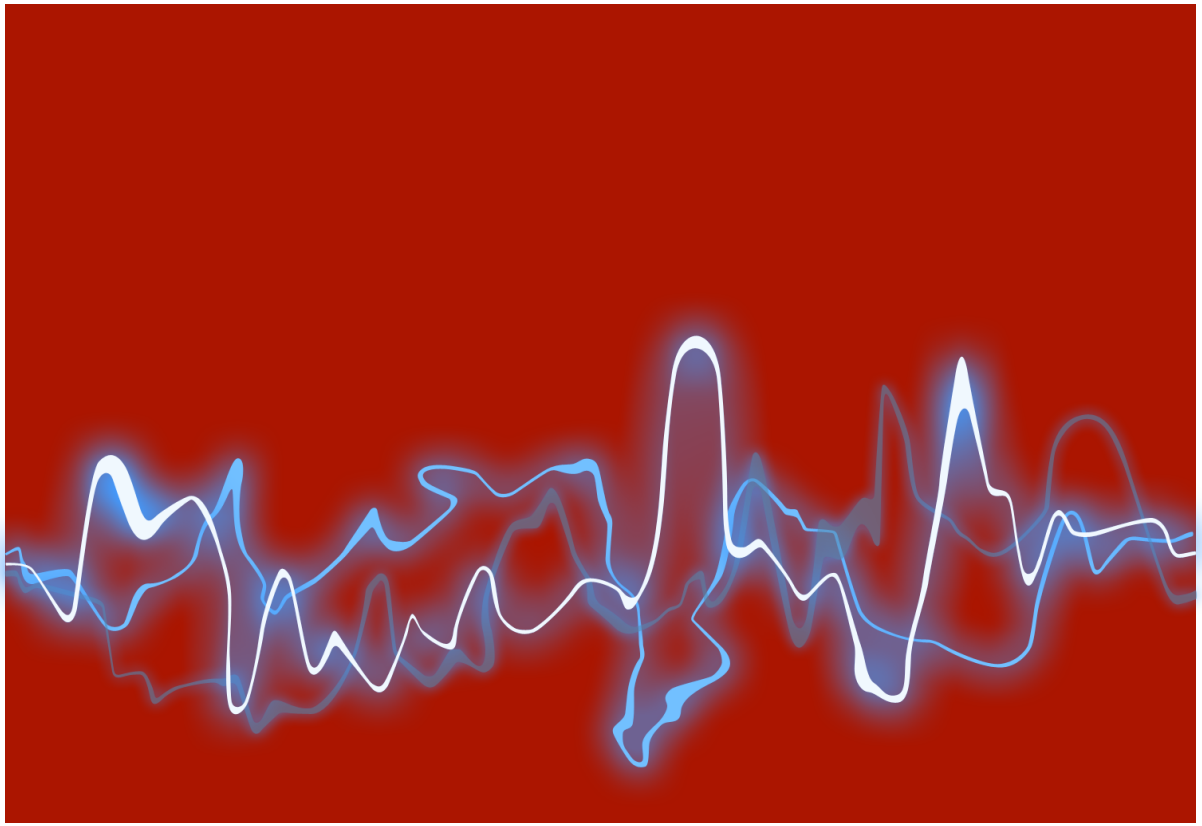

The Aftermath of *R.E.*:

Prospective Challenges to a Child's Proposed Placement

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Introduction

- R.E. is "less than a model of clarity."
- Post R.E., district courts, OSR, IHOs have wrestled with its significance
- Some have read R.E. to say, that, in reimbursement cases, a student must first attend the placement school before challenging the school's ability to implement the student's IEP
- R.E., however, does not foreclose all prospective challenges

R.E. AND ITS AFTERMATH

- Second Circuit adopted a modified four corners rule
  - Testimony that materially alters the IEP is not permitted
  - Testimony that explains or justifies the services listed in the IEP is permissible
- The fact that children in one of the proposed placement schools were underserved for occupational therapy did not persuade the Court to find in favor of one of the parents whose child had OT on his IEP and recommended to attend the school underserving other children in OT

R.E. AND ITS AFTERMATH

"'Speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement' because the provision of a FAPE must be evaluated 'prospectively.'"

"…retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered[]."

"…must focus on the written plan offered to the parents[]."

"…the IEP must be evaluated 'prospectively as of the time of its drafting[]'".

THE NEED FOR *M.O.*

- This evolving narrow view is contrary to *T.Y.*
  - School districts would have "carte blanche" to assign student to any school, even a school that could not fulfill the IEP
  - Parents would be placed in a position of first sending their children to facially deficient schools before mounting a challenge
- Parents have a role to play in the placement decision
- Parents also have a continuing participatory right to timely and relevant information

THE NEED FOR *M.O.*

- *Rowley (1982):*

  IDEA's procedural protections "giv[e] parents and guardians *a large measure of participation at every stage* of the administrative process."

- *Honig (1988):*

  IDEA "establishes various procedural safeguards that guarantee parents both *an opportunity for meaningful input into all decisions affecting their child's education* and the right to seek review of any decisions they think inappropriate."

- *Schaffer (2005):*

  "School districts have a 'natural advantage' in information and expertise, but Congress addressed this when *it obliged schools to safeguard the procedural rights of parents and to share information with them*."

- *Winkelman (2007):*

  IDEA "sets up general procedural safeguards that protect *the informed involvement of parents in the development of an education* for their child."

THE NEED FOR *M.O.*

- Various courts in this Circuit recognize that parents have procedural rights that extend beyond the CSE meeting
  - *C.U.* (footnote 15)
  - *V.S.* (footnote 15)
- In all, courts in this Circuit agree that "parents must have sufficient information about the proposed placement school's ability to implement the IEP to make an informed decision as to the school's adequacy." [*D.C.*, footnote 8]

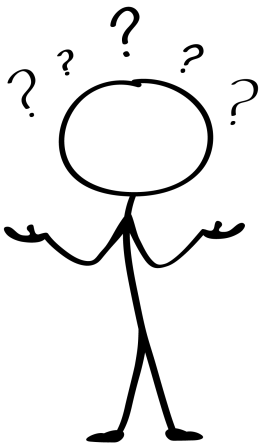
THE NEED FOR *M.O.*

- *M.O.* (2015) is the Second Circuit's attempt to clarify the proper reach of its holding in *R.E.*
- Parents have the right to challenge the placement school's ability to comply with the student's IEP
- *M.O.* also confirms two other parental rights

THE NEED FOR *M.O.*

- Testimony explaining how the IEP would be implemented is sufficiently prospective, and may be considered
- Should ask, "[W]hether, at the time [the parent] was actually considering the proposed placement, the school *could* offer [services] in line with the IEP."
- Open question as to what is meant by, "at the time of the parent's placement decision."

M.O. RAISES NEW QUESTIONS

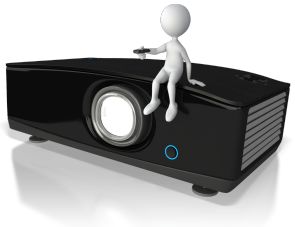


- *M.O.* attempts to make a distinction between permissible and impermissible challenges
  - Distinction is far from clear
- *M.O.* makes a distinction between deciding that a placement was inappropriate because " a school with the capacity to implement a given student's IEP will simply fail to adhere to that plan's mandates" and finding that the placement was inappropriate because "a proposed school lacks the services required by the IEP."

WHAT'S PERMISSIBLE

- May-fail-to-adhere arguments are not permissible
- Court does not want to engage in hypothetical challenges
- Capacity-to-implement arguments are permissible
- Must show school is "wholly incapable" of implementing services listed on IEP

Case Review



QUESTIONS REMAIN

- *M.O.* provides needed clarity, but questions remain
- Anticipate new arguments, thanks, in part, to *B.P.*, the latest Second Circuit decision on the subject

BURDEN OF PROOF

- Do not conflate the school district's burden with the parents' responsibility to rebut the presumption that the placement school will fulfill its obligation under the IEP
- Courts presume that the placement school will fulfill its obligation
- Parents must come forth with *prima facie* evidence establishing otherwise
- Only then is the school district's duty to prove the adequacy of the placement school triggered

Failure-to-Implement Claims

In responding to claims that the placement school is substantively inadequate because the school itself does not provide related services to its students, the Second Circuit has said that the "appropriate forum for such a claim is 'a later proceeding.'"

Bobby R.

- The Second Circuit has not squarely addressed the question of what standard governs failure-to-implement claims
- Consensus approach is the standard in *Bobby R.* (5th Cir.)
- A party challenging the implementation of an IEP must demonstrate that school district failed to implement substantial or significant provisions of the IEP

Bobby R.

- Only material failures are compensable
- Though a showing of demonstrable educational harm is not required, the child's educational progress, or lack of it, may be probative