



Second Circuit Upholds New York's Ban Against the Use of "Aversive Interventions"

August 22, 2012

Bryant v. New York State Education Department, No. 10-4029-cv, — F.3d — (2d Cir. August 20, 2012).

On August 20, 2012, the United States Court of Appeals for the Second Circuit issued a divided 2-1 decision in *Bryant v. New York State Education Department*, No. 10-4029-cv, — F.3d — (2d Cir. August 20, 2012), upholding New York's prohibition against approved out-of-state day or residential schools from using "aversive interventions."

In 2006, New York's Education Department created a regulation prohibiting schools, including "approved out-of-state day or residential schools" from using "aversive interventions." N.Y. Comp. Codes R. and Regs. tit. 8, § 19.5(b)(1) (2012). Under the regulations, an "aversive intervention" is defined as an intervention "intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors," such as the use of shock treatment or the application of other painful and intrusive activities. Id. § 19.5(b)(2).

In 2010, the regulation was challenged by the parents of seven children who sent their children from New York schools to the Judge Rotenberg Center ("JRC"), which is an a Massachusetts residential program that provides residential, educational, and behavioral services to individuals with severe behavioral disorders, and is well known for using aversive interventions. JRC is often considered a last resort for students with long histories of severe behavioral problems that have impeded their education and development, such as aggressive, self-injurious, destructive, and non-compliant behavior.

In challenging the prohibition, the parents argued that (1) the ban undermines their children's right to a free and appropriate public education ("FAPE"); (2) the prohibition violates their children's Constitutional rights and the Rehabilitation Act of 1973; and (3) it is an infringement on the individualized assessment and treatment of students with disabilities. The United States District Court for the Northern District of New York, however, dismissed the suit for failure to state a claim.

On appeal, the Second Circuit affirmed the lower court's decision and concluded that the "State's prohibition of one possible method of reducing the consequences of a child's behavioral disability does not undermine the child's right to a FAPE or prevent administrators from enacting an individualized plan for the child's education." The Court also noted that "[t]here is an ongoing debate among the experts regarding the advantages and disadvantages of aversive interventions and positive-only methods of behavioral modification." In weighing in on

that debate, the Court concluded that “[t]he judiciary is ill-suited to decide the winner.” Likewise, in regard to affirming the dismissal of the Constitutional claims, the Court held that the prohibition “represents a considered judgment by the State of New York regarding the education and safety of its children that is consistent with federal education policy and the United States Constitution.”

If you or your company have any questions or concerns about this topic and would like further information, please email James G. Ryan at jryan@cullenanddykman.com.

A special thanks to Sean Gajewski, a law clerk at Cullen and Dykman, for helping with this post.