NO. _____

In The
Supreme Court of the United States

Andrea Phillips, individually and as Parent and Natural Guardian of S.H., Paul Hinton, individually, and as Parent and Natural Guardian of S.H.,

Petitioners,

v.

David C. Banks, in his official capacity as the Chancellor of the New York City Department of Education, New York City Department of Education,

Respondents.

TO THE HONORABLE SONIA SOTOMAYOR
AS CIRCUIT JUDGE FOR THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPLICATION FOR A 60 DAY EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Carissa Shipley, Esq.
Counsel of Record
Brain Injury Rights Group, Ltd.
300 E. 95th St., #130
New York, New York 10128
Tel. 646.850.5035
carissa@pabilaw.com
Counsel for Petitioners

LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond Virginia 23219 (804) 644-0477

To the Honorable Sonia Sotomayor, as Circuit Judge for the United States Court of Appeals for the Second Circuit:

The Petitioners, ANDREA PHILLIPS, individually and as Parent and Natural Guardian of S.H., PAUL HINTON, individually and as parent and natural guardian of S.H., under Supreme Court Rule 13(5), request a 60-day extension to petition for a writ of certiorari. This request, if granted, would extend the deadline from June 19, 2024, to August 18, 2024.

Petitioners will ask this Court to review a decision of the United States Court of Appeals for the Second Circuit, issued on April 11, 2024 (attached hereto as **Exhibit 1**), which affirmed the District Court's deference to the decision of the State Review Officer ("SRO") in an Individuals with Disabilities Act ("IDEA") case which found that the Defendants offered S.H. a free appropriate public education ("FAPE").

The Second Circuit affirmed the District Court's decision to grant Defendants' motion for summary judgment. Summary judgment was granted because the District Court deferred to the SRO's opinion that S.H.'s classification was irrelevant, that appropriate evaluative information was considered, and that the Individualized Education Program ("IEP") was adequate. Furthermore, the District Court deferred to the SRO's findings that the goals set in S.H.'s IEP were appropriate overall, despite the fact that three of the seven goals were found to be above or below the student's instructional level.

While the Second Circuit affirmed the SRO's findings, the bigger issue in this case is the common practice of the District Courts simply rubber-stamping SRO

opinions. Not only is this done where the SRO opinion is inadequately reasoned, but also where legal interpretation of the IDEA's statutory requirements is at issue and also where the child's performance shows the IEP was inappropriate. In addition, each claim made by the parent that the SRO was not well reasoned is analyzed individually. This form of review has resulted in the forest of the child's receipt of FAPE being lost among the trees of each individual issue which is in direct contravention of the purposes of the IDEA.

Here, the SRO and District Court considered the Plaintiff's objections to classification a "red herring". In reality, the difference between a classification of "traumatic brain injury" and "multiple disabilities" is an important one. When the classification is determined, the Defendants' own rules, the New York Rules & Regulations, and case law all require evaluations in the area of suspected disability. The Defendants' internal procedures require a neuropsychological evaluation to be done when traumatic brain injury is the classification. Yet the Defendants claim that classification is only used for purposes of determining whether a child is qualified to receive special education services. This is clearly incorrect, and, in this case, led to a problematic review of the child's IEP.

The child's IEP required physical therapy, occupational therapy, and speech-language therapy but the Defendants did not obtain ANY evaluative reports in these areas. The committee on special education ("CSE") instead says they relied on "anecdotals", which is not even a word, much less an effective measurement of disability. Yet the District Court accepted the SRO's findings that there was enough

information to justify reducing S.H.'s services over parent's objection. Neither would consider the progress made by S.H. when his services were increased and additional supports provided by his private school.

The parents supported their concerns about S.H.'s services by showing that he only met four of his seven goals. The SRO found that the goals, year after year, were "appropriately calculated" when they were created, even though they were not met. Essentially, what a failing grade would be for a student in the District, was a passing grade for the District itself.

The analysis done on these two points was done by the SRO in a strict "snapshot" manner, focusing only on the direct issue with the information the CSE had at the time instead of the adequacy of the education provided as shown by the performance of the child. In an absolutely disgusting claim, the Defendants stated that allowing the SRO to consider whether the goals were met or not would mean that the "offering of a FAPE would turn not on the adequacy of the education actually offered to the student, but on the student's actions thereafter… in an extreme case, the student could foreclose the provision of a FAPE by choosing not to achieve… even reasonable goals, thereby earning a private education at public expense" (Answer Brief, Doc. 73 at 42). This is a student diagnosed with cerebral palsy, multifocal partial seizures, dysgenesis of the corpus collosum, strabismus, astigmatism, hyperopia, and global developmental delay which have adversely affected his cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior,

physical functions, information processing and speech. He is non-verbal and non-ambulatory.

This student's progress depends solely on the education and related services he is provided, not because he has plotted with his parents to dupe an educational expert into ordering public funding for a private education. When S.H.'s performance, goals, and IEP are considered wholistically, it is clear that he did not receive a FAPE. In fact, it is logically inconsistent that he only met four of seven goals, that he had appropriate goals, and that he received appropriate services. Only two of the three can be true. Somehow, the use of the snapshot rule per *Roland M. v. Concord School Committee*, has dominoed to the point where the CSE may blindfold itself by limiting evaluations and creating an IEP with only the information they have allowed themselves to consider. See *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990). The SRO then limits him or herself to the information the CSE had on one specific issue at that one moment in time it was decided, to the exclusion of other issues brought forth and the performance of the child. Then, the district courts defer to the SRO on each individual concern of the parent instead of considering evidence of how the student has performed since the SRO decision. Thus, the district courts in New York and the Second Circuit have lost sight of the priorities of the IDEA.

There is a difference between circuits in determining whether the IEP is appropriate and how much evidence of a student's successes or failures can be considered or whether the SRO and District Court can look at these "post hoc" facts. There is not a clear divide, but rather a "fanning out", with the circuits occupying

separate places on a spectrum from a complete ban of performance-based evidence to a requirement to consider a lack of performance as an indication of a failed IEP.[1] This case is yet another in a long line of Second Circuit cases which promotes the rule that parents "cannot later use evidence that their child did not make progress under the IEP in order to show it was deficient from the outset". *R.E. v. N.Y.C. Dep't of Educ.,* 694 F.3d 167, 187 (2d Cir. 2012). The Third Circuit allows the district court to consider "evidence of progress or lack thereof" as relevant but "not inherently or automatically dispositive". *Susan N.,* 79 F.3d at 762 *(citing Carlisle Area Sch. V. Scott P.,* 62 F.3d 520, 534 (3d Cir. 1995)). In contrast, the Seventh Circuit "disallow[s] all evidence following the IEP as a matter of practice, if not as a matter of law"[2]. *See* Fan, supra note 20, at 1529 (describing the Seventh and Ninth Circuits as having "adopted the Fuhrmann concurrence's strict temporal rule disallowing all evidence following the IEP").

The Fifth and Tenth Circuits encourage the more wholistic approach that Plaintiffs requested of the Second Circuit in this case. The Tenth Circuit defines the IEP not just as a written plan, but also as the "subsequent implementation of that document" which is an "on-going, dynamic activity, which obviously must be evaluated as such". *O'Toole ex. rel. O'Toole v. Olathe Dis. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701-02 (10th Cir. 1998). When S.H.'s lack of progress is considered and the snapshot rule finding his IEP appropriately calculated at the time, based on "anecdotals" instead of evaluations and the snapshot rule finding his goals reasonably

[1] Maggie Whittlin, Hindsight Evidence, 116 Colum. L. Rev. 1323, note 172, at 1386.
[2] Dennis Fan, *No **Idea** What the Future Holds: The Retrospective Evidence Dilemma*, 114 Colum. L. Rev. 1503 (2014).

calculated at the times they were set, despite not being met year after year, it is clear that this Court must intervene to preserve the IDEA's priorities of educating special needs children and to resolve the circuit splits. Plaintiffs here hope that the Court will agree with the Tenth Circuit, that a school district cannot "ignore the fact that an IEP is clearly failing" due to a student's lack of progress. *Id.* at 702. The First Circuit has, over time, narrowed it rule while the Ninth has relaxed its rule.[3] As each Circuit continues to move along the spectrum, what is clear is by S.H.'s lack of progress in public school and achievement in private school is that he did not receive a FAPE and the blind deference of each court to the decision below it without considering the facts of the case after the IEPs were developed has denied the IDEA's aim of ensuring "that the rights of children with disabilities and parents of such children are protected". 20 U.S.C. §1400(d).

The Second Circuit's deference to the District Court and the District Court's deference to the SRO conflicts with purpose of the IDEA. The snapshot rule and ban on post-hoc evidence, namely a student's performance under their IEP, is a question of exceptional public importance as the rules imposed by a State cannot contravene the purpose of a federal statute.

The Petitioners request this extension of time for the following reasons:

1. This case presents substantial and essential questions of law, including whether the snapshot rule or admission of post-hoc facts contravenes Congressional intent as to the protections of disabled students under the IDEA.

[3] Jennifer N. Rosen Valverde, A Panoramic IDEA: Cabining the Snapshot Rule in Special Education Disputes. 55 Ariz. St. L.J. 1445 (2023).

2. This case also presents substantial and essential questions of law about the extent to which a federal district court should defer to an administrative decision-maker.

3. As opposed to a clear circuit split, each circuit Court applies its own rule as to whether a student's performance on his or her IEP is admissible. These rules are on a spectrum from non-admissible to required and undersigned counsel would like additional time to thoroughly research and present each circuit's rule to this Court.

4. The Brain Injury Rights Group, Ltd. ("BIRG") is a small nonprofit law firm based in New York City. The Firm has a limited number of attorneys to work on the petition for writ of certiorari in this case.

5. If the Second Circuit's decision is not reviewed by this Court, state administrative officers and federal courts will be free to ignore the failure of a student to progress in his or her education in favor of analyzing each of the parents' challenges to the IEP individually.

6. If the Second Circuit's decision is not reviewed by this Court, federal courts within the Second Circuit will continue to rubber stamp the opinion of the SRO, thereby denying parents and students the right to a meaningful review as contemplated by the IDEA.

For these reasons, the Petitioners request a 60-day extension of time to petition for a writ of certiorari to August 18, 2024.

Dated: June 18, 2024
New York, New York

Respectfully submitted,

/s/ Carissa Shipley

Carissa Shipley, Esq.
Counsel of Record
Brain Injury Rights Group, Ltd.
300 E. 95th St., #130
New York, New York 10128
carissa@pabilaw.com

23-362
Phillips v. Banks

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of March, two thousand twenty-four.

PRESENT:

RICHARD C. WESLEY,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,
Circuit Judges.

Andrea Phillips, individually and as Parent and Natural Guardian of S.H., Paul Hinton, individually, and as Parent and Natural Guardian of S.H.,

Plaintiffs-Appellants,

v. **No. 23-362**

David C. Banks, in his official capacity as the Chancellor of the New York City Department of Education, New York City

Exhibit A

Department of Education,

Defendants-Appellees.

FOR PLAINTIFFS-APPELLANTS: RORY J. BELLANTONI (Peter G. Albert, *on the brief*), Brain Injury Rights Group, New York, NY.

FOR DEFENDANTS-APPELLEES: JOSHUA LIEBMAN (Richard Dearing, Ingrid R. Gustafson, *on the brief*) *for* Hon. Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Gorenstein, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiffs-Appellants Andrea Phillips and Paul Hinton, individually and as parents of their son S.H., appeal from a February 15, 2023 judgment granting summary judgment to the New York City Department of Education (DOE). We assume the parties' familiarity with the underlying facts, procedural history, and

issues on appeal, to which we refer only as necessary to explain our decision.

S.H. is a young man who has been diagnosed with cerebral palsy, multifocal partial seizures, dysgenesis of the corpus callosum, strabismus, spastic quadriplegia, and cortical vision impairment. S.H. attended special-educational public school from 2006 until January 2020, when his parents unilaterally placed him in a private special education program at the International Institute for the Brain (iBRAIN). On April 29, 2020, Plaintiffs filed a due process complaint alleging that DOE failed to provide S.H. a free and appropriate public education (FAPE) for his entire educational career, spanning from the 2006-2007 school year to the 2019-2020 school year, as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415. Plaintiffs sought tuition and services reimbursement for S.H.'s attendance at iBRAIN during the 2019-2020 school year, as well as compensatory services, including funding for S.H. to attend iBRAIN for twelve years of extended education.

An Impartial Hearing Officer (IHO) dismissed all claims before the 2017-2018 school year as time-barred under the IDEA's two-year statute of limitations and denied the remainder of Plaintiffs' complaint. On appeal, the State Review Officer (SRO) concluded that DOE denied S.H. a FAPE by failing to implement

occupational therapy services during the 2017-2018 school year but otherwise upheld the IHO's determinations, including that DOE provided a FAPE for the 2018-2019 and 2019-2020 school years and that claims from before the 2017-2018 school year were time-barred. The SRO awarded sixteen hours of compensatory occupational therapy services for Plaintiffs' claims that accrued on or after April 30, 2018, which were not time barred. Plaintiffs then brought suit in the district court, seeking review of the SRO's decision. The district court deferred to the SRO's determinations and granted DOE's motion for summary judgment.

On appeal, Plaintiffs challenge the district court's conclusions that (1) DOE provided a FAPE for the 2018-2019 and 2019-2020 school years and (2) Plaintiffs are entitled to a compensatory award only for their claims that accrued on or after April 30, 2018 for the 2017-2018 school year.

The IDEA requires school districts "to provide all children with disabilities a free appropriate public education," which consists of "special education and related services tailored to meet the unique needs of a particular child, and [must] be reasonably calculated to enable the child to receive educational benefits." *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 107 (2d Cir. 2007) (cleaned up). Claims for tuition reimbursement are assessed under the three-step *Burlington-*

Carter test, which considers whether (1) the school district's proposed placement failed to provide the student a FAPE, (2) the parents' alternative private placement was appropriate, and (3) equitable considerations favor the parents. *See E.M. v. N.Y.C. Dep't of Educ.*, 758 F.3d 442, 451 (2d Cir. 2014). If the court determines that the school district denied the child a FAPE in violation of the IDEA, then an award of compensatory services may also be appropriate. *See Somoza v. N.Y.C. Dep't of Educ.*, 538 F.3d 106, 109 n.2 (2d Cir. 2008).

I. The SRO's Conclusions

Plaintiffs argue that the district court erred by deferring to the SRO's conclusion that DOE provided a FAPE for the 2018-2019 and 2019-2020 school years. More specifically, Plaintiffs contend that the SRO's decision was not well-reasoned and did not consider evidence showing that DOE failed to properly evaluate S.H. in developing S.H.'s Individualized Education Plans (IEPs) and recommended inappropriate goals in the IEPs.

When reviewing state administrative proceedings under the IDEA, "we engage in an independent, but circumscribed, review, more critical than clear-error review but well short of complete *de novo* review." *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 875 (2d Cir. 2016) (cleaned up). We "must defer to the SRO's

decision on matters requiring educational expertise unless" we determine that the SRO's decision was "inadequately reasoned, in which case a better-reasoned IHO opinion may be considered instead." *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 189 (2d Cir. 2012). When parents seek to overturn an SRO's decision, they bear the burden of demonstrating that the decision was insufficiently reasoned or supported. *See M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 225 n.3 (2d Cir. 2012).

We conclude that Plaintiffs have failed to show that the SRO's decision is not entitled to deference. Plaintiffs argue that DOE incorrectly classified S.H.'s disability as "multiple disabilities" rather than "traumatic brain injury," which prevented S.H. from receiving the neuropsychological evaluation necessary for developing appropriate recommendations for special education services. Appellants' Br. at 15–17. Plaintiffs contend that this misclassification prevented DOE from formulating a legally adequate IEP.

However, the SRO reviewed the record and determined that the Committee on Special Education (CSE) adequately reviewed a range of evaluative materials in formulating S.H.'s IEPs. The record showed that the CSE reviewed numerous assessments related to S.H.'s academic skills, cognitive skills, behavioral skills, and physical capabilities to develop the IEPs for the 2018-2019 and 2019-2020 school

years. While Plaintiffs think that "a neuropsychological evaluation would [] have been the best starting point to determine S.H.'s functioning," Appellants' Br. at 18, DOE's failure to conduct the evaluation does not render the IEP legally inadequate. *Cf. M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ.*, 725 F.3d 131, 140 (2d Cir. 2013) (holding that DOE's failure to conduct a functional behavioral assessment alone did not render an IEP legally inadequate).

Accordingly, we defer to the SRO's conclusion that the CSE considered sufficient evaluative evidence in formulating the IEPs.

Plaintiffs also argue that the district court should not have deferred to the SRO's conclusion that the IEP's goals were reasonably calculated because the SRO's underlying reasoning was flawed.

An IEP must include a statement of measurable annual goals to meet the child's needs and make progress in the educational curriculum. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(II). The SRO determined that most of the goals in S.H.'s IEPs were appropriate for his instructional level, though some were not a perfect match. This conclusion carries substantial weight, as "the sufficiency of goals and strategies in an IEP is precisely the type of issue upon which the IDEA requires deference to the expertise of the administrative officers." *Grim v. Rhinebeck Cent.*

Sch. Dist., 346 F.3d 377, 382 (2d Cir. 2003).

Plaintiffs argue that the SRO's conclusion is not entitled to deference because it illogically concluded that the goals were appropriate despite acknowledging that three of the goals did not match S.H.'s skills. The SRO acknowledged that the evidence showed that as compared to the 2018 IEP, the 2019 IEP contained two goals that "were somewhat below the student's instructional level" and one goal that "was likely too ambitious." Joint App'x at 59. However, as the record supports, the SRO concluded that these adjustments in goals were appropriate because they "were developed by the student's then current teacher and providers and the evidence indicate[d] that the student's responsiveness was inconsistent and that changes in the goals were needed." *Id.*

Accordingly, we defer to the SRO's conclusion that these goals were "appropriately ambitious in light of [S.H.'s] circumstances." *See Endrew F. ex rel Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 402 (2017).

II. Statute of Limitations

As to the 2017-2018 school year, the SRO concluded that Plaintiffs' claim that DOE failed to implement S.H.'s home-based occupational therapy, which resulted

in an award of 16 hours of compensatory services, was the only one that accrued after April 30, 2018. Plaintiffs argue that the statute of limitations should toll for six months because DOE allegedly created the IEP for the 2017-2018 school year six months late.

The IDEA requires parents to file a due process complaint "within 2 years of the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. § 1415(f)(3)(C); *D.S. By & Through M.S. v. Trumbull Bd. of Educ.*, 975 F.3d 152, 168 (2d Cir. 2020). Plaintiffs do not allege that either of the two statutory exceptions to the IDEA's two-year statute of limitations applies. *See* 20 U.S.C. § 1415(f)(3)(D) (providing exceptions from the two-year statute of limitations due to "specific misrepresentations by" DOE or DOE's "withholding of information from the parent"). Indeed, Plaintiffs do not dispute that they could have discovered any claims arising from the IEP prepared for the 2017-2018 school year in November 2017, when Plaintiffs attended the CSE meetings and were informed of the IEP. Accordingly, we agree with the SRO that Plaintiffs' claims for the 2017-2018 school year are time-barred except their claim for implementation of home-based occupational therapy accruing after April 30, 2018.

Finally, because we defer to the SRO's decision on prong one of the *Burlington-Carter* test, we need not address the remaining two prongs.

* * *

We have considered the remaining arguments on appeal and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court