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Read All About It!

A Monthly Synopsis of Salient Cases in Special Education

INTRODUCTION

This month we review several cases regarding issues that special education administrators and CSE chairpersons will encounter in their everyday roles. A landmark federal district court decision will modify how districts treat special education students who have been parentally placed in private schools in DOLs. Specifically, the federal court has proclaimed that the issue of whether the parent has made clear his or her intention to place the student in the DOL is not relevant to the question of whether the DOR owes a FAPE obligation to the parentally placed student. Rather, this issue is only relevant to whether the equitable considerations warrant a reduction in all or some of the costs of the child's private education. Thus, the Southern District has held that, regardless of the parents' intention to unilaterally place a student in the DOL, the DOR continues to owe FAPE obligations to the student. This is the case even where the DOL has developed an IESP.

Second Circuit Court of Appeals

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1. Questions Regarding "Prevailing Party" Status Leave District On the Hook for Attorneys' Fees.

J.S. and S.S. ex rel. Z.S. v. Carmel Cent. Sch. Dist., 2012 WL 5440112 (2d Cir., 2012)

SALIENT FACTS:

After an unsuccessful attempt to recover attorney's fees at the federal district court level, the parents appealed the matter to the Second Circuit Court of Appeals. The main issue on appeal was whether the parents were the "prevailing party" under IDEA. In the underlying administrative action, the parents sought reimbursement of tuition for 2007-08 and were granted such relief under pendency. The IHO's final order found that the 2007-08 IEP was inadequate and endorsed the ABA methodology taught by the private school.

COURT'S DECISION:

The district argued that the IHO's decision did not constitute a material alteration of the parties' legal relationship sufficiently enough to warrant an award of attorney's fees. However, the court concluded that the district's vigorous defense of the case at the IHO level and then appeal to the SRO, all after paying for the student's tuition per pendency, belied this argument. The Court ruled that, because the IHO's decision that the IEP was inadequate was an administrative decision on the merits, and therefore changed the relationship between the parties, the parents were eligible for attorney's fees.

WHY YOU SHOULD CARE:

In order to be considered the "prevailing party" in an IDEA action, the party must obtain a judicially sanctioned "material alteration of the legal relationship of the parties." In the Second Circuit, "an IHO decision on the merits constitutes 'administrative imprimatur' sufficient to change the legal relationship between the parties and render the prevailing party eligible for an award of reasonable attorneys' fees." Despite a district already providing the relief the parent has demanded as a result of pendency, an IHO decision declaring the IEP inadequate will effect a material change between the parties, and will support the parents' application for legal fees.

Federal District Courts

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1. District Not Obligated to Place a Student in a Smaller Class Although He Might Have Received More Individual Attention There.

In the Matter of R.C. and L.C. ex rel. M.C. v. Byram Hills Sch. Dist., 2012 WL 5862736 (S.D.N.Y., 2012)

SALIENT FACTS:

A student with LD had been parentally placed at the Eagle Hill School. During the CSE meetings convened to develop the student's 2008-09 and 2009-10 IEPs, the CSE recommended special classes and the related services of counseling, occupational therapy ("OT"), physical therapy ("PT"), speech/language ("SL") therapy and adapted physical education ("APE"). Accommodations including refocusing and redirection to address the student's distractibility were also recommended. More specifically, for 2008-09, the CSE recommended an 8:1:1 special class for ELA and math and a 3:1 aide during the student's general education classes. The parents rejected the 2008-09 IEP and maintained the student's unilateral placement at Eagle Hill. For 2009-10, the CSE increased the recommended class size from 8:1:1 to 12:1 and removed the aide during general education periods to encourage the student's independence. During both CSE meetings, representatives from Eagle Hill actively participated. Despite the CSE incorporating the Eagle Hill revisions to the annual goals into the 2009-10 IEP, the parents rejected the District's recommendation, maintained the student's unilateral placement and sought reimbursement of tuition for 2008-09 and 2009-10.

The IHO concluded that the 2008-09 IEP recommending an 8:1:1 special class and the support of an aide offered FAPE, but the 2009-10 IEP recommending a 12:1 class without the support of an aide denied FAPE. The IHO reasoned that the District offered no testimony to support the increase in class size and the lack of an aide other than that the removal of an aide was intended to "foster [the student's] independence." The SRO affirmed the IHO's determination regarding the 2008-09 IEP, but reversed the determination regarding the 2009-10 IEP. Specifically, the SRO pointed out that "the IEP provided numerous program modifications to assist [the student's] learning in spite of his impulsivity, anxiety, attention difficulties, language deficits and problems with nonverbal communications."

COURT'S DECISION:

On appeal, the parents argued that the general education recommendation was inappropriate because the student required a small classroom with teachers who were able to meet his significant and complex needs. However, the court noted that the SRO found that during 2008-09, the student would have been supported by a team of staff including a special education teacher and aide during his special education classes and a 3:1 aide during his general education classes. Regarding the 2009-10 recommended 12:1 class without an aide for the student's general education classes, the court noted that the SRO determined that specific reasons supported the CSE's decision that the student could be educated in the less restrictive environment. The SRO found that the parents' reports and testing demonstrated that the student had progressed academically and socially; there was evidence that the student could follow classroom procedure, exhibited the ability

to work independently, did not have difficulty with organizational skills and never exhibited difficulty transitioning between tasks. Accordingly, because the SRO articulated specific reasons for his decision to adopt a different educational policy than the IHO, the court afforded due deference to the SRO's decision. Therefore, the court affirmed the SRO's decision and denied the parents' request for tuition reimbursement for Eagle Hill during 2008-09 and 2009-10.

WHY YOU SHOULD CARE:

Parents may wish that their student receive an optimal education. They may insist that the CSE recommend a more restrictive program in order to enable the student to receive more individualized attention. However, the court pointed out that,

> While it is natural to assume that a student would benefit from being in a smaller classroom environment with more support, [] IDEA does not require that the District provide an ideal learning environment, but instead only one where the student can progress. At *15.

As long as the CSE recommendation provides the student with a reasonable opportunity to make meaningful progress toward attaining his or her IEP goals in the LRE, the IEP will likely be deemed appropriate.

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2. Exorbitant Attorney's Fees Request Warrants Reduction.

E.F. and D.R. ex rel. N.R. v. New York City Dept. Of Educ., 2012 WL 5462602 (SDNY., 2012)

SALIENT FACTS:

Parents who were successful in proving that the district violated IDEA sought to recover attorney's fees and costs from the District in the amount of $163,464.00. According to the parents, these charges were incurred in connection with their attorney's representation during two administrative proceedings before an IHO (pendency and the underlying action), two appeals of the IHO's decisions to the SRO and this proceeding requesting fees.

COURT'S DECISION:

To determine reasonable attorney's fees and costs to which a prevailing party is entitled, a court must calculate the "presumptively reasonable fee." This fee is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rate. Included in the fee request were hourly rates of $600 - $650 per hour for the firm's founder and $275-$295 for the firm's associates. The court noted that one of the most important factors in determining the prevailing market rate is the amount counsel *actually* charged their clients. The court

pointed out that there was no question that the parents could have found a capable attorney to represent them at rates lower than those charged by their attorney. In affidavits submitted by the lead attorney in support of the fee application, it was observed that there were "skilled counsel who charge less – and sometimes considerably less – than [the parents' attorney's] hourly rate for similar services." The court pointed out further that earlier this year, it determined that the particular lead attorney's reasonable hourly rate was $415 not $600 - $650 per hour.

Because the attorney was "highly qualified in matters relating to the field of special education law" and "specialize[d] in cases involving autistic children," the court concluded that his "expertise weigh[ed] in favor of awarding him a fee at the higher end of the prevailing market rate. However, because the legal and factual issues in the case were not particularly complex, an award of $600 was unreasonable. In light of the lead attorney's experience, the parents' award of nearly $300,000 in the underlying IDEA action, and the complexity of the case, the court held that $475 was a reasonable hourly rate for the lead attorney.

Next, the court addressed the reasonableness of the number of hours expended on the cases. The court wrote,

> Certainly it is neither unexpected nor inappropriate that the lead attorney on a matter attend the hearing and engage in some pre-hearing preparation. Nevertheless, certain tasks performed by [the lead attorney] clearly could have been completed by junior associates for less expense, such as summarizing the evidence and testimony and performing Google searches.

As such, the court concluded that a 15% reduction of the 297 hours billed by the parents' attorney was warranted. Accordingly, the court reduced the parents' fee request from $163,464.00 to $110,343.51 including costs.

WHY YOU SHOULD CARE:

The reasonable hourly rate is not one that "well-heeled clients" might be willing to pay, but that which a client who wished to pay no more than necessary would be willing to pay. The fee applicant bears the burden of proving that the rate charged is in line with the prevailing rates within the community. Although courts should use the prevailing hourly rate in the district in which it sits, it may make appropriate adjustments based upon case-specific variables, which may include:

1. The time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite to perform the legal service properly;

4. Preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amount involved and the results obtained;
9. The experience, reputation and ability of the attorneys;
10. The "undesirability" of the case;
11. The nature and length of the professional relationship with the client; and
12. Awards in similar cases.

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3. Despite Clear Evidence of Parents' Intent to Unilaterally Enroll Student in DOL, DOR Not Relieved of FAPE Obligations.

E.T. and D.T. v. The Board of Education of the Pine Bush Central Sch. Dist., 2012 WL 5936537 (S.D.N.Y., 2012)

SALIENT FACTS:

Prior to the CSE's annual review, the DOR curiously advised the parents that it was considering two BOCES schools specifically for students with Asperger's Syndrome. After receiving some district-provided information about these schools, the parents visited one of the BOCES schools and determined that it was inappropriate. Thereafter, the parents attended a CSE meeting of the district where the student's private school was located ("DOL"). With the Parents' input, the DOL developed an IESP which recommended a 1:1 aide with related services of counseling, OT and speech and language therapy. Thereafter, the parents attended an annual review meeting at the CSE of the district of residence ("DOR"). The DOR developed an IEP which recommended the student's placement at BOCES. At the meeting, the parents, for the first time, informed the DOR that a month earlier, they had participated in the development of the student's IESP at the DOL and intended to maintain the student's placement in the private school located in the DOL. The DOR adjourned the CSE meeting so that it could obtain a copy of the IESP, incorporate the IESP goals into the IEP, and update a transition plan and the existing IEP goals and objectives. Despite the parents failing to make themselves available for a follow-up meeting, the CSE reconvened, and finalized the student's IEP in which it maintained the BOCES recommendation. Thereafter, the parents rejected the recommendation and filed for due process seeking reimbursement of tuition paid to the private school in the DOL.

In denying the parents' request for reimbursement, both the IHO and SRO found that the DOR had **no** obligation to offer the student FAPE, and therefore, could not be held responsible for reimbursement of tuition. In reaching their

conclusions, both administrative officers relied on guidance from the U.S. Department of Education ("DOE") that, if the parent makes clear his or her intention to keep the child enrolled in the private school in the DOL, the DOR need not make FAPE available to the child. Additionally, the SRO relied upon guidance from SED on this same issue. The SRO pointed out that, "neither [] IDEA nor State law preclude a parent from meeting with CSEs from both a [DOL] and a [DOR] to develop an IESP or an IEP for their consideration...[however][the] IDEA and State law also do not require both public school districts to *simultaneously provide* services under both schemes" (emphasis in the original). On appeal, the federal court disagreed.

COURT'S DECISION:

The court noted that "[c]ourts have, in fact, affirmatively recognized that two school districts may have IDEA obligations to the same disabled child." The court pointed out that, "[n]othing in the language of [] IDEA divests a [DOR] of its FAPE obligations 'simply by virtue of a parental placement at an out-of-district, but in-state private school." In addressing the IHO and SRO's reliance on DOE and SED guidance documents, the court concluded that the parents' intent to enroll the student at the private school did not divest the DOR of its FAPE obligation to the student. The court wrote,

> [U]nder Burlington/Carter, the issue of parental intent vis-àvis the child's enrollment is **not** dispositive of whether a school district has a FAPE obligation to a disabled child. Rather, it is only after a court concludes that the school district failed to provide a FAPE and that the parents' chosen placement for the child was appropriate that it can determine, based upon equitable considerations, whether reimbursement for some or all of the cost of the child's private education is warranted. At *15 (emphasis added).

Thus, according to the court, it is only after the court has concluded that the district failed to offer a FAPE and determined that the parents' chosen placement was appropriate, does the court reach the issue of equitable considerations, regarding the parents' intent. The court pointed out that other courts have found that, "the issue of parents' intent is a question that informs the balancing of the equities rather than whether the district had an obligation to the child under [] IDEA" (*citing* Forest Grove, 557 U.S. 247 ["where the fact that 'parents failed to give the school district adequate notice of their intent to enroll the child in private school' was an equitable factor"]).

Although both the IHO and SRO determined that the DOR had no obligation to provide a FAPE to the student, neither addressed whether the district, in fact, offered the student FAPE, whether the parental placement was appropriate, or whether equitable factors precluded tuition

reimbursement. Therefore, the court determined that the SRO erred in concluding that the DOE guidance was dispositive of the district's IDEA obligations to the student. Accordingly, the court vacated the SRO's decision and remanded the matter to the SRO to determine whether the district offered FAPE during 2010-11; and if not, whether the parents' chosen placement was appropriate; and whether equitable considerations warrant tuition reimbursement.

WHY YOU SHOULD CARE:

First the U.S. Department of Education in 2006, and then the New York State Education Department in 2007, pronounced that once a parent has made clear her intention to unilaterally enroll the student in a private school located in a DOL, the DOR need not make FAPE available to the child.[1] The SRO has expanded this one-prong test into a two-prong test and additionally required that the DOL must determine, through its child find process, that the student is a student with a disability (i.e. developed an IESP).[2]

Despite these pronouncements, in one fell swoop, the Southern District of New York has debunked this often relied upon principle. Now, districts are obligated to offer FAPE to all students residing in their geographic boundaries *regardless of* their placement. Whether parents have made clear their intent to unilaterally place a student in a private school in a DOL is irrelevant to determining whether the DOR had an obligation to provide FAPE to a child. Rather, whether the parents made clear their intention to keep the student enrolled at the private school located in the DOL would be relevant to the balancing of equitable considerations (i.e. the third-prong of the Burlington/Carter analysis). The moral of this story is that regardless of a parent's clear intent to place their child in a DOL, the DOR must always offer FAPE to all students with disabilities residing within its geographic boundaries. The question of intent will only be relevant to whether equitable considerations warrant a reduction in all or some of the cost of the child's private education.

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[1] See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46540, 46593 (Aug. 14, 2006); Memorandum from James P. DeLorenzo, Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c (Sept. 2007).

[2] See *Application of the Board of Education*, Appeal No. 11-153, at 7-8 (Jan. 23, 2012), *Application of a Student with a Disability*, Appeal No. 11-011, at 8-9 (Apr. 1, 2011).

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