SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns issues that were subject to recent, published federal court decisions and are of general significance: (a) exclusionary discipline of students with disabilities on the basis of school safety, and (b) attorneys' fees for prevailing parents. Both of these cases relate to other items available on my website **perryzirkel.com**.

In *Rayna P. v. Campus Community School* (2019), the federal district court in Delaware addressed the $375k fees request of the parents' attorneys in the wake of two largely successful suits on behalf of two siblings with disabilities. In both cases, the court significantly increased the hearing officer's compensatory education awards (education special needs trusts of $170k and $209k), although upholding the denial of such relief for ESY. Starting with the due process hearings, the case was multi-year litigation. The defendant charter school admitted that the parents met the applicable standard for being a prevailing party but advanced several arguments to oppose the requested amount.	
First, the defendant challenged the opposing counsel's billing records as vague and lacking in specificity, citing various examples such as "review of materials regarding strategy."	The court concluded: "I find the items listed in the Plaintiffs' attorneys' billing records sufficiently specific to allow me to determine whether the hours claimed are unreasonable for the work performed.
Second, the defendant claimed that the billing of 768 intra-office communications amounted to excessive and unnecessary charges in relation to the norm.	Drilling deeper, the court calculated that over the course of the two cases, the average amounted to 1.5 hrs. per week, which was for delegation to and supervision of junior attorneys, which effectively minimized the total costs.
Third, the defendant claimed, without specific support, that almost half of the work on each case duplicated the work on the other case, thus amounting to substantial double billing.	Finding that none of the plaintiffs' attorneys billed twice for the same work and impressed that they built in a 5% discount for any inadvertent double-counting, the court rejected this third argument.
Fourth, the defendant argued that the hourly rates that the four attorneys charged was unreasonable in relation to the immediate region and the applicable skill and experience.	Concluding that special education litigation is specialized and complex and that the only one of the attorneys' rates warranted reduction in relation to the region (from $395 to $350 per hr.), amounting to a $15k decrease in the total.
Fifth, the defendant asserted that the total fee should be reduced due to the plaintiffs' loss with regard to ESY compensatory education.	The court disagreed, concluding that the attorneys obtained "excellent results" and "nearly complete relief," only losing on a minor, nonfrivolous claim.
Finally, the defendant argued for reduction because (a) parents' counsel had a contract for one third of any monetary relief and (b) the charter school's limited funds were for education services.	Citing precedent, the court ruled that both of these considerations were irrelevant to Congress's criteria for providing attorneys fees to parents who prevailed in IDEA litigation.
The bottom line was a limited reduction to an award of approximately $308k, which is likely to be met with boos among educators but is within the range of transaction costs, or part of the price, of litigation in special education.	

In *Olu-Cole v. E.L Haynes Public Charter School* (2019), the D.C. Circuit Court of Appeals addressed the discipline issues arising from a mainstreamed high school student with emotional disturbance (ED) who punched another student repeatedly in the head at school, causing a concussion. After determining that this conduct was a manifestation of the student's ED, the school placed him in an isolated interim alternate educational setting (IAES) for the maximum of 45 school days. Near the end of this period, the school filed for a due process hearing, seeking an extension of the IAES and a change to a more restrictive IEP placement. When his parent sought to return him to his mainstreamed placement upon expiration of the 45-day period, the school refused. His parent immediate filed in federal court for a preliminary injunction for his readmission to his original placement based on stay-put, also requesting compensatory education. Although agreeing with the merits of the parent's claim, the court denied her motion based on the lack of irreparable harm and "the significant potential injury to other [students]." The parent immediately filed an appeal. Two days later, the school readmitted the student, and the hearing officer dismissed the district's complaint.	
As a threshold matter, the school argued that the appeal was moot due to his readmission to school within a few days of the expiration of the IAES period and the dismissal of its due process hearing request. In an officially published decision, the appellate court rejected the school's mootness claim, concluding that the wrongful denial of stay-put delayed the student's return to school and his entitlement to compensatory education "remains live."	The compensatory education claim in this case includes not only the delayed school days of readmission but also potentially (1) the basis for the IAES in the first place (because the concussion would not appear to constitute the requisite "serious bodily injury" for a unilateral IAES, and the alternative of substantial likelihood of injury to others would have required a due process hearing determination) and (2) the appropriateness of the isolated IAES. Moreover, the D.C. Circuit uses the qualitative approach for compensatory education, which could exceed the period of the denial of FAPE.
The school also argued that safety supported the trial court's decision to deny the preliminary injunction. The appellate court agreed only in limited part, concluding that the trial court improperly shifted the burden of proof to the parent and that the school had a "heavy burden 'by a clear showing'" to overcome the IDEA presumption of stay-put.	The appellate court explained that the trial court's public-interest determination of "potential" harm to others did not meet the requisite degree of certainty and gravity. Moreover, the school's intervening decision to readmit the student contradicted its position. If the school had a justifiable basis for extending the IAES, it should have filed sooner for either an expedited hearing or a *Honig* injunction in court, which each use the substantial likelihood of injury to others (or to self) as the standard.
As a last resort, the school argued that stay-put did not apply in this case, because the hearing officer had not yet issued a decision. The court easily rejected this claim, pointing to the express IDEA language that limits the IAES to its expiration or the hearing officer's decision, "whichever occurs first."	This final argument appears to be a hail Mary pass as one last-gasp attempt to score a victory. It does, however, point out the difficulties of obtaining an impartial decision in these high-stakes discipline cases, because an "expedited hearing" under the IDEA regulations may take as much time as the maximum period of an IAES, which a district may be seeking to either effectuate or extend.
The bottom line to cases engaging in disciplinary changes in placement, including but not limited to IAESs, is to avoid knee-jerk reactions based on one-sided interests in school safety and, instead, either engage in professionally prophylactic alternatives in partnership with parents or be careful to comply fully with the complicated but compromise rules that Congress established in the IDEA (and that the Supremes did in *Honig*).	