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COURT OF APPEALS
STATE OF NEW YORK

CRUZ,

Appellant,

-against-

NO. 1

BANKS,

Respondent.

20 Eagle Street
Albany, New York
January 6, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon, and happy
2 New Year. The first case on the calendar is Cruz v. Banks.

3 MR. BELLANTONI: Good afternoon, Your Honor. May
4 I reserve time for rebuttal?

5 CHIEF JUDGE WILSON: Yes. How much would you
6 like?

7 MR. BELLANTONI: Three minutes, please.

8 CHIEF JUDGE WILSON: Yes.

9 MR. BELLANTONI: May it please the court. My
10 name is Rory Bellantoni, and I'm here for the appellant,
11 Ms. Cruz.

12 The certified question from the Second Circuit in
13 this case is narrow and practical. When a student is
14 covered by more than one class-size regulation under
15 Section 200.6(H)(4), do the varying restrictions serve as a
16 distinct requirement that must be independently fulfilled,
17 or a list of class-size options from which the DOE may
18 pick?

19 I submit that the answer should be cumulative
20 requirements. If more than one provision applies, the DOE
21 must comply with all applicable ceilings and staffing
22 floors.

23 JUDGE SINGAS: Well, why shouldn't we - - -

24 JUDGE GARCIA: What is your position - - -

25 JUDGE SINGAS: Sorry.

1 JUDGE GARCIA: Was that your position in front of
2 the hearing officer?

3 MR. BELLANTONI: I'm sorry?

4 JUDGE GARCIA: Was that your position in front of
5 the hearing officer? That interpretation you just gave us?

6 MR. BELLANTONI: It was - - - yes. It - - - it
7 was our position that where a student had, in this case - -
8 - well, if we - - - if I go back for a second. The year
9 prior to the one at issue here, the student was classified
10 under the IDEA with traumatic brain injury. The next year,
11 the DOE classified the student as having multiple
12 disabilities.

13 Now, one of the problems in this case is under
14 the IDEA the classification is not supposed to be part of
15 the IEP. You look at the classification, and you determine
16 that the child needs special education, you're supposed to
17 leave that at the door. Unfortunately, the regulation here
18 talks about multiple disabilities not in the same context
19 necessarily as classification. So you - - -

20 JUDGE GARCIA: So sorry. What I'm trying to find
21 out is, did you make this argument to the hearing officer
22 that you were entitled to this cumulative effect of these
23 provisions? So in effect, I think what you're arguing is
24 it should be 6:1:2, right?

25 MR. BELLANTONI: 6:1:2 or 6:1:1.

1 JUDGE GARCIA: Did you make that argument - - -

2 MR. BELLANTONI: Yes.

3 JUDGE GARCIA: - - - to the hearing officer?

4 MR. BELLANTONI: Well, it - - - I don't know that
5 the word "cumulative" - - - what was used. But what we
6 argued is that each one of those sections has to be
7 satisfied.

8 JUDGE CANNATARO: Did you say "or 6:1:1" when you
9 answered that last question?

10 MR. BELLANTONI: Yes.

11 JUDGE CANNATARO: You said 6:1:2 or 6:1:1?

12 MR. BELLANTONI: Well, yes.

13 JUDGE CANNATARO: How does 6:1:1 - - -

14 JUDGE GARCIA: And how's that cumulative?

15 JUDGE CANNATARO: - - - a cumulative application?
16 That only applies to one category, doesn't it?

17 MR. BELLANTONI: Correct. Correct.

18 JUDGE CANNATARO: How would that - - -

19 JUDGE GARCIA: How does that satisfy 12:1:4 then?

20 MR. BELLANTONI: No. But the - - - if we're
21 talking about a student with highly intensive management
22 needs - - - part of the issue here as well is students with
23 highly intensive management needs almost always have a 1:1
24 paralegal. So although the 6:1:1 class size maybe
25 represents one adult in the class, the reality is there are

1 going to be six students, one teacher, one para - - - six
2 more paras. And some of these students have 1:1 nurses.

3 JUDGE SINGAS: No. But what you're asking for is
4 a 6:1:2 if they're all separate requirements.

5 MR. BELLANTONI: Well, it - - - what the parent
6 here was asking for was the 6:1:1. 6:1:2 would be the
7 ratio that would apply under subsection (iii) for students
8 with multiple severe disabilities who treat - - - whose
9 treatment requires - - -

10 JUDGE SINGAS: Right. So if we're going to treat
11 each of the subsections as its own requirement, then it
12 would be a 6:1:2 in this case cumulatively. And my
13 question is, do you think that's what the regulation
14 anticipated when it set out four different class sizes?

15 I mean, there could be variations that are
16 different than any of these, and doesn't that go against
17 your reading of the statute?

18 MR. BELLANTONI: No. I - - - not necessarily.
19 No, no.

20 JUDGE SINGAS: Why not?

21 MR. BELLANTONI: Because it - - - each of the
22 individual rules has to be satisfied. That - - - the
23 statute starts out with - - -

24 JUDGE HALLIGAN: But what does that mean in terms
25 of the actual configuration in the classroom?

1 MR. BELLANTONI: Well, it - - - the classroom
2 size for students with special needs initially shall not
3 exceed fifteen.

4 JUDGE HALLIGAN: No. But I'm asking specifically
5 if you have a student who may fall within multiple
6 categories, then what is the bottom line in terms of the
7 configuration of students and instructors that you're
8 suggesting is required?

9 MR. BELLANTONI: I think as the Second Circuit
10 framed the first part of the certified question; those
11 requirements must be independently fulfilled.

12 JUDGE HALLIGAN: So what does that mean, though?
13 Are you saying twelve or six? Are you saying four, two,
14 one? What specifically are you suggesting is required here
15 - - -

16 MR. BELLANTONI: If - - -

17 JUDGE HALLIGAN: - - - in terms of the numbers?

18 MR. BELLANTONI: - - - if I can just walk through
19 it. The first requirement is special ed class students,
20 the class size shall not exceed fifteen. And then it's
21 "except that" each of the - - -

22 JUDGE HALLIGAN: Sorry. I'm just trying to ask a
23 what - - - what I think is a straightforward question,
24 which is what is your position as to what the specific
25 numerical requirements are where you have a student that

1 may fall within different categories?

2 MR. BELLANTONI: It - - - what the class size - -
3 -

4 JUDGE HALLIGAN: Yeah.

5 MR. BELLANTONI: - - - would have to satisfy
6 both. (iii) does not say the class must be twelve. (iii)
7 says the maximum class size - - -

8 JUDGE HALLIGAN: In other words it would be
9 capped at six in your view?

10 MR. BELLANTONI: That's right. So if - - - the
11 maximum class size is twelve, a class of 6:1:2 would
12 satisfy both the highly intensive management needs - - -
13 that class shall not exceed six, and it would satisfy
14 (iii).

15 JUDGE HALLIGAN: And then would you - - - would
16 it be two or four or one? What about the rest of the - - -
17 what about the other positions?

18 MR. BELLANTONI: It would - - - it - - - the
19 ratio that would satisfy both (iii) and (ii)(a) would be
20 6:1:2.

21 Now, subsection (ii) allows for additional
22 supplementary school personnel. The class shall not exceed
23 six, and there's no limit on the number of personnel that
24 can be put in that classroom. So when there was a finding
25 previously, I think, by the SRO in Navarro Carrillo that

1 subsection (iii) provides the greatest support for the
2 student, again, subsection (iii) would have, at most, four
3 adults. Whereas subsection ii(a) with the paras and with
4 other staff could be above that. (4) specifically says,
5 "In addition to the teacher and staff-student ratio shall
6 be one staff person to three students."

7 Doesn't allow for one or more supplementary
8 school personnel assigned to each classroom? There's no
9 limit on 6(a) or (b).

10 JUDGE GARCIA: How, if at all, should we factor
11 in deference to the agency here?

12 MR. BELLANTONI: In this case, I would - - - I
13 would argue there shouldn't be much. And I say that
14 because SRO, the State Review Officer here, is
15 adjudicating. He was acting more like a judge than an
16 agent or officer of the State Department of Education. If
17 the State Department of Education, like the federal DOE,
18 came out with a memorandum, a letter, if the commissioner
19 came out with - - -

20 JUDGE RIVERA: Yeah, yeah. But that would go to
21 a determination about what's proper pedagogically for that
22 student. That's - - - yes, you're - - - this is a pure
23 legal question.

24 MR. BELLANTONI: Well, the question, yes. The
25 question was - - -

1 JUDGE RIVERA: What do you do when a student - -
2 -

3 MR. BELLANTONI: - - - should there be any
4 deference?

5 JUDGE RIVERA: - - - fits under more than one - -
6 - by definition - - - appears to fit under more than one
7 category? That's the legal question.

8 MR. BELLANTONI: In the first instance we would
9 argue, as we did in the papers, that this is a legal issue.
10 You don't need to defer to the SRO on legal issues. But
11 even putting that aside - - -

12 JUDGE RIVERA: Well, it's their regulation.
13 We've said it's their regulation. They've authored it.
14 There is some deference due to the author of the
15 regulation. Unless of course, it conflicts with the
16 statute - - - I don't think you've argued that, but maybe
17 you have - - - or it otherwise appears internally
18 inconsistent. Right? Their interpretation goes against
19 the plain language of the regulation itself.

20 MR. BELLANTONI: Right. If it would make it
21 absurd in some way, then yes. But again, there is a
22 distinction here between the State Review Officer, SRO
23 Bates, and the Commissioner of the Department of Education.

24 JUDGE TROUTMAN: But isn't it - - - when they
25 have the multiple disabilities, isn't that the

1 quintessential time where expertise would come into play as
2 to how to interpret it?

3 MR. BELLANTONI: To develop the IEP, yes. But
4 mainly what this section is talking about in section
5 1(ii)(a) and (ii)(b) are management needs. Management
6 needs are not necessarily special education. It's the 1:1
7 attention the student needs on a daily basis. So a student
8 - - -

9 JUDGE SINGAS: How do you interpret this
10 habilitation and treatment? What does that mean to you?

11 MR. BELLANTONI: Habilitation would be learning
12 new tasks, in the first instance, and treatment for any
13 medical condition the student might have that doesn't rise
14 to that level of highly intensive management needs.

15 JUDGE SINGAS: So can habilitation be a form of
16 socialization, so that may be a twelve-member class would
17 better suit the student for habilitation needs?

18 MR. BELLANTONI: I'm sorry. Can you repeat the
19 question?

20 JUDGE SINGAS: Can habilitation encompass some
21 socialization factors so that a child with twelve students
22 would do better in that environment socializing with other
23 children as opposed to - - - like, why should the 1:1 ratio
24 of the teacher trump the habilitation and treatment aspect?

25 MR. BELLANTONI: I'm not necessarily saying that

1 it should trump it. It goes back to the management needs
2 are so severe. And again, it's the helping the - - - the
3 student drink, eat, sometimes breathe if they aspirate, go
4 to the bathroom, change a diaper. These are management
5 needs that are so highly intensive the - - - the rule
6 requires no more than six in that class.

7 To put this student in a class with twelve,
8 again, the class would become unwieldy - - -

9 JUDGE SINGAS: But doesn't then the twelve become
10 superfluous in this scheme?

11 MR. BELLANTONI: In the scheme of the statute, or
12 for this student?

13 JUDGE SINGAS: No. But what you're arguing,
14 then, there would never be a twelve-person classroom for a
15 highly intensive student, correct?

16 MR. BELLANTONI: Well, correct. For high - - -
17 for highly intensive. Number (i) talks about management
18 needs that interfere, not highly or intensive, (ii)(a) is
19 highly intensive, (ii)(b) is intensive. So if a student
20 has mild management needs, moderate, or perhaps - - - you
21 know, that doesn't - - - doesn't need the help at all that
22 most students need, there would be classes of students in a
23 12:1:4 setting. Not every student needs the high level of
24 1:1 para - - -

25 JUDGE HALLIGAN: The 6:1:2 ratio that you're

1 proposing, that's not found explicitly in the regulation,
2 right? That's your reading of combining two of the
3 provisions; am I right?

4 MR. BELLANTONI: No. Not necessarily.

5 JUDGE HALLIGAN: Well, wait - - -

6 MR. BELLANTONI: (iii)? No, you couldn't.

7 JUDGE HALLIGAN: Is there a provision in the
8 regulation which requires for a particular group of
9 students 6:1:2, in so many - - - in so many words?

10 MR. BELLANTONI: Subsection (iii) - - -

11 JUDGE HALLIGAN: Yes.

12 MR. ROSINUS: - - - requires that ratio.

13 JUDGE HALLIGAN: Um-hum.

14 MR. BELLANTONI: So if you're in a school
15 district upstate and maybe they don't have twelve kids,
16 they have six, 6:1:2 would satisfy (iii). It doesn't say
17 "must be twelve", must - - - cannot be twelve. It's - - -

18 JUDGE HALLIGAN: Right.

19 MR. BELLANTONI: - - - it's the ratio. So 6:1:2
20 would be the same as 12:1:4.

21 JUDGE HALLIGAN: My - - -

22 JUDGE CANNATARO: But your argument - - - go
23 ahead. Finish your thought.

24 JUDGE HALLIGAN: It seems to me that it would be
25 reasonable to read the regulation as setting forth a series

1 of different ratios depending on the needs of the student.
2 And I think what you're asking us to do, if I'm
3 understanding you correctly - - - this is what I'm trying
4 to clarify - - - is instead to meld two different
5 categories and come up with a different ratio that's not
6 set forth in the regulation. But maybe I'm
7 misunderstanding.

8 MR. BELLANTONI: Again, not necessarily because a
9 6:1:2 ratio classroom satisfies number (iii). They didn't
10 have to place this student in a classroom with - - -

11 JUDGE HALLIGAN: Yeah. But - - -

12 MR. BELLANTONI: - - - twelve students.

13 JUDGE HALLIGAN: - - - Subsection (iii) doesn't
14 say specifically 6:1:3, does it? Or am I looking at the
15 wrong section? Looking at (iii)?

16 MR. BELLANTONI: No. It says the maximum class
17 size is twelve and the teacher - - - the staff-student
18 ratio shall be one staff person to three students. 6:1:2
19 fits that ratio. It doesn't say it must be twelve here.

20 JUDGE HALLIGAN: I see.

21 MR. BELLANTONI: It says shall not exceed twelve.
22 And the ratio has to be - - - I have to read it because I'm
23 not a great mathematician. Shall be one staff person to
24 three students: 1:3. When you've got six to the - - -
25 6:1:2, 12:1:4.

1 JUDGE CANNATARO: But you have to admit, don't
2 you, that the statute itself doesn't speak in terms of
3 these ratios. I understand the math that you're doing.
4 You know, if you take a class of twelve and you divide it
5 by two, that's six, and then you can do the math on the
6 opposite side of the equation with the personnel.

7 But it - - - the statute speaks in terms of
8 fifteen, twelve, and six.

9 MR. BELLANTONI: No, no, no, no, the statute
10 specifically says in (iii), "shall not exceed twelve", and
11 the ration - - - the ratio that I'm describing is in
12 statute. It says the staff-student shall be one staff to
13 three students.

14 It doesn't say 6:1:2 or 12:1:4, and I don't know
15 if there's any permutation between that could possibly
16 satisfy that. But 6:1:2 satisfies (iii) the same way
17 12:1:4 does. And the statute says that, "shall not exceed"
18 - - - and by the way, that is the only provision that has
19 the ratio. All the others just say - - -

20 JUDGE CANNATARO: But that's my point. You're
21 just saying when it defines 6:1:1 or whatever, it uses
22 language like "shall not exceed", which suggests that it
23 doesn't prohibit a different configuration of numbers, but
24 it doesn't explicitly lay those different configurations
25 out. There is no 6:1:2 anywhere in the regs, is there?

1 MR. BELLANTONI: Well, there - - - there is no
2 specific 12:1:4 in the regs either. It says, "shall not
3 exceed". So anything between one and twelve if it's in
4 that ratio is - - - is as open as 12:1:4.

5 JUDGE GARCIA: Counsel, if - - - your red light
6 is on. With the Chief Judge's permission. It seems if I
7 step back from these regs and - - - that (ii) (a) goes to
8 management needs that might interfere with your ability to
9 learn if those management needs weren't addressed.

10 And if I look at romanette (iii), it's
11 disabilities that actually affect the program that's being
12 offered. So I think something back to Judge Singas'
13 question is why shouldn't the folks involved in this have
14 the discretion to determine that habilitation as a program
15 need which I agree, in my understanding, has some element
16 of socialization, is better done in a twelve-person class.

17 MR. BELLANTONI: Right.

18 JUDGE GARCIA: And so these things - - -

19 MR. BELLANTONI: I apologize if - - -

20 JUDGE GARCIA: - - - almost in a way conflict
21 because they go to different types of things. So a student
22 who has management needs may be having a different
23 educational program, but because of the management needs,
24 you don't want those needs to interfere with their ability
25 to prosper under that program and make progress.

1 Under romanette (iii) they have certain
2 disabilities that are actually impacting the programing
3 being offered.

4 MR. BELLANTONI: Well, if I may, the statute
5 begins and it talks about students up to fifteen in a - - -
6 in a class that primarily a need for specialized
7 instruction.

8 JUDGE GARCIA: Right.

9 MR. BELLANTONI: So (iii) - - -

10 JUDGE GARCIA: And instruction can mean very
11 different things.

12 MR. BELLANTONI: But (iii) doesn't talk about
13 instruction. In (iii) we talk about students with - - -

14 JUDGE GARCIA: What do you take "program" to
15 mean?

16 MR. BELLANTONI: Well, it would be the IEP. But
17 what the focus here is on is multiple disabilities needing
18 - - - primarily. It says whose program consists primarily
19 of habilitation and treatment, not special education as in
20 the first subsection.

21 And if I confuse the issue I greatly apologize,
22 but I'm not suggesting here that the DOE should be able to
23 make a choice. If you start with the fifteen students,
24 that's the maximum class size except that, and you go
25 through each one of these.

1 JUDGE GARCIA: I guess my point is - - -

2 MR. BELLANTONI: If any of them apply, like, (6).

3 JUDGE GARCIA: I guess my point is something of
4 the nature of if it conflicts in a way with the ability to
5 achieve romanette (iii): socialization goal for programing
6 under habilitation with a six-person class, shouldn't we
7 let someone decide that besides us? Right.

8 Shouldn't the agency be able to say, no, 12:1:4
9 is what this student really needs to benefit the most from
10 the programing we're offering?

11 MR. BELLANTONI: If - - - if there's a true
12 confliction. And I think that's what we go back to.

13 The - - - the District Court judge - - -

14 JUDGE GARCIA: Do we decide?

15 MR. BELLANTONI: - - - the District Court judge
16 in the first case agreed with the IHO and the SRO and said
17 there was. Second Circuit affirmed. It was a summary
18 order. It didn't have precedential value.

19 But Judge Calabresi, when he - - - when he
20 certified the question, believes there's a dissonance
21 between these rules. And again, if a student has multiple
22 disabilities and the program consists primarily of
23 habilitation and treatment, the student can be in that
24 program, but the class should not exceed six.

25 And by the way, these structures talk about the

1 maximum class size for special classes. This rule benefits
2 the other students in the class as well, so that students
3 going into the class are joining other students that have
4 highly intensive management needs or multiple disabilities,
5 where the focus is habilitation and treatment.

6 We're not just looking in the abstract at this
7 one student. These are the classes that DOE needs to set
8 up so they're there already. It's not like we're looking
9 for a program or trying to create - - -

10 JUDGE RIVERA: So - - - so romanette (iii) allows
11 up to twelve?

12 MR. BELLANTONI: I'm sorry?

13 JUDGE RIVERA: Romanette (iii) allows up to
14 twelve, right? That's what it says.

15 MR. BELLANTONI: Up to twelve and six would be -
16 - -

17 JUDGE RIVERA: Shall not exceed twelve?

18 MR. BELLANTONI: Six would be up to twelve. A
19 6:1:2 class would be up to twelve - - -

20 JUDGE SINGAS: Well, of course.

21 MR. BELLANTONI: - - - and would also satisfy the
22 rule that says a student with highly intensive management
23 needs that - - - that need that - - - and forgive me for
24 not reading it earlier - - - a high degree of individual
25 attention and intervention with more students and more

1 paras and more people in that 12:1:4 class.

2 CHIEF JUDGE WILSON: Thank you, Counsel. Your -
3 - - your time is up. You have your rebuttal.

4 MR. BELLANTONI: Thank you, Judge.

5 MR. ROSINUS: Good afternoon, Your Honors. And
6 may it please the court. I'm Alan Rosinus. I represent
7 the respondents, New York City Department of Education, and
8 its Chancellor.

9 JUDGE HALLIGAN: Counsel, can I ask you about the
10 deference point? I want to make sure I understand the
11 landscape.

12 I take it that the regulation - - - but correct
13 me if I'm wrong - - - is a state regulation; is that right?

14 MR. ROSINUS: That's right, Your Honor.

15 JUDGE HALLIGAN: Okay. And the - - - the - - -
16 is it the CSE, the committee, is a creature of the local
17 school district; is that right?

18 MR. ROSINUS: That's also - - - yes.

19 JUDGE HALLIGAN: Okay.

20 MR. ROSINUS: That's also right, Your Honor.

21 JUDGE HALLIGAN: And so how or why would there be
22 deference to a regulation that is promulgated by a state
23 agency when it's being interpreted by a different local
24 entity?

25 MR. ROSINUS: Yeah. We don't think that our

1 interpretation deserves deference, Your Honor. We think,
2 to the - - - as we say in our brief, to the extent that
3 deference is owed here, it's that the first step of - - -
4 of the - - - of what the regulation requires the CSE to do.

5 JUDGE HALLIGAN: And why would there be any
6 deference if there are distinct government entities, one
7 state and one local, that are engaged here? There may be
8 general, you know, respect for expertise, but that's
9 different, I think, than the way we usually think of
10 deference in the administrative context.

11 MR. ROSINUS: Right. Let me be very clear. We
12 do not think there's any deference owed to the CSE's
13 interpretation of the regulation.

14 JUDGE HALLIGAN: Okay.

15 MR. ROSINUS: That's not what we're saying. What
16 we're saying - - -

17 JUDGE SINGAS: Can you answer this - - - can you
18 - - - can we go back to this point about the - - -

19 MR. ROSINUS: Yes, Your Honor.

20 JUDGE SINGAS: - - - twelve-person classroom?
21 Like, why would the DOE think it's appropriate for some
22 students to be in a twelve-person classroom, and what's
23 your take on habilitation and treatment? And if we did
24 what your adversary is asking us to, does that become
25 superfluous?

1 MR. ROSINUS: So I think that a couple of things,
2 Your Honor. First, the 12:1:4 maximum and ratio has to be
3 read together. So what you have there is, you have - - -
4 and that gets to a fundamental point about the way that
5 this regulation operates.

6 This regulation is about formulating a set of
7 classrooms that will serve the needs of the similarly
8 situated disabled students within them. And so what that
9 means in practice, first of all, is that the - - - the
10 maximum student number and the staffing ratio or staffing
11 minimum - - - because different provisions, as Your Honors
12 know, have different - - - have either minimum or ratio - -
13 - go hand in hand the maximum student numbers and the
14 minimum staffing.

15 Because what it - - - that means is if you - - -
16 if you have twelve students, but you have a 3:1 student-
17 staff ratio, you can accommodate those additional students.

18 And I think that the - - - to answer the question
19 about habilitation. So habilitation is a well-known term
20 in the special education community. It basically refers to
21 activities of daily living. It could include
22 socialization, certainly, as Your Honors have said, but it
23 includes sort of all - - - it's an umbrella term that
24 includes all activities of daily living.

25 And you see that in - - - with this student, I

1 know, of course, what's before this court is the
2 interpretation of the reg. But when you - - - but a good
3 example of how to apply that properly is in this case when
4 you look at the IEP. What the IEP did here was - - - first
5 of all, on page 421 of our - - -

6 JUDGE RIVERA: Before - - - before you - - -

7 MR. ROSINUS: Yes, Your Honor.

8 JUDGE RIVERA: - - - go down the road of the IEP.
9 Thank you very much. These are the chancellor's regs,
10 correct?

11 MR. ROSINUS: I think that's right, Your Honor.
12 They're - - - they're the - - -

13 JUDGE RIVERA: What is the - - -

14 MR. ROSINUS: - - - SED Chancellor - - -

15 JUDGE RIVERA: The Chancellor's interpretation of
16 these regulations? What is the Chancellor's answer to the
17 question about what do you do if a student - - - I
18 understand you see this case differently - - - if a student
19 appears to fit more than one of these particular sub-
20 provisions? What's the Chancellor's interpretation?

21 MR. ROSINUS: So we don't have an interpretation
22 from the State Education Department or Chancellor, but what
23 we do have are the opinions of the SROs. The SROs are - -
24 -

25 JUDGE RIVERA: What - - - so just to be clear.

1 MR. ROSINUS: Yes, Your Honor.

2 JUDGE RIVERA: In this case, you're saying the
3 regulatory entity has no interpretation that it is
4 promoting; is that correct?

5 MR. ROSINUS: That's correct, as far as I know,
6 Your Honor. So yes. I mean, so and ultimately - - -

7 JUDGE RIVERA: So the interpretation you're
8 arguing now is whose if it's not the regulators?

9 MR. ROSINUS: I'm sorry. I didn't hear the last
10 part.

11 JUDGE RIVERA: Whose interpretation are you now
12 advocating if it's not the regulators?

13 MR. ROSINUS: Well, our argument is based on (a)
14 the - - - how the SROs have interpreted it as well. They -
15 - - their interpretation has been largely in line with
16 ours. And the - - - and - - -

17 JUDGE RIVERA: Well, who's the "ours"?

18 MR. ROSINUS: With the Department of Ed, New York
19 City Department of Ed's.

20 JUDGE RIVERA: Is it not then your interpretation
21 of the reg?

22 MR. ROSINUS: I'm sorry?

23 JUDGE RIVERA: Is it not then your interpretation
24 of the regulations? I don't understand how an agency can
25 say we have no interpretation of our own regs.

1 MR. ROSINUS: Well, they're not our regs, Your
2 Honor. They're the state - - - they're the state's regs.
3 We're the city - - - we're the city DOE, so.

4 JUDGE RIVERA: But that's what I asked is - - -
5 is - - - does the Chancellor have an interpretation? You
6 told me no.

7 MR. ROSINUS: Oh, you mean the DOE Chancellor?

8 JUDGE RIVERA: Yeah.

9 MR. ROSINUS: Yeah. The DOE Chancellor's
10 interpretation is the interpretation that we have here.

11 JUDGE RIVERA: Okay.

12 MR. ROSINUS: And - - -

13 JUDGE GARCIA: That's through the hearing
14 officer?

15 MR. ROSINUS: No. The hearing officers are
16 impartial, independent, Your Honor. They're - - -

17 JUDGE GARCIA: It's the State Review, though?

18 MR. ROSINUS: The State Review Officer has taken
19 the same position that we take, but they are separate from
20 us.

21 JUDGE GARCIA: Right.

22 MR. ROSINUS: So - - -

23 JUDGE GARCIA: Do they work for the Chancellor,
24 though? Are they - - -

25 MR. ROSINUS: They work for the State Education

1 Department.

2 JUDGE GARCIA: Right.

3 MR. ROSINUS: Yeah.

4 JUDGE GARCIA: So is that what you're saying is
5 the state interpretation? The State Education Department
6 interpretation?

7 MR. ROSINUS: Not exactly. Because they're - - -
8 by regulation, they operate independently of the State
9 Education Department, although they are employed by them.
10 But I think it's important to note that they have said - -
11 - they've taken a position that's largely consonant with
12 ours, the New York City DOE's, and the State Education
13 Department has never stepped in and said, we disagree.

14 Also the Second Circuit in the Carillo case, it
15 was a summary order as my colleague says, not binding. But
16 it, by the same token, they said something very similar to
17 what we're saying here, which is that the DOE can select
18 from among the options. We think that the selection is - -
19 - is a little bit - - - it's not quite clear in the Carillo
20 decision what that means. We think that the selection is
21 at the level of classifying the student's disability, not
22 at choosing the classroom. Because we think that the
23 latter follows more or less inexorably from the former.

24 CHIEF JUDGE WILSON: So you sort of whizzed by
25 something that I wanted to back to go back to. I think you

1 said something to the effect of the regulations that we're
2 looking at are about setting up classrooms.

3 MR. ROSINUS: Yes, Your Honor.

4 CHIEF JUDGE WILSON: And if I understand what you
5 mean by that, it's that the size limits and staffing
6 maximums that we're looking at in the regulations direct
7 you about what types of classrooms you have to set up and
8 what the maximum instructional capacity those classrooms
9 can be.

10 And there's a separate exercise of figuring out
11 what of those out of those subset - - - set, I guess I
12 should say - - - a particular student is best suited to go
13 into?

14 MR. ROSINUS: That's right, Your Honor.

15 CHIEF JUDGE WILSON: And if I could characterize,
16 maybe unfairly the plaintiff's position, it's that you need
17 to design the classrooms based on an individual student's
18 needs, if necessary?

19 MR. ROSINUS: Right. And I think the point there
20 is that you can - - - you can address the student's
21 individual needs separately. A student can receive, for
22 instance, if he needs one, a 1:1 paraprofessional or a 1:1
23 health aide, for instance.

24 The student in this case was the - - - the CSE
25 recommended that he receive both. You can see that on page

1 405 - - -

2 CHIEF JUDGE WILSON: So let me ask you - - -

3 MR. ROSINUS: - - - of the response appendix.

4 CHIEF JUDGE WILSON: - - - also, is there a
5 different procedure by which a particular student could,
6 let's say they're placed into one of these categories and
7 it's an appropriate placement in the sense that - - - under
8 your way of looking at this, could the student say, but
9 yes, but in fact, this is not providing me the educational
10 circumstances I need, and you've got to provide me
11 something different or additional?

12 MR. ROSINUS: That can happen, Your Honor. But
13 again, I think that - - - that implicates other parts of
14 the DOE's framework. It implicates the parts that go to
15 the provision of FAPE broadly. It also implicates the
16 regulations that pertain to, again, the provision of - - -
17 for instance, a 1:1 paraprofessional or so - - - or a
18 health aide or related services or push-in services,
19 pullout services, all of which are - - - can be provided
20 for and many of which are provided for on the IEP for the
21 student here.

22 Yet because the plaintiffs have this critical
23 section on page - - -

24 JUDGE RIVERA: Just to be clear. This happens
25 frequently, that a student fits under more than one sub-

1 provision?

2 MR. ROSINUS: I can't say it's happened - - - I
3 can't say exactly how much - - - with how much frequency it
4 happens, Your Honor. But yes, it does - - - it has
5 definitely happened in multiple cases that I've seen. And
6 - - -

7 JUDGE RIVERA: And it's resolved how?

8 MR. ROSINUS: It's generally resolved by - - -

9 JUDGE RIVERA: By predominates - - -

10 MR. ROSINUS: Yes. In - - -

11 JUDGE RIVERA: - - - a need?

12 MR. ROSINUS: - - - effect, yes. By determining
13 which type of classification best fits the student and
14 which type of program best fits the student.

15 So here, for instance, when you look at page 421
16 of the respondent's appendix, you can see the DOE school
17 psychologist who is - - - psychologist, who is also the - -
18 - the district representative at the CSE meeting for this
19 student for this school year, who said the student was
20 regressing in gross motor skills; had not made academic
21 progress the year before; was still functioning at a pre-
22 kindergarten level, and basically needed to focus on a
23 program of habilitation and treatment.

24 And the IEP is consonant with that. It has many
25 different goals and tasks for the student that are - - -

1 that fit under the umbrella of habilitation. This is on
2 pages 449 to 61 of the respondent's appendix.

3 JUDGE SINGAS: Yeah. But you'd agree the
4 regulation isn't written that way? There's nothing that
5 says best fits this. When you look at the regulation, they
6 look like freestanding subsections. No conjunctive
7 language, no periods, no best fits this.

8 MR. ROSINUS: The best fit is not explicit, Your
9 Honor, that's right. But I think - - - but I also agree
10 with your point that it's a set of options. It's a set of
11 classroom placements that are listed seriatim. And what
12 that means is, and this is what I want to get to about the
13 plaintiff's reply. On page 13 she says, "The subsections
14 of 200.6(h)(4) are not categories of classroom placements,
15 but categories of students." That's a misreading of the
16 regulation, Your Honors.

17 When you look at subsection (h), the very
18 beginning of subsection (h), it says, "The following
19 standards shall be used in the provision of special classes
20 for students with disabilities." (h)(ii) says, "In all
21 cases, the size and composition of a class shall be based
22 on the similarity of the individual needs of the students."
23 And then it has a list of classroom placements that are
24 tailored to the needs of those students - - -

25 JUDGE HALLIGAN: So you might have - - -

1 MR. ROSINUS: - - - as a class.

2 JUDGE HALLIGAN: - - - you might have answered
3 this in responding to the Chief's question, but just so I'm
4 clear. If you have a student and because of the
5 habilitation and treatment needs, the determination is that
6 being in a class size of twelve is appropriate, but that
7 particular student has other needs that require perhaps 1:1
8 care. I understood you to say there's a process by which a
9 parent can pursue that. And if it's appropriate and needed
10 that that could be provided even in a twelve-person
11 classroom setting, notwithstanding that, that doesn't match
12 the ratio that's set forth under that subsection; is that
13 right?

14 MR. ROSINUS: That's right, Your Honor. And here
15 the student did get that recommended by the CSE. On page
16 RA-405 of the record you can see - - - he was - - - we
17 recommended a 1:1 paraprofessional for this student. We
18 recommended a 1:1 health aide for this student.

19 The staffing ratios are for the class - - - in
20 the regulation here, (h) (4) are for the class as a whole.
21 And one of the main things that they miss and it - - - it's
22 one of the main things they miss when they read this
23 regulation - - - (h) (4) (i) speaks of - - - talks of the
24 students, the - - - it describes the type of student and it
25 says, "To the extent an additional adult is needed, the

1 class shall not exceed twelve students."

2 (h) (ii) (a), which is one of the directly relevant
3 provisions here, says, "The class shall not exceed six
4 students with one or more supplementary school personnel."

5 (h) (iii) - - - romanette (iii) says, "The - - -
6 in addition to the" - - - so the class shall not exceed
7 twelve students, in addition to the teacher, the staff to
8 student ratio shall be 3:1.

9 Again, the staffing ratio and the student maximum
10 go hand in hand. And Judge Halligan, you may - - - what
11 you said earlier is absolutely right. What they're saying
12 is they want a 6:1:2 placement. They're asking for a
13 placement that has a required maximum of six students and a
14 required student to staff ratio of 3:1. That's not in this
15 regulation. That's not one of the classroom placements
16 that the regulation sets forth.

17 JUDGE CANNATARO: Is it prohibited by the
18 regulation?

19 MR. ROSINUS: Well, it's not. The regulation - -
20 - there is no - - - what I'm saying is there's no required
21 - - - there's no classroom placement that has both of those
22 requirements. So the regulation is - - - is geared towards
23 setting up a set of classrooms. And that is not one of the
24 classrooms that it sets up.

25 JUDGE SINGAS: I know. But the classroom might

1 change. And the Chief asked you if there are other places
2 in the regulation where you might get additional staff, and
3 that would change the regulation. So doesn't that
4 undermine your argument? It would change the staff ratios?

5 MR. ROSINUS: Well, no. Again, Your Honor,
6 because the - - - the staff ratios here are for the - - -
7 are for the class. And then there are separate provisions
8 where you can get, for instance, a 1:1 paraprofessional for
9 an individual student, which this student has.

10 JUDGE HALLIGAN: But because of that, it seems to
11 me that in a particular class, because of the needs of a
12 particular student or students, you might in fact have a
13 ratio that, when we do the math, turns out to be 6:1:2.
14 Because it might be 12:1:4 because of the needs of the
15 particular students, maybe, that require 1:1
16 paraprofessionals.

17 MR. ROSINUS: That's right.

18 JUDGE HALLIGAN: But that doesn't mean that you
19 are going out setting up entire classrooms that are aimed
20 at the 6:1:2 ratio? And I assume - - -

21 MR. ROSINUS: Yes.

22 JUDGE HALLIGAN: - - - if you were that, then you
23 would have to set up a great multiplicity of classrooms, as
24 opposed to tailoring services to particular students that
25 might deviate from that ratio within a particular

1 classroom? Is that fair?

2 MR. ROSINUS: That's right, Your Honor. It could
3 be a - - - it could be a plethora of classrooms, yeah.

4 JUDGE RIVERA: I'm a little confused. I thought
5 you don't count the six - - - let's just stay with the
6 6:1:1:2 thing - - - based on what an individual student
7 might receive in the class, because you're looking at the
8 ratio for the class?

9 MR. ROSINUS: That's - - - that the way I would
10 answer it, Your Honor. Yeah, that's the best way of
11 looking at it, I think, Your Honor. But I think the other
12 point to make is that - - -

13 JUDGE RIVERA: So it wouldn't - - - just the flip
14 side of that.

15 MR. ROSINUS: Yes.

16 JUDGE RIVERA: It wouldn't matter, let's say
17 there are six students - - - we'll just stay with that for
18 one moment - - - in the class. It wouldn't matter for
19 purposes of what we're arguing, that five of those students
20 have additional personnel, staff working with them, because
21 that's not the way you would count it?

22 MR. ROSINUS: I think that's right, Your Honor.
23 Exactly. Because the staffing is for the classroom.

24 And if I may just say one last thing in response.
25 What - - - the point is that what the plaintiff is arguing

1 is not that you would count the - - - their argument isn't
2 really trying to count the additional staff member
3 inferences, a 1:1 para for an individual student as part of
4 the ratio. Because what they're saying is that - - - or
5 one of the things they're saying is sometimes they say they
6 want a 6:1:1. But what they're saying is they're going to
7 take one element from (h) (ii) - - - (h(4) (ii) (a) which is
8 the six-student maximum and another element, a class-wide
9 element from (h) (4) (iii), which is the 3:1 ratio for the
10 class and put those together.

11 And my point is that that's not there - - -

12 JUDGE GARCIA: That was my original question. Is
13 that what they asked for in front of the hearing officer?

14 MR. ROSINUS: My recollection is, is what Mr.
15 Bellantoni said is right, is that they actually asked for a
16 6:1:1, which actually conflicts with their position here.
17 Because by their logic, they're saying, well, he - - - he's
18 highly intensive, so he gets a six-student maximum.

19 But by the same token, they agree that he has
20 severe multiple disabilities, and that would be a 3:1
21 ratio, but they didn't ask for that. So - - -

22 JUDGE GARCIA: It seemed like they asked for a
23 different choice. They wanted the 6:1:1 rather than
24 12:1:4.

25 MR. ROSINUS: Right. Exactly. They weren't even

1 asking - - - they weren't even making an argument, a
2 request that was consistent with what they're arguing here,
3 Your Honors.

4 CHIEF JUDGE WILSON: I thought they were actually
5 asking for continued placement in the iBrain School, which
6 had a 6:1:1. I didn't see anything in the record saying
7 that the iBrain program had a 6:1:2.

8 MR. ROSINUS: But I think they were also saying,
9 Your Honor, that the CSE should have proposed a 6:1:1 in
10 the public school.

11 CHIEF JUDGE WILSON: Yes.

12 MR. ROSINUS: Yeah. So - - - and that conflicts
13 with what they're saying here. Because what they're saying
14 here is well - - - well, anyway, what they're saying here
15 is some of the time anyway, is he had both and therefore he
16 should get both requirements.

17 But one of those requirements in (h) (4) (iii) - -
18 - romanette (iii) is the 3:1 ratio, which the 6:1:1
19 placement that they sought below - - - that she sought
20 below does not meet, Your Honors.

21 So we would respectfully ask that this court
22 answer the survey question as we indicate.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. ROSINUS: Thank you, Your Honors.

25 MR. BELLANTONI: So if I can just clarify briefly

1 and I'll try to be brief.

2 Below, we were arguing for the 6:1:1 placement
3 and that the student has - - - and has a traumatic brain
4 injury. We didn't say the student has multiple - - -
5 severe multiple disabilities and we want the benefit of
6 both sections.

7 The SRO reversed or - - - or ruled against us on
8 that, and then we end up in federal court where we're
9 dealing with the fact that, okay, now the student is
10 classified as having multiple disabilities. But even with
11 that classification, because the student also has highly
12 intensive management needs instead of perhaps mild or
13 moderate, that that cap should be at six, not twelve. And
14 again, twelve requires staff in a certain ratio that shall
15 not exceed six.

16 If a parent wants to rely on these statutes that
17 doesn't have legal representation, they might think that
18 "six" means six, and "shall" means shall.

19 The student - - -

20 JUDGE GARCIA: Counsel, can I just ask you and
21 maybe, in some way, to clarify this. Before the hearing
22 officer was there a question of whether because this
23 student qualified for both romanette (ii)(a) and romanette
24 (iii) under (4), which one of those classes they would be
25 put in? Or was that not an issue before the hearing

1 officer, which you seem to be saying?

2 MR. BELLANTONI: It was - - - it wasn't an issue
3 as far as we conceded or agreed there were multiple
4 disabilities and the student should be placed under (iii).
5 We - - - and maintained to this day, that the student
6 doesn't have multiple disabilities as defined. There is a
7 classification: traumatic brain injury, and that's what the
8 student has.

9 The multiple disabilities is a freestanding - - -
10 a separate disability. However when the SRO held that the
11 right - - - and by the way, let's go back again. The DOE
12 in the year before this one classified the student as
13 having TBI. Put the student in a 6:1:1 class with
14 traumatic brain injury.

15 Next year, the recommendation was 12:1:4, and the
16 student all of a sudden now has multiple disabilities.

17 The student had a brain injury that occurred
18 earlier in the student's life. That shouldn't change, but
19 that's not - - -

20 JUDGE GARCIA: I understand you may disagree with
21 how the student has been classified. But my question is in
22 front of the hearing officer, did these two classifications
23 exist at that time so that they qualified either under
24 romanette (ii) (a) or romanette (iii)?

25 MR. BELLANTONI: I would argue, yes. But we

1 didn't argue that. We argued solely for the 6:1:1 class,
2 and - - - and argued that it was appropriate under - - -

3 JUDGE GARCIA: Right.

4 MR. BELLANTONI: - - - highly intensive
5 management.

6 JUDGE GARCIA: It seems before the hearing
7 officer, there was an argument you could do either, and we
8 think you should have done six, and now it seems your
9 argument is you need to combine them, so you satisfy both.

10 MR. BELLANTONI: It wasn't you should do either.
11 If you were going to do the second one, then the maximum
12 number of students should have been six. They didn't
13 recommend a 6:1:2 placement - - - 12:1:4. So under both
14 statutes you would satisfy both if that ratio was 6:1:2.

15 We were more concerned about is the class size
16 being twelve than the ratio being 6:1:2.

17 JUDGE GARCIA: Right. And I think your argument
18 there was we get six not twelve, which just is an argument
19 that you should have put the student in (iii), not (ii)(a).
20 Or - - -

21 JUDGE CANNATARO: Other way around.

22 JUDGE GARCIA: Or other way around.

23 MR. BELLANTONI: (ii)(a) not - - -

24 JUDGE GARCIA: (ii)(a) not (iii), which is a
25 different argument. This argument you're making now is you

1 don't have to choose; you can satisfy both.

2 It seems to me I really can't be sure that your
3 argument below was you made the wrong choice. You should
4 do (ii) (a), and you chose (iii)?

5 MR. BELLANTONI: Not necessarily because we're
6 coming here on a certified question. We're not appealing
7 what the SRO did here. What - - - whatever our position
8 was, and we're going back to Judge Calabresi, you could
9 answer this question in our favor, and the judge can say
10 exactly what you just said, and we can still lose.

11 The certified question here is when one applies
12 and another applies, should both be satisfied, or does the
13 DOE get to pick one that might violate the other?

14 What - - - whether we advocated that position
15 below, and I - - - I would say, and I have the statute. I
16 couldn't pull it up, but Navarro Carrillo was a case
17 decided '21, '22? The statute goes back to the early
18 2000s. I don't know why this never came up before, but in
19 any SRO opinion where students had highly intensive
20 management needs or multiple disabilities, most of the - -
21 - or a lot of the cases, the parent was challenging the
22 6:1:1 that the DOE recommended.

23 So there's a portion of this historically that's
24 not before you and it's kind of missing. But again, to go
25 back to the certified question, I don't think our position

1 below was inconsistent, but assuming it was for your - - -
2 for your question or statement, either one, the judge - - -
3 the Second Circuit is asking, how do we clarify this?
4 Because this happens over and over and over again.

5 JUDGE GARCIA: But maybe it goes instead to the
6 deference question which is if the state hearing officer -
7 - - for whatever value, the deference has to the state
8 hearing officer - - - whatever that opinion may have never
9 considered this, then we don't even have a state hearing
10 officer view of how to interpret your issue.

11 MR. BELLANTONI: Except I think the Second
12 Circuit's decision, the judge - - - Judge Nathan and Judge
13 Calabresi looked at this more as a question of law issue -
14 - - which is why we're here - - - than a deference issue.
15 So that doesn't necessarily help us and would continue to
16 result in inconsistent rulings where a district court judge
17 gives deference, another does not. The CSE - - -

18 JUDGE RIVERA: Did the State ever take a position
19 at the Second Circuit in this case?

20 MR. BELLANTONI: I am not aware of any State
21 position.

22 JUDGE RIVERA: Again, where's the deference if
23 you don't know what their position is?

24 MR. BELLANTONI: Well, it - - - they - - -

25 JUDGE RIVERA: Which is why I was asking those

1 questions.

2 MR. BELLANTONI: It would have to be some way to
3 involve them, and they haven't been involved yet.

4 And I would just say, if I may, before I'm done.
5 The CSE here exercised all of its expertise that it could
6 exercise. Nobody challenged that beforehand. And they
7 classified the student as having highly intensive
8 management needs with their special expertise. They
9 classified the student as needing or found it needed 12:1:4
10 class size. Nobody interfered with that.

11 The choosing of the class size is either a matter
12 of making all of the various classes fit, or allowing the
13 DOE to pick three or four, or one or two of the choices
14 without any understanding how that's going to happen
15 beforehand.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. BELLANTONI: Thank you.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Cruz v. Banks, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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