberg. In Dr. Salsberg's 2009 evaluation, he recommended that the student's classroom should include other children who are interactive and can model and promote good social behavior.

In developing the student's 2010-11 IEP, the CSE reviewed recent progress reports, including Dr. Salsberg's 2010 updated psychological report. After reviewing district-provided reports and observing the student for one hour in his 2010-11 8:1+2 class, Dr. Salsberg recommended that the student be placed in a 1:1 full-time ABA program in a special school with related services. The CSE noted that the student had made progress in the 8:1+2 class adhering to classroom routines and in generalizing those routines outside of the classroom. However, the CSE also noted that the student had not mastered his toilet training goals and his articulation hampered his progress. Additionally, the CSE noted that the student exhibited significant delays across all areas of development; demonstrated significant weaknesses in receptive and expressive language; limited social skills; and deficits in fine motor skills and sensory processing.

The CSE considered Dr. Salsberg's recommendation of 1:1 instruction and rejected it because the CSE concluded the student required continued exposure to peers in a classroom setting "to develop joint attention and play skills, [the] ability to follow routines within a group and to develop leisure time skills...." The CSE considered maintaining the student's 8:1+2 placement and rejected it based on the student's then-current language processing, motor needs, social-emotional development and academic needs. Taking into consideration Dr. Salsberg's

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recommendations for a 1:1 program as well as the parents' concerns for a more restrictive placement, the CSE recommended a 6:1+2 class. The recommended program used discrete trial teaching ("DTT") and ABA methods throughout the day when DTT instruction is not being provided. The CSE also recommended a 1:1 aide, home-based 1:1 ABA services for 10 hours per week and related services.

Because the parents insisted that their son would not benefit from exposure to peers, they unilaterally placed the student at the Manhattan Children's Center ("MCC") and sought tuition reimbursement. The IHO found in favor of the parents and awarded tuition reimbursement, and the SRO reversed, finding that the district offered FAPE in the 6:1+2.

COURT'S DECISION:

On appeal, the parents argued that the district's recommendation was inappropriate because the class did not offer a full-time ABA program, the student could not benefit from being in a school with typically developing students, and he required 1:1 instruction. The court noted testimony that "the way the [6:1+2] program works is all of the teaching staff rotate through the DTT programs with the children, as well as in [the student's] case, programs were run expressly by his one-to-one aide." Additionally, the court pointed out that the recommended program used a variety of evidence-based teaching strategies, as well as ABA methodologies, and as such, included the parents' desired teaching methodology. Accordingly, the court concluded that the recommended program was appropriate.

Next, the court addressed the parents' concerns that the student could not benefit from exposure to typical peers. The court pointed out that in 2009, the parents' expert stated that an appropriate placement should include children who can model and promote appropriate behavior. However, the following year, without noting a substantial change in the student's performance, the private expert recommended that the student be placed in a 1:1 setting. The court was unable to reconcile the change in the expert's opinion that the child would benefit from exposure to typically developing peers in 2009, but not 2010-11. The testimony did not support that the student could not benefit from being in the presence of typically developing peers. However, the court was persuaded by testimony from the coordinator of the student's home program, and observed him in school and at home that the student would continue to benefit from exposure to typical peers. The proposed class included students between 5 and 8 years of age who had profiles similar to the student. Specifically, the students had classifications of multiple disabilities, autism, intellectual disability and emotional disturbance. In addition, like the student, the students in the proposed class had cognitive levels below the 1st percentile, and received similar related services. Therefore, the court concluded that the student would be suitably grouped for instructional purposes.

In addressing the parents' argument that the provision of a 1:1 aide was an

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inappropriate substitute for 1:1 instruction, the court pointed out that the main evidence that the student required 1:1 instruction was from the parents' private evaluator, not the district. The court acknowledged that it was not at liberty to favor the opinion of a privately hired expert over the deference that should be afforded to the District in matters of educational policy.

Next, the court addressed the parents' assertion that the 1:1 aides were responsible for direct instruction, which should have been provided by special education teachers. The court pointed out that under New York regulations, 1:1 aides may not be used as a substitute for certified, qualified teachers for an individual student. District staff testified that the student's 1:1 aide would have been responsible for running the student's DTT program, maintaining his program book, collecting discrete trial data, maintaining that data, preparing statistical reports and assisting with behavioral and management needs; all under the supervision of the student's special education teacher. Additionally, although the 1:1 aide would help the student with transitioning and behavior problems, she would not have provided instruction. The parents argued that because the district characterized the aide as an "instructional aide," the aide was expected to provide the student with instruction. However, the court wrote,

> The evidence in the record does not indicate that the aide would have exercised any responsibilities outside of those, which she was allowed to perform. The Court finds the District's fleeting characterization of the aide as an instructional aide to be of no legal significance (emphasis added) At *27.

Accordingly, the court ruled that as long as a 1:1 aide acts under the supervision of a special education teacher, it is within a 1:1 aide's scope of authority to conduct discrete trials and run the corresponding programs.

WHY YOU SHOULD CARE:

An IEP is substantively adequate if it provides personalized instruction with sufficient support services to permit the child to benefit educationally. However, a district is not required to provide every special service necessary to maximize each handicapped child's potential or everything that might be thought desirable by loving parents. Walczak v. Florida U.F.S.D., 142 F.3d 119, 132 (2d Cir. 1998).

As you may be aware, recently many parents and their representatives or advocates have taken issue with districts' uses of teacher's aides/ 1:1 aides/ paraprofessionals to conduct discrete trials, rather than use special education teachers. A 1:1 aide may perform non-instructional duties such as:

- Maintain files and prepare statistical reports;
- Manage records, materials and equipment; and
- Supervise students under the supervision of the special education

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teacher;
- Assist in physical care tasks and health-related activities as appropriate in assisting students behavioral and management needs.

As a result of allegations made by parents and their representatives regarding the proper use of paraprofessionals, there was confusion among many districts about whether using paraprofessional to conduct discrete trials qualified as "instruction." The parents' position was that students who require an ABA approach using discrete trials are only able to learn using discrete trials, and therefore, conducting discrete trials constitutes providing instruction. However, the contrary position was that the discretion and variety involved in providing instruction does not exist when conducting discrete trials. Rather, the special education teacher sets specific parameters for the aide, including the number of trials to conduct and what qualifies as an acceptable response. Therefore, the aide is merely a facilitator of the discrete trial program, rather than the teacher who has developed the program specific to the student's special education needs. According to this decision, conducting discrete trials and running the corresponding programs does not constitute providing instruction. Therefore, districts may breathe a sigh of relief that they may continue employing paraprofessionals or teacher's aides to conduct discrete trials.

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3. A District Is Not Obligated To Consider A Private School In All Cases.

A.D. and M.D. ex rel. E.D. v. New York City Dept. Of Educ., 2013 WL 1155570 (S.D.N.Y., 2013).

SALIENT FACTS:

The parents of a 14-year-old student classified with autism who had a history of anxiety, aggression, sensory processing deficits and difficulties transitioning pursued due process to challenge the district's offer of FAPE. Per the terms of a Settlement Agreement, for 2008-09 and 2009-10, the District reimbursed the parents for the student's placement at the Rebecca School. The CSE convened to develop the student's 2010-11 IEP and reviewed the district's psychologist's draft IEP. The draft IEP was based on information from 2009 and 2010 Rebecca School teacher progress reports and a comprehensive 2010 psychological evaluation. Rebecca staff reported that the student's behavior had de-escalated and did not seriously interfere with her instruction. Based on the CSE's review of the information before it, the draft IEP was edited and the CSE, including the parents, agreed that the IEP was an accurate description of the student's needs and abilities. The CSE considered a 12:1:1 and an 8:1:1 placement, but rejected both because the student reportedly experienced significant anxiety in

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large group settings. The CSE did not consider recommending a non-public placement, but recommended a 6:1:1 in-district special class. The parents rejected the recommendation, maintained the student's placement at Rebecca and sought reimbursement.

COURT'S DECISION:

The IHO found in favor of the district and the SRO affirmed. On appeal, the parents argued that the IEP was procedurally deficient because IDEA requires the district to recommend a placement based on the student's unique needs and it was insufficient for the district to consider only the 6:1:1 option and not a non-public school placement. In rejecting this argument, the court pointed out that the CSE considered two less restrictive placements (i.e. 12:1:1 and 8:1:1 classes), but rejected both because they would have provided insufficient support for the student. The CSE determined that the 6:1:1 class would appropriately meet the student's needs and the parents did not object. It remained undisputed that the District did not consider non-public placements for the student. The court wrote:

> The CSE was obligated to recommend an appropriate placement that would be in the [LRE] for the student. Therefore, once the CSE determined that a 6:1:1 classroom would be appropriate for the student, it had identified the [LRE] that could meet the student's needs and did not need to inquire into more restrictive options such as a nonpublic school.

The court rejected the parents' argument that the district should have developed a transition plan for the move from Rebecca to the in-district program. According to the parents, IDEA always requires transitional support services. The court disagreed. The court pointed out that the Regulations mandate transition services for students 15 and older and students with autism who have been placed in programs containing students with other disabilities. Here, neither circumstance applied. The court pointed out that under New York Regulations, the transition from private school to public school is not the type of change that mandates transition support services.

WHY YOU SHOULD CARE:

The Regulations require that the prior written notice ("PWN") must include a description of other options that the CSE considered and the reasons why those options were rejected. See 8 NYCRR §200.5(a)(3)(iii). As illustrated in this case, once the CSE has determined that the LRE for a particular student is in an in-district program, it need not consider a more restrictive option proposed by the parents. Where the CSE has settled on the LRE option after considering less restrictive alternatives, the PWN must describe the less restrictive options that were considered and rejected and reasons why they were rejected. If, during the CSE meeting, the parent requests that the committee consider recommending that the student be placed in a non-public school, the CSE must consider the parent's

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concerns. If it is determined that the district is capable of meeting the student's needs in a less restrictive alternative, the IEP will not reflect a non-public school placement. However, discussion regarding this more restrictive alternative proposed by the parent should be reflected under the section in the PWN entitled "Other Options Considered" and/or "Other Factors That are Relevant to the Proposed or Refused Action."

When a student transitions from a more restrictive program to a less restrictive program, from middle school to high school, or from one placement to another, there may be concerns that the student will need support. However, under these circumstances, a transition plan is not required. See E.Z.-L ex rel. R.L. v. N.Y.C. Dep't of Educ., 763 F.Supp.2d 584, 598 (S.D.N.Y., 2011) ("there is no requirement in the IDEA for a 'transition plan' when a student moves from one school to another"). A transition plan is mandated for a student 15 or older to help the child prepare for post-secondary life. A transition plan is not mandated when a child moves from private to public school or from one program to another although transitional support services may be warranted.

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4. Private School's Equestrian Program Insufficient to Fully Address Student's Specific Motor Deficits.

L.K. ex rel. Q.S. v. Northeast School District a/k/a Webutuck Central Sch. Dist., 2013 WL 1149065 (S.D.N.Y., 2013)

SALIENT FACTS:

After being unsuccessful in convincing the SRO that the Kildonan School ("Kildonan") appropriately addressed the student's motor deficits through an equestrian program required for all students, the parents appealed the matter to federal court. In preparing for 2010-11, the CSE of the student's then-DOR ("CSE 1") recommended an integrated co-teaching ("ICT") placement with the support of a teacher's assistant and related services of counseling and OT. Despite the student receiving PT the previous year and PT reports suggesting that the student should continue to receive PT, CSE 1 did not recommend PT services for 2010-11. Thereafter, the parents moved and became residents of another district. Prior to the start of the school year, the CSE of the new DOR ("CSE 2") convened to develop the student's IEP for 2010-11. CSE 2 reviewed a psychological report provided by the parents, which noted, among other things, that the student's sensory processing disorder affected his ability to coordinate smooth motor responses. CSE 2 recommended an ICT class for Math and English and related services of counseling and OT. Although the IEP did not recommend PT, it required a 1:1 PT consultation once per quarter. The parents rejected the

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recommendation, placed the student at Kildonan and sought tuition reimbursement. Kildonan did not provide students with related services despite certain services being mandated by the students' IEP. The IHO found that Kildonan's failure to provide the student with services was not fatal and determined that Kildonan was appropriate. The SRO reversed the IHO's decision.

COURT'S DECISION:

Because the district conceded Prong I of the Burlington-Carter analysis - that it failed to offer FAPE, the court skipped to Prong II - whether the private program was appropriate. Kildonan was described as a private school that specializes in educating children with dyslexia. However, it does not offer OT, PT or counseling related services. If a student enters Kildonan with an IEP recommending OT or PT, the services are reportedly provided outside of the school day by the district in collaboration with the parents. Otherwise, the student will not receive the IEP-mandated services. The court noted that all Kildonan students are required to participate in school-sponsored activities such as an equestrian class regardless of whether the student has any weaknesses or needs in balance, strength and agility. The court concluded that because these activities were not specifically designed to address the student's unique needs in the areas of fine motor development, gross motor development or sensory processing, they were insufficiently tailored to meet his specific needs.

Curiously, despite hiring their private PT evaluator and calling him as a witness during the hearing, the parents argued that the SRO placed undue weight and relied almost exclusively on their private evaluator's report. The court rejected this argument. The court pointed out that the student's private PT indicated that the student demonstrated low muscle tone and poor endurance, which affected his ability to focus throughout the day on academic challenges and recommended that the student would benefit from PT services. The court noted the private evaluator's testimony that, "while horseback riding might be helpful in addressing some of the student's motor deficits, she was not sure that it would 'fully address those issues.'" Accordingly, the court found that the parents failed to establish that Kildonan met the student's specific, unique needs.

WHY YOU SHOULD CARE:

While a parent may desire to procure the best possible education for his or her child, as articulated by this court, "it is not the role of the [] court to award tuition reimbursement where it is not shown that a particular placement even if highly beneficial for the student, is suited to meet a child's unique needs". Even when the court rejects the appropriateness of the district's program, it may still rely on the IEP to identify the appropriate levels, abilities and needs. When considering whether the private school offered services tailored to meet the student's unique needs, the court will review the related services afforded by the private school, which are tailored to meet the student's specific needs. Private schools, which ignore a student's IEP and do not provide the mandated related

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services, will likely be found inappropriate due to the failure to meet the student's needs.

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5. The Application of FRCP's Rule 68 Written Offer of Settlement to IDEA.

S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 1180860 (N.D.N.Y., 2013)

SALIENT FACTS:

Per the terms of a Stipulation of Settlement, the district agreed to train the student's special education teacher in a particular teaching methodology. Shortly thereafter, the teacher discontinued working for the district. The district never provided an appropriately trained substitute teacher. The parents filed for due process alleging that the district failed to provide an appropriately trained substitute special education teacher for the student. The parents were successful at the hearing, and thereafter sought attorney fees. Pursuant to Rule 68 of the Federal Rules of Civil Practice Laws and Rules ("CPLR"), the district presented the parents with a written offer of settlement ("Offer") offering compensatory services. After the parents rejected the Offer, the district challenged the parent's entitlement to reimbursement of any legal fees incurred after the rejection of the offer.

COURT'S DECISION:

Generally, under IDEA, courts may award reasonable attorney fees to a prevailing party. However, IDEA prohibits courts from awarding attorney fees to the prevailing party/parent if a Rule 68 Written Offer of Settlement has been made to the parent, and:

1. The Offer is made more than ten (10) days before the hearing begins;
2. The offer is not accepted within ten days; *and*
3. A court or administrative officer (i.e. impartial hearing officer) finds that the relief finally obtained by the parent is not more favorable to the parent than the Written Offer of Settlement; *unless* the parent was the prevailing party and was *substantially justified* in rejecting the offer. See 20 U.S.C. §§1415(i)(3)(D)(i), (i)(3)(E).

The court acknowledged that, in this case, an offer was properly made more than 10 days before the hearing began and was not accepted, therefore fulfilling the first two requirements of Rule 68.

Turning to the third requirement, the court determined that the parent

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obtained slightly more relief at the administrative level than what was offered by the district. The district's Offer included compensatory services in an unspecified amount and form. In contrast, the SRO's order mandated that the district provide the student with 200 minutes per school day of compensatory services provided by a certified special education teacher. The court concluded that the lack of specificity in the district's Offer justified the parents' rejection.

Further, even if the SRO's award had not been more favorable than the district's Offer, the court concluded that the parent was substantially justified in rejecting the Offer for two reasons. First, the terms of the district's Offer were vague. Second, some of the terms had no deadlines or penalties for any delay in providing services. Therefore, if the district failed to provide the services without consequences, the parent would have effectively waived the student's right to FAPE. However, because the difference between the SRO's order and terms of the district's Offer were minimal, the court reduced the parents' post-Offer legal fees by 50%.

WHY YOU SHOULD CARE:

Rule 68 is a product of the Federal Rules of Civil Procedure, which, according to this court, is applicable in IDEA proceedings. Thus, if, during the course of an IDEA proceeding, the parties are unable to reach a settlement, the District may present the parents with a Rule 68 letter. If the parents reject the Rule 68 offer, are not substantially justified in doing so, and do not obtain more relief at the hearing than that offered by the district in the Rule 68 letter, the parents may be precluded from collecting attorney's fees for any legal services rendered after the date of the Rule 68 letter. Depending on the date the district filed the Rule 68 letter, this letter can be a useful strategy in encouraging settlement. If the Rule 68 letter is filed shortly before the first hearing date, (but not less than 10 calendar days before the hearing), parents should be more motivated to accept the term. The main reason being that a large portion of the legal fees incurred will be attributed to the hearing. As such, if the parents cannot recover these fees, the case may not be worth litigating.

Although a parent may be justified in rejecting a Rule 68 Offer, and may obtain more relief at the hearing than offered by the District, the court maintains discretion in awarding post-Rule 68 attorneys fees. If, at the hearing, the parents obtain relief minimally in excess of the district's Offer, the court will consider the differences in the relief in determining availability of post-offer attorneys fees. Under these circumstances, where the difference in the relief are slight, a court may be inclined to order a reduction in post-Rule 68 attorney fees. To ensure that the court is capable of thoroughly assessing the difference in the relief, districts should ensure that the Rule 68 offer includes clear, specific and precise terms.

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6. If You Don't Say It, You've Waived It.

D.C. ex rel. E.B. v. New York City Dept. Of Educ., 2013 WL 1234864 (S.D.N.Y., 2013)

SALIENT FACTS:

The parent of a child with autism and a life threatening seafood allergy challenged the district's 2010-11 placement recommendation for a 6:1:1 in-district program. The student's allergy was so severe that the mere smell of seafood would trigger an anaphylactic reaction. For 2009-10, the student attended the Rebecca School ("Rebecca") where he was placed in an 8:1:4 special class. At the CSE meeting, the Parent argued that the student required more individualized support. However, the CSE did not consider an 8:1:4 class or any class more restrictive than the 6:1:1 class. Because the CSE discussed that the student required a seafood-free environment, the IEP indicated that, "there could be 'no seafood in his environment.'" The IEP also noted that the student required an Epi-Pen and a nurse on site to monitor his allergies and asthma. The IEP included no accommodations or modifications to the student's program, geared toward ensuring that the student received a seafood-free environment. During the parent's July visit to the proposed school, she observed a lunch menu with seafood listed as an item. The mother was informed that, at the time of her visit, the cafeteria was not seafood-free; students were allowed to bring their own lunches into school, which could contain seafood; and seafood was prepared by high school students in a work-site cafeteria and served to teachers in a room adjacent to the students' cafeteria. The parent maintained the student's placement at Rebecca and sought reimbursement of tuition. The parent argued that because the cafeteria was not seafood-free, the district was incapable of meeting the student's special education needs.

COURT'S DECISION:

The court relied primarily on R.E. v. New York City Dept. Of Educ., 694 F.3d 167 (2d Cir., 2012) in finding that the district denied FAPE. The court noted district testimony that had the student attended the designated school, he would eat lunch in his classroom with a paraprofessional during the days when seafood was served. Further, district staff testified that had the student enrolled in the school, the school would have taken the steps necessary to provide a seafood-free environment. However, there was contradictory testimony that at the time of the parent's visit, the facility was unprepared to provide a seafood-free environment. Further, neither of these accommodations was listed on the student's IEP.

The parent argued that R.E. prohibited the IHO and SRO from considering such retrospective testimony (i.e. testimony that certain services not listed in the IEP would actually have been provided to the child had he attended the district's

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proposed placement) about what the district would have done had the student attended the recommended program. However, the district countered that R.E. did not apply to these facts because R.E. concerned testimony attempting to correct substantive deficiencies in the IEP, rather than testimony regarding the implementation of the IEP itself, as was the case here. The court disagreed. Prior to making a placement decision, a parent must have sufficient information about the proposed placement and the school's ability to implement the IEP to make an informed decision as to the school's adequacy. The court wrote,

> Although the issue in this case is the capability of the proposed placement to implement the IEP, not the suitability of the IEP itself, the reasoning of [R.E.] compels the same result for retrospective testimony in this context as well.

The court continued,

> The [R.E.] rule does not make all hearing testimony inadmissible, but only testimony regarding events that occurred after the unilateral placement decision was made or testimony of information that alters the representations that were made to the parent.

The court held that prior to making a placement decision, a parent must have sufficient information about the proposed school's ability to implement the IEP to make an informed decision as to the school's adequacy. At the time, the parent must decide whether to accept or reject the proposed placement, the only information available to the parent about the proposed placement are the district's recommendation and if the parent visited the proposed placement, the information provided during the visit. The court wrote, "the information a parent can glean from these two sources creates considerable reliance solely on this information, whether to take the financial risk of unilateral placement".

Despite the contradictory district testimony that had the student attended the district's program, the district would have implemented the IEP, which noted that the student required a seafood-free environment, the court held that the evidence supported a contrary conclusion. The court was persuaded that the information the parent obtained when she visited the proposed school evidenced that the district was incapable of providing a seafood-free environment and was therefore incapable of implementing the student's IEP as written. Therefore, the court found that the district denied FAPE and awarded the parents reimbursement.

WHY YOU SHOULD CARE:

In R.E., we learned that testimony may not be offered at a hearing to supplement details not provided in the IEP and not discussed at the CSE meeting. Thus, a deficient IEP may not be rehabilitated or amended after the fact through

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testimony regarding services that do not appear in the IEP itself. As such, testimony seeking to prove that had the student attended the district's proposed placement, he would have received services not delineated in the IEP is prohibited. This court has clarified that the R.E. reasoning applies equally to cases concerning the implementation of the IEP. In these due process proceedings, the parent is not challenging the substance of the IEP itself. Rather, the parent is challenging the district's ability to implement the IEP. In developing an IEP or Section 504 Plan for a student with a particular food allergy, the CSE must determine whether based on the severity of the allergy, the student requires an environment free from the particular food. If, for example, the CSE determines that the student requires a peanut-free environment, it should note this in the IEP under "Management Needs". However, the CSE should not stop there! Accommodations and modifications must be discussed and developed to ensure that the student is provided with a peanut-free environment. Pursuant to D.C. and R.E., if a CSE fails to include accommodations and modifications tailored toward ensuring a peanut-free environment in the IEP, the district may not present testimony at the hearing that attempts to explain how the District would have implemented such accommodations or modifications. Although unaddressed by this court and R.E., if a district fails to include a particular accommodation in an IEP, but notes the CSE's discussion of this accommodation in the PWN, a district may argue that the contents of the PWN allow it to explain how the district would have implemented the IEP. Because this argument has not yet been addressed by a court or the SRO, it is uncertain how either will rule on this issue. CSEs must remember that if they are going to write an IEP for a student at risk for anaphylaxis, they must spell out how the District will implement the IEP, to provide the child with equal access. Otherwise, the district will be unable to present testimony or evidence at the hearing, which seeks to cure the defects of the IEP.

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7. Court's Regression Analysis Negates Need for ESY.

C.H. ex rel. F.H. v. Goshen Central Sch. Dist., 2013 WL 1285387 (S.D.N.Y., 2013).

SALIENT FACTS:

The parents of a student with a learning disability challenged the Sub-CSE's refusal to recommend that the student receive extended school year ("ESY") services. The Sub-CSE convened to develop the student's 2010-11 IEP which recommended that the student continue her general education program with a pull-out for ELA in a 2:1 setting, and consultant teacher services to assist the student during ELA. ESY services were removed from the IEP, which included a note that "[a]n ESY program is not recommended because no regression has been observed." As proposed relief, the parents requested, among other things,

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"[p]rovsion of a 1:1 ESY program designed and implemented by a certified Orton-Gillingham instructor." The parents argued that the district did not have any evaluative data before it to support the removal of ESY services from the IEP. The IHO held that the district denied FAPE by failing to provide ESY services. However, the SRO reversed.

COURT'S DECISION:

The court noted that the student's special education teacher observed little to no regression after an 18-day winter recess and 5-day snowstorm break, thus supporting the district's position that the student would not experience substantial regression. Additionally, the court pointed out that none of the private consultants who examined the student indicated that substantial regression was likely to occur. The court wrote, "[w]hile it is true that the burden remains on the [d]istrict to show that the student did not exhibit a need for ESY, in order to prevent regression (citations omitted), a negative can often be proven only by the absence of the evidence." In conducting its regression analysis, the court articulated the following standard,

> Where a thorough evaluation by numerous professionals who have considered the issue – including some privately retained by the parents - reveals no reasonable risk of substantial regression, a school district may meet its burden of showing th[at] [there is no] need for ESY services.

Accordingly, the court concluded that because the record contained no indications that substantial regression was likely and the parents identified no evidence indicating that substantial regression was likely, ESY services were not required.

The parents also challenged the specific teaching methodology used for the student's reading instruction. The parents challenged the CSE's refusal to recommend Orton-Gillingham as the sole teaching methodology. However, the court reminded the parents that the law does not require an IEP to adopt a particular recommendation of an expert, it only requires that the recommendation be considered by the CSE in developing the IEP. Additionally, the court pointed out that the IEP noted that the student required a multi-sensory learning style. Further, his teacher had some training in Orton-Gillingham, albeit not the extent of training the parents wished. Nevertheless, the court concluded that, "IDEA does not require provision of what the parents think is best, or even what is best; it merely requires what is good enough for the student to make reasonable progress."

WHY YOU SHOULD CARE:

Students who demonstrate substantial regression are entitled to 12-Month/ ESY services. The Regulations define substantial regression as, "a student's inability to maintain developmental levels due to a loss of skills or knowledge

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during July and August of such severity as to require an inordinate period of review [i.e. 8 weeks] at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year." See 8 NYCRR §200.1(aaa). Generally, it is the district's obligation to prove that a student has not exhibited substantial regression warranting ESY services. In order to do so, the CSE should ensure regression data is collected during extended periods without services, and review this data. In the event regression data is not collected, the student's special education teacher should be able to provide the CSE with anecdotal reports of the student's performance after extended school breaks. The CSE will review this information coupled with any grades or test scores. It is good practice that when a CSE is considering a removal or reduction of services, evaluations should be conducted in the specific area. The results of the evaluation should be considered by the CSE in considering whether to reduce or remove the services.

When considering eligibility for ESY, the CSE should review existing regression data during all extended breaks as well as anecdotal reports provided by the student's teacher. ESY should then be recommended in the specific areas where substantial regression is noted. If the regression data does not support substantial regression and the anecdotal information from the teachers does not support substantial regression, then this is a basis to determine that a child is ineligible for ESY services. It is important to remember that CSEs must make an ESY eligibility determination for every child who comes before the committee.

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