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'Hard-Fought' Settlement Reached

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Current and former students of a Brooklyn high school who were banned from classrooms or otherwise prevented from earning diplomas - in accordance with exclusionary policies acknowledged by a former principal - have begun applying for free compensatory education under settlement terms of a three-year class action brought against New York City by pro bono attorneys at Morrison & Foerster, in association with the nonprofit Advocates for Children.

"There is an urgent need for these [students] to obtain a prompt remedy - through injunctive relief, monitoring and compensatory education services - that protracted litigation would preclude," Eastern District Judge Jack B. Weinstein wrote in a Nov. 25 memorandum approving the settlement.

Plaintiffs in the matter of *D.S. v. New York City Department of Education*, 05-CV-4787, alleged that some students at Bedford-Stuyvesant's Boys and Girls High School were "placed on modified schedules in which they did not receive daily instruction adequate to earn a high school diploma [or were] marked as 'long-term absent' [or were] denied classroom assignments, school enrollment and daily admission to school buildings," according to court papers.

"The reasons these students were excluded are unclear, and not really a part of the lawsuit," said Matthew D'Amore, a partner in Morrison & Foerster's New York office and lead co-counsel for the plaintiffs. "Were they disciplinary problems or in need of remedial instruction? There are procedures in place to address such things, a whole book of procedures."

Mr. D'Amore added that it does not matter what the reasons were.

"The solution was improper," he said. "There are regulatory laws in place, meaning there are things you can do and things you can't do."

For its part in the settlement, the result of what Mr. D'Amore termed "hard-fought negotiations," the city made no admission of wrongdoing. Eamonn Foley, the city Law Department's lead counsel, deferred comment to the Department of Education.

"The Department of Education has agreed to settle this case," spokeswoman Maibe Fuentes-Gonzalez said in a written statement. "We believe the agreement is in the best interest of all parties."

Shawn Morehead, litigation director at the Manhattan-based Advocates for Children, said of the fight, "You can have long and difficult negotiations and arrive at a solution that both sides feel is reasonable."

The potential overall cost to the city of providing compensatory education is not mentioned in the settlement memorandum. Asked for a ballpark figure discussed during negotiations with the city, Ms. Morehead responded, "That's confidential, to the extent [such discussion] happened."

Judge Weinstein's memorandum said denial of educational opportunity for as many as 500 students occurred for four reasons:

- "Insufficient instruction" within regular school programming to warrant graduation for some students;
- Full "exclusion" of some students from classrooms;
- "Partial day exclusion" of some students; and
- Assignment of some students to the school's Academic Intervention Program, known casually as the "auditorium program."

Judge Weinstein wrote in his memorandum, "At an administrative special education hearing [preceding litigation], a former B&G principal testified to the school's history of excluding students, including a policy of denying registered students access to the school. School officials' reasons for wrongful exclusion have included lack of high school credits and poor school performance."

According to court papers, which included a survey of more than 100 excluded Boys & Girls students, the auditorium program was essentially a "warehousing" technique, a term Ms. Morehead accepted as appropriate to the facts: Students would file into the auditorium for several morning hours of no academic instruction, after which they were dismissed for the day.

When the students acted up, plaintiff counsel alleged, school officials engaged in disciplinary misconduct aimed at discouraging attendance. Their tactics "included the seizing of students' winter coats and identification cards necessary . . . to enter the building," wrote Judge Weinstein, who issued no ruling per se but who recounted allegations in the plaintiffs' original complaint.

Laws Allegedly Violated

According to Mr. D'Amore and Ms. Morehead, the city violated the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. §1983; the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§1400-15; the Americans with Disabilities Act, 42 U.S.C. §§12101-34; §504 of the Rehabilitation Act; the state Constitution, Article XI §1; and state education law and regulations.

One of the named plaintiffs, a 21-year-old whose parents are college-educated, put his objection more succinctly in an oral statement to the court.

"[F]our years of my life was stolen . . . I'll never be able to have the experience of taking a regional state test. I'll never have the experience of coming home with my report card for my father to see my straight A's," the young man said. "Now all that is left is for me to get a [General Educational Development degree] and even with the GED, it has its disadvantages. So I will have to work harder than other people [who] have a high school diploma."

So far, said Ms. Morehead, some 60 former and current Boys & Girls students have filed claims through Advocates for Children for compensatory education offered by the city through private and public institutions. Services include counseling, literacy programs, guidance and academic support, career and vocational training "and other educational programs where warranted," according to the settlement.

Further per agreement, the city has published notice of the settlement and mailed information and applications to all known students excluded from the ordinary Boys and Girls curriculum.

Going forward, wrote Judge Weinstein, "The settlement . . . prohibits the defendants from excluding students from educational services or transferring or discharging them from B&G without following specified protective procedures. . . . Mechanisms for monitoring - conducted by plaintiffs' counsel and an independent monitor - form a useful and critical component to ensure that B&G students' rights to educational opportunity are protected."

Mr. D'Amore's pro bono team included Morrison & Foerster litigation associates Jun Tsutsumi, Colette Verkuil and Julie Capehart.

"We were brought in by Advocates for Children, with whom we've had a long relationship, when it became clear that a lawsuit had to be filed," said Mr. D'Amore. "The fact that this [exclusionary] program existed, and had been going on for awhile, surprised me."

He added, "There's no ruling by the court. Nevertheless, a case like this helps clarify the boundaries of permissible and impermissible conduct. Judge Weinstein's [memorandum] will speak for itself."

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