New York State Bar Association

Special Education Law Update 2015

Special Education Caselaw Update

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Caselaw – 2014 to present

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Identification

- ***M.M. v. New York City Dep't of Educ.,*** 26 F. Supp. 3d 249, 256 [S.D.N.Y. 2014]. The Court held that a student's continued receipt of good grades may constitute evidence indicating that the student's performance in school was not adversely affected by emotional problems, but it is not necessarily conclusive.

Parental Participation

- ***Doe v. E. Lyme Bd. of Educ.,*** 790 F.3d 440, 449 [2d Cir. 2015]. Where a parent challenged the district's action of finalizing an IEP outside of her presence, the Second Circuit held that a CSE can "issue an IEP" after the CSE meeting without the parent being physically present if the parent was able to participate in the IEP development process, reasoning that the "right of participation encompasses the right to offer input and to have that input considered; it does not entail a right to be physically present throughout the agency's own decisional process."
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- ***R.B. v. New York City Dep't of Educ.,*** 603 F. App'x 36, 2015 WL 1244298, at *2 [2d Cir. Mar. 19, 2015]. The Court rejected the parents' claim that they were denied meaningful participation in the selection of the school that their son would attend because "parents are guaranteed only the opportunity to participate in the decision about a child's 'educational placement,' . . . which 'refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school."
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- ***G.W. v. New York City Dep't of Educ.***, 554 F. App'x 56 [2d Cir. 2014]. The Second Circuit upheld the District Court's decision (2013 WL 1286154 [S.D.N.Y. 2013]) finding that the IEPs for a first grader with a speech or language impairment were substantively appropriate and rejecting the parents' claims that, among other things, the CSEs failed to defer to private experts, improperly used a draft IEP, and that e-mails purged by the district constituted spoliation of evidence.
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- ***R.B. v. New York City Dep't of Educ.***, 15 F. Supp. 3d 421, 430 [S.D.N.Y. 2014]. The inclusion of a special education teacher from the district who would not have been a teacher of the student may have constituted a procedural violation, but the District Court held it was not a denial of a FAPE where the CSE considered both documentary and meeting input from the student's teachers from a private special education school.

Evaluation Procedures

- ***R.B. v. New York City Dep't of Educ.***, 15 F. Supp. 3d 421, 431 [S.D.N.Y. 2014]. The Court reasoned that the failure to conduct a vocational assessment did not render the IEP procedurally inadequate when otherwise adequate measures existed to examine the student's needs.
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- ***Scott v. New York City Dep't of Educ.***, 6 F. Supp. 3d 424, 439-40 [S.D.N.Y. 2014]. The Court rejected the parents' claims regarding the adequacy of the student's evaluation and the CSE's failure to consider evaluations that occurred after the resolution period.
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- ***Letter to Baus,* 65 IDELR 81 [OSEP 2015].** The USDOE's Office of Special Education Programs (OSEP) opined that a parent has the right to request an independent educational evaluation (IEE) at public expense when the parent disagreed with an evaluation because it was not sufficiently comprehensive or where the district failed to assess a specific area of the student's needs.
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- ***Letter to Savit*, 64 IDELR 250 [OSEP 2014].** The IDEA and its implementing regulations do not provide a general entitlement for third parties, including attorneys and educational advocates, to observe students in current classrooms or proposed educational placements. With respect to IEE's, the IDEA allows districts to set criteria for evaluations, such as the timing of the evaluation and rules governing classroom observations. However, districts may not apply stricter criteria to third parties conducting publicly funded IEEs, such as by granting them less time than they grant their own evaluators to observe students with disabilities in class or in a proposed educational placement.

Snapshot and Retrospective Evidence

- ***E.M. v. New York City Dep't of Educ.***, 758 F.3d 442, 462-63 [2d Cir. 2014]. In upholding the district's provision of a FAPE, the SRO and the District Court relied upon evidence extrinsic to the IEP, namely "[t]estimony from a teacher at [the student's] proposed public school classroom that the child would be provided with sufficient supervision in the classroom setting—supervision that would approximate 1:1 when needed." However, the Circuit Court vacated the District Court's decision and remanded the matter to the administrative officer for a new determination because testimony used in determining that the district's placement was appropriate for the student was impermissibly restrospective.
  - The Circuit Court points to its opinion in R.E. v. New York City Dep't of Educ., 694 F.3d 167 [2d Cir. 2012], which held that the "'IEP must be evaluated prospectively as of the time of its drafting and . . . that retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered.'"
- ***Reyes v. New York City Dep't of Educ.***, 760 F.3d 211, 220 [2d Cir. 2014]. A district's recommendation for a "transitional" paraprofessional in an IEP—combined with testimony that the IEP could later be modified to extend the paraprofessional's services if needed—was found by the Circuit Court to be impermissible reliance on retrospective testimony that was improper under R.E., thus overturning the SRO's decision finding that the plan was viable. The Court indicated that an "IEP that contemplates or implies the possibility of amendments is therefore not substantively different from an IEP that is silent on the issue. If the school district were permitted to rely on the possibility of subsequent modifications to defend the IEP as originally drafted, then it could defeat any challenge to any IEP by hypothesizing about what amendments could have taken place over the course of a year."

Other FAPE Considerations

- ***B.K. v. New York City Dep't of Educ.***, 12 F. Supp. 3d 343, 367 [E.D.N.Y. 2014]. The Court held that "minor technical deficiencies" do not amount to the denial of a FAPE when considered cumulatively.
- ***Scott v. New York City Dep't of Educ.***, 6 F. Supp. 3d 424, 439-40 [S.D.N.Y. 2014]. The court rejected the parents' argument that the student's IEP was inadequate due to the failure to adhere to State regulatory requirements for speech-language services since they were otherwise appropriate and aligned with the recommendations in the hearing record. The Court also found that the procedural violations did not cumulatively result in a substantive denial of FAPE, but held that the placement was not substantively appropriate for the student.
- ***R.B. v. New York City Dep't of Educ.***, 15 F. Supp. 3d 421, 434-36 [S.D.N.Y. 2014]. Finding in favor of the district on the issue of 1:1 support, the District Court held that while the parents may have preferred that the student receive 1:1 support from a teaching assistant, rather than a paraprofessional, the CSE was not required to yield to their preferences, and the IEP was not rendered substantively inadequate by their disagreement. Furthermore the Court held that the use of the modifier "crisis" paraprofessional on the district's final notice of recommendation ("FNR") instead of a "transitional" paraprofessional called for by the IEP did not result in a denial of a FAPE.
- ***C.L. v. New York City Dep't of Educ.***, 552 F. App'x 81, 82 [2d Cir. 2014]. The Second Circuit held that the district failed to provide the student with a FAPE because it did not sustain its burden of demonstrating that the student could learn new material in the proposed program and upheld the district court's decision that the SRO decision was not entitled to deference because the SRO did not grapple with witness testimony from the parents' unilateral placement.
- ***L.M. v. E. Meadow Sch. Dist.***, 11 F. Supp. 3d 306, 315-16 [E.D.N.Y. 2014]. The Court held that the IEP for a five-year old with autism was substantively appropriate, resulting in progress, when the parents pulled him out at noon each day and where their challenge was to the reasonableness of the district's proposed feeding program.
- ***M.S. v. New York City Dep't of Educ.***, 2 F. Supp. 3d 311 [E.D.N.Y. 2013]. The Court rejected procedural, substantive, and implementation challenges to a proposed IEP for a student with autism and found no fatal reliance on retrospective testimony.

Behaviors

- ***E.H. v. New York City Dep't of Educ.***, 611 F. App'x 728, 2015 WL 2146092, at *2 [2d Cir. May 8, 2015]. Where the district considered the student's psychological reports and his progress at a private school, spoke to the student's private school teacher, and asked the student for input, the Court affirmed the District Court's holding that the CSE's failure to conduct a "formal assessment"—such as a functional behavioral assessment (FBA)—did not deny the student a FAPE because the CSE was able to adequately identify the student's behavioral impediments and create strategies to address the student's behavior.
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- ***T.M. v. Cornwall Cent. Sch. Dist.***, 752 F.3d 145, 169 [2d Cir. 2014]. The Court affirmed the District Court's ruling that when the district failed to conduct an FBA or develop a BIP it did not deny the student a FAPE when the IEP otherwise adequately identified the student's behaviors and met the student's behavioral needs.
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- ***M.W. v. New York City Dep't of Educ.***, 725 F.3d 131, 140-41 [2d Cir. 2013]. The Court held that the failure to conduct an FBA does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identified a student's behavioral impediments and implements strategies to address that behavior. The Court also noted that where an IEP actually includes a BIP, parents should at least suggest how the lack of an FBA contributed to a BIP's inadequacy or prevented meaningful decision-making, rather than simply claim that a BIP is defective as a matter of law due to a failure to conduct an FBA.
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- ***C.F. v. New York City Dep't of Educ.***, 746 F.3d 68, 80 [2d Cir. 2014]. The parents of a student with autism presenting with significant interfering behaviors, including maladaptive and self-stimulatory behaviors, brought suit. The Circuit Court explained that an FBA was not required by the IDEA and that the failure to produce an appropriate BIP was a procedural violation and the lack of an FBA was relevant to the extent that it led to an admittedly vague BIP; however, while the Court did not rule upon each failure in isolation, it explained that such failures can be considered cumulatively with other failures. When the Circuit Court considered such failures cumulatively in this case together with the district's failure to consider a 1:1 classroom ratio for the student, the Court concluded that the district denied the student a FAPE.
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- ***F.L. v. New York City Dep't of Educ.***, 553 F. App'x 2, 2014 WL 53264, at *6-*8 [2d Cir. Jan. 8, 2014]. The Court held that because the CSE developed a BIP that was reasonably calculated to address the student's behaviors through IEP provisions and a 1:1 behavioral management professional, the CSE's failure to conduct its own FBA did not deny the student a FAPE.

Present Levels of Performance

- ***L.O. v. New York City Dep't of Educ.***, 2015 WL 1344759, at *11 [S.D.N.Y. Mar. 24, 2015]. The Court held that an IEP need not recite the student's specific standardized test scores so long as it conveys the substantive results of the tests.
- Appeal docketed No. 15-1019 (2d Cir. Apr. 6, 2015)

Annual Goals

- ***D.N. v. Bd. of Educ.***, 2015 WL 5822226, at *13-*14 [E.D.N.Y. Sept. 28, 2015]. The Court held that the district's recommendation of a 1:1+1 special class placement was not reasonably calculated to enable the student to receive educational benefits, because the IEP—which included an annual goal that required peer interaction—would have been impossible to achieve because the student would not be provided with any opportunities to interact with any peers.
- Appeal docketed No. 15-3253 (2d Cir. Oct. 15, 2015)

- ***J.C.S. v. Blind Brook-Rye Union Free Sch. Dist.***, 2013 WL 3975942, at *11-*12 [E.D.N.Y. Aug. 5, 2013]. The parents of a student with an ADHD sued the district for tuition reimbursement. As to one aspect of their case, the Court held that use of similar annual goals drawn from a previous IEP in formulating a revised IEP was not a procedural violation that denied the student a FAPE, especially where the student's needs had not changed significantly since the prior IEP.

- ***B.P. v. New York City Dep't of Educ.***, 2014 WL 6808130, at *11 [S.D.N.Y. Dec. 3, 2014]. When considering an IEP that included 16 annual goals and corresponding short-term objectives, the District Court held that the sufficiently measurable short-term objectives overcame the alleged deficiency in the measurability of the annual goals. The Court also resolved a factual dispute regarding whether the annual goals adequately addressed the student's spatial and visual needs.
- Appeal Docketed, No. 15-16 (2d Cir. Jan. 5, 2015).

- ***T.F. v. New York City Dep't of Educ.***, 2015 WL 5610769, at *6 [S.D.N.Y. Sept. 23, 2015]. In this tuition reimbursement case involving a student with Down Syndrome, the District Court held that the annual goals in the district's proposed IEP were appropriate where the CSE drew the annual goals from, and aligned the annual goals with. the student's most recent progress reports from the private school that she had been attending.
- Appeal Docketed, No. 15-3383 (2d Cir. Oct. 23, 2015).

- ***R.B. v. New York City Dep't of Educ.***, 15 F. Supp. 3d 421, 433-34 [S.D.N.Y. 2014]. The other annual goals and short-term objectives set forth in the IEP were sufficiently detailed, measurable, and suited to the student's individual needs

Restraints

- ***D.F. v. Collingswood Borough Bd. of Educ.***, 596 F. App'x 49, 2015 WL 137630, at *5-*6 [3rd Cir. Jan. 12, 2015]. The Court affirmed the District Court's holding that the parents' petition, "claiming improper restraint," was substantively insufficient.

  - There are currently no explicit federal regulations or binding guidance on the use of restraints and seclusions in schools. However, in examining the issue in April 2015, the Health, Education, Labor and Pensions Committee of the U.S. Senate approved language to curtail the use of restraint, seclusion, and other techniques as part of a proposal to reauthorize the Elementary and Secondary Education Act of 1965 (referred to as the Every Child Achieves Act of 2015). The plan indicates that states must explain "[H]ow the state educational agency will protect each student from physical or mental abuse, aversive behavioral interventions that compromise student health and safety, or any physical restraint or seclusion imposed solely for purposes of discipline or convenience, which may include how such agency will identify and support, including through professional development, training, and technical assistance, local educational agencies and schools that have high levels of seclusion and restraint or disproportionality in rates of seclusion and restraint." (http://www.help.senate.gov/imo/media/S_EveryChildAchievesActof2015.pdf).

Bullying

- ***N.M. v. Cent. Bucks Sch. Dist.***, 992 F. Supp. 2d 452, 470-472 [E.D. Pa. 2014]. This student had received diagnoses of post-traumatic stress disorder (PTSD) and generalized anxiety disorder. The Court held that the district did not deny the student a FAPE where the district was proactive in addressing bullying. The district took steps in eliminating a culture of harassment. The District Court looked to OSEP's ***Dear Colleague Letter***, 55 IDELR 174 [OSEP 2010], as examples of appropriate action that districts can take and found that although the district could have taken additional measures, it was not indifferent to harassment and appeared to be willing to take further action. The Court reasoned that the IEP in question provided support for the student's social and emotional needs.

- ***Dear Colleague Letter***, 61 IDELR 263 [OSEP Aug. 20, 2013]. Noting that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive FAPE pursuant to their IEPs.

- ***Spring v. Allegany-Limestone Cent. Sch. Dist.***, 2015 WL 5793600 [W.D.N.Y. Sept. 30, 2015]. This case involved the suicide of a student with a disability with diagnoses including Tourette's Syndrome, an ADHD, and Callosum Dysgensis. The parents filed suit, alleging that the student was "'subjected to numerous acts of fear and intimidation including, but not limited to, teasing, taunting, bullying, name calling, violence, offensive touching, hitting, interference with relationships, and public and private humiliation—conduct motivated in whole or part by his disabilities.'" However, the District Court dismissed the parents' Section 1983, Title II, and Section 504 claims, which alleged that the district was responsible for the student's suicide because the district "implicitly and explicitly" condoned acts of bullying by his peers. With respect to the parents' Section 1983 claim, the Court held that absent an underlying constitutional violation by an "individual," such as a specific staff member, the Section 1983 claim could lie against the school district or board. The Court also dismissed the parents' Section 504 and Title II disability discrimination claims, finding that they failed to sufficiently plead that the student "suffered from a qualifying disability" under those statutes. The parents also claimed that the student's substantive due process rights under the 14th Amendment were violated, however, the Court held that unless one of two exceptions applied, a district will not be held liable for failing to protect against private harm. The Court declined to exercise supplemental jurisdiction over the parents' remaining state-law claims.

- ***T.K. v. New York City Dep't of Educ.***, 32 F. Supp. 3d 405, 422-427 [E.D.N.Y. 2014]. The Court held that the district did not provide the student a FAPE because it failed to address bullying of the student in her IEP or BIP. The Court further held that even if the annual goals, strategies, and services outlined in the student's IEP might have "incidentally" helped decrease the student's vulnerability to bullying, they were not presented in language the student's parents could understand as reasonably calculated to address bullying and to provide a FAPE.
- Appeal docketed, No. 14-3078 (2d Cir. Aug. 21, 2015).

Educational Methodology

- ***R.B. v. New York City Dep't of Educ.***, 589 F. App'x 572, 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]. In upholding the District Court's conclusion that the district offered the student a FAPE, the Circuit Court held that the omission of a particular methodology, such as DIR/Floortime, in the student's IEP was not a procedural violation, so long as the methodologies referenced in the IEP were "appropriate to the student's needs," citing federal regulation. The Court noted that there was some evidence that student made progress with a different methodology.
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- ***E.H. v. New York City Dep't of Educ.***, 611 F. App'x 728 [2d Cir. May 8, 2015]. Finding that the SRO erred in concluding that the issue of methodology was not properly raised in the parents' due process complaint notice, the Circuit Court vacated the District Court's decision upholding the SRO decision and remanded the matter for a determination of whether the CSE denied the student a FAPE by adopting the annual goals developed by staff at the student's private school without also evaluating whether it was necessary to adopt the "DIR/Floortime" methodology employed by the private school.
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- ***A.S. v. New York City Dep't of Educ.***, 573 Fed. App'x 63, 66 [2d Cir. 2014]. The Circuit Court upheld a decision by the District Court and found that it could not be said that the student could only make progress in a program that used applied behavioral analysis (ABA), where the parents' argument that a methodology similar to TEACCH (Treatment and Education of Autistic and Communication-related handicapped Children) employed by the district was inappropriate. The parents' conclusion, according to the Circuit Court, was not as certain as the parents urged.

School Visits and Site Selection

- ***C.U. v. New York City Dep't of Educ.***, 23 F. Supp. 3d 210 [S.D.N.Y. 2014]. The District Court held that the district's failure to provide the parents of a 15-year-old student with autism with a meaningful opportunity for participation by not providing the parents with a copy of the IEP in timely manner (before the beginning of the school year) or relevant information about the "school placement" denied the student FAPE. The Court concluded that although the IEP was adequate, the parents had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP. The District Court found that the parents prevailed in their tuition reimbursement claim due, in part, to delays and lack of response by the district that violated the parents' right to evaluate the "school placement" so that they could make an informed decision about the student's school. The Court found that this significantly impeded the parents' opportunity to participate in the decision-making process concerning the provision of the FAPE.

- ***V.S. v. New York City Dep't of Educ.***, 25 F. Supp. 3d 295, 301 [E.D.N.Y. 2014]. Relying on C.U., the District Court held that the SRO and the IHO erred by failing to consider the parent's right to meaningfully participate in the school selection process, as opposed to the parent's right to determine the actual school selection. The parent objected to one school location and she received no response from the district after sending a letter listing her objections. Thereafter the parent was not given notice of a second school location, which is the site that the district defended at the impartial hearing. The Court held that district's "bait and switch" regarding the proposed school site for IEP implementation for a student with autism was a denial of a FAPE in terms of parental opportunity for meaningful participation.

- ***S.M. v. Taconic Hills Cent. Sch. Dist.***, 553 F. App'x 65 [S.D.N.Y. 2014]. While the district committed a procedural error in admitting the student to a program that had no openings and could not implement the student's IEP, the Second Circuit rejected the parents' claim that the district denied the student a FAPE because the student's placement was the subject of ongoing hearings the district was prepared to implement the services laid out in a prior IEP as the student's "pendency" placement.

- ***R.B. v. New York City Dep't of Educ.***, 15 F. Supp. 3d 421, 434-36 [S.D.N.Y. 2014]. The Court held that the parents' lack of certainty of the physical location of the student's class, the district's failure to prospectively identify the student's teacher and his classmates' ages and abilities, without more, was not a denial of a FAPE. The parents' argument that the district denied the student a FAPE because it would have been unable to implement the IEP due to a lack of an occupational therapy gym or hanging equipment was also rejected.

- ***M.O. v. New York City Dep't of Educ.***, 793 F.3d 236, 244 [2d Cir. 2015]. Further clarifies the following 2012 statement in R.E. by the Second Circuit—"If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it." The Second Circuit noted further in M.O. that "[b]ecause R.E. does not foreclose *all* prospective challenges to a child's proposed placement school, we find it necessary to clarify the proper reach of our holding in R.E." The Court explained that "[w]hile it is speculative to conclude that a school with the capacity to implement a given student's IEP will simply fail to adhere to that plan's mandates, . . . , it is not speculative to find that an IEP cannot be implemented at a proposed school that lacks the services required by the IEP." Parents are not required to send their child to a facially deficient placement school prior to challenging that school's capacity to implement their child's IEP, but substantive attacks on IEP that were couched as challenges to the adequacy of proposed school placement are not permissible. The Circuit Court ultimately rejected the parents' challenges to the proposed placement school as impermissible under the facts of this particular case.

Tuition Reimbursement and Unilateral Placements

- ***Ward v. Bd. of Educ.***, 568 F. App'x 18, 2014 WL 2219164, at *3 [2d Cir. May 30, 2014]. A student was unilaterally placed in a residential setting by the parent, but did not receive specialized instruction in mathematics that was designed to address the student's needs and the student was instead placed in a less challenging consumer mathematics course and performed worse in mathematics than in a prior year. The Circuit Court also noted that the private school failed to set goals to address the student's behavior deficits and noted how the student's lack of emotional regulation negatively affected the student at the unilateral placement. The Court upheld the District Court's holding that the district was not responsible for the costs of the student's residential program because the parents failed to demonstrate that the unilateral placement offered instruction specifically designed to meet the student's unique needs.

- ***Hardison v. Bd. of Educ.***, 773 F.3d 372, 387-388 [2d Cir. 2014]. The Court reversed the District Court's tuition reimbursement order and directed it to reinstate the SRO's decision, which found that the parents' unilateral placement of the student was not appropriate because the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress." The Court emphasized that little evidence of the student's progress was in the form of "objective evidence" preferred by the Second Circuit. With regard to one witness from the unilateral placement called by the parents, the Court noted the lack of evidence of qualifications and his unfamiliarity with the student's academics as reasons why the Court found the testimony unpersuasive.

- ***C.L. v. Scarsdale Union Free Sch. Dist.***, 744 F.3d 826, 837, 840 [2d Cir. 2014]. A student was given a Section 504 accommodation plan for several years, but the CSE declined to find the student eligible for special education and related services under the IDEA and the district continued to offer a Section 504 plan. An IHO and an SRO found a denial of a FAPE, but disagreed as to whether the unilateral placement was appropriate. The Court also held that "while the restrictiveness of a private placement is a factor [in assessing the appropriateness of a unilateral placement], by no means is it dispositive" and that "[r]estrictiveness may be relevant in choosing between two or more otherwise appropriate private placement alternatives, or in considering whether a private placement would be more restrictive than necessary to meet the child's needs, but where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option."

Compensatory Education

- ***G.L. v. Ligonier Valley Sch. Dist. Auth.***, 2015 WL 5559976 [3rd Cir. Sept. 22, 2015]. The Third Circuit clarified that the two-year statute of limitations in the IDEA operates as a "discovery rule" limitations period (i.e., knew or should have known) versus an occurrence rule (i.e., date the injury occurred). However, as for the remedy in a case of first impression, the Court rejected arguments that the IDEA limitations period caps the period for which parents may seek relief for IDEA violations and held that the IDEA's statute of limitations only applies to the filing of due process complaint notices. Thus, once past the hurdle of the statute of limitations, the Third Circuit appears to have decoupled the limitations period and the remedy, noting that the IDEA affords a "broad remedial scheme," and that numerous federal Courts have awarded compensatory education as relief for denials of a FAPE longer than two years.

- ***Doe v. E. Lyme Bd. of Educ.***, 790 F.3d 440, 453, 456-57 [2d Cir. 2015]. This case involves a district's failure to provide pendency or "stay-put" services. The Court reversed the District Court's ruling, which awarded reimbursement only for stay-put services that the parent paid for upfront. The Court held that the District Court "abused its discretion by limiting the award of relief to [the parent's] out-of-pocket expenses instead of awarding the full value of services that the [district] should have provided." The Court concluded that "when an educational agency has violated the stay-put provision, compensatory education may—and generally should—be awarded to make up for any appreciable difference between the full value of stay-put services owed and the (reimbursable) services the parent actually obtained."

Due Process Hearings

- ***Stropkay v. Garden City Union Free Sch. Dist.***, 593 F. App'x 37 [2d Cir. Dec. 3, 2014]. The Court held that the district's failure to provide related services to the student as required by the IEP allowed the parent to pursue a Section 504 and a Title II action against the district without first seeking administrative relief with the IDEA under the futility exception. However, with respect to the parent's retaliation claims, which rested on a set of alleged retaliatory acts, including that the defendants prevented the use of an upgraded power chair, the Court held that these claims constitute grievances related to the education of disabled students and were therefore subject to the IDEA's exhaustion requirements. The Court notes that "just as a hearing-impaired student's request for a service dog falls within the ambit of the IDEA's framework . . . so too do the wheelchair, toileting, and other issues raised here."

- ***Frank v. Sachem Sch. Dist.***, 84 F. Supp. 3d 172 [E.D.N.Y. Feb. 5, 2015]. Distinguishes Stropkay and concluded that the parent's ADA claim that relates to a student's placement falls squarely within the ambit of due process hearing afforded by the IDEA and thus must satisfy the IDEA exhaustion requirements of the IDEA.

- ***B.S. v. Anoka Hennepin Pub. Sch.***, 799 F.3d 1217, 1220-1221 [8th Cir. 2015]. The Court affirmed the District Court's dismissal of the parents' case and held that an ALJ's imposition of a nine-hour time limit on the presentation of the parents' case in a due process hearing was not an abuse of discretion and thus did not violate the parents' due process rights. The Court noted that the ALJ's time limit was based on his belief that nine hours was reasonable, and not based on the Minnesota ED's "best practices" for IDEA hearings. The ALJ referenced the "best practices" document which discusses a three-day limit, but indicated on the record that it was "not a dictate." Appeal docketed, No. 15-724 (2d Cir. Mar. 9 , 2015).

Least Restrictive Environment

- ***R.B. v. New York Dep't of Educ.***, 603 F. App'x 36, 2015 WL 1244298 [2d Cir. Mar. 19, 2015]. In their initial filing, the parents contended that the 6:1+1 special class placement recommendation was not appropriate for the student because the student required a "smaller, more supportive program." In response to this concern, the IEP was amended to provide for a full-time transitional paraprofessional to help the student transition from private school to public school by maintaining a 2:1 student-to-adult classroom ratio that the student was receiving in his private school. On appeal, the parents argued that this placement was "too supportive." The Court held that the requirement that students be educated in the "least restrictive environment" applies to the type of classroom setting, not the level of additional support a student receives within a placement, with the goal of integrating students with disabilities into the same classrooms as students without disabilities.
- ***T.M. v. Cornwall Cent. Sch. Dist.***, 752 F.3d 145, 161-67 [2d Cir. 2014]. The Court rejected the District Court's argument that the LRE provision only applies to extended school year (ESY) placements (i.e., placements during July and August) if the district has a range of programs available. The Court held that the IDEA's LRE requirement applies to ESY placements just as it does to school-year placements, and thus if a student needed a twelve-month educational program, including an ESY placement, the district was required to consider a continuum of alternative ESY placements and to offer the student the least restrictive placement from that continuum appropriate for his needs.
- ***M.W. v. New York City Dep't of Educ.***, 725 F.3d 131, 143-46 [2d Cir. 2013]. The Court affirmed the District Court's ruling denying the parents' request for tuition reimbursement and held that the student's placement in an integrated co-teaching class (ICT) was appropriate. In this particular case, the Court characterized an ICT as a "service" in a general education environment rather than a special education classroom and thus the same LRE considerations did not apply. The Court also rejected the notion that LRE is related to the number of students with disabilities in the classroom.

- ***D.N. v. Bd. of Educ.***, 2015 WL 5822226, at *12 [E.D.N.Y. Sept. 28, 2015]. The CSE recommended a 1:1+1 special class placement and 1:1 related services for a student with autism. The IEP set forth needs and annual goals for the student to interact with peers, but did not then otherwise identify how or where the student would interact with peers. The Court determined that this violated the requirement that the student be educated in the LRE and denied the student a FAPE in the LRE because the student would have no contact with any other students—disabled or non-disabled. Testimony that "'[t]he student would initially be taught in a 1:1 setting, with other students eventually being integrated into his classroom, with the eventual goal that he may be integrated into the district's 8:1:1 classroom if appropriate'" was impermissibly retrospective because this plan was absent from the IEP. The Court granted tuition reimbursement at a unilateral placement in which the student was educated in a private placement with three special education students in a special class, each having a 1:1 instructor.

- ***B.K. v. New York City Dep't of Educ.***, 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]. In the case of an eight-year-old child with autism who was attending a private unilateral placement, the Court held that once the CSE reached the conclusion that a 6:1+1 special class was appropriate to address the student's needs, it was under no obligation to consider "more restrictive programs." The Court indicated that the fact that the CSE's ultimate recommendation deviated from the parents' express request that the student be permitted to remain at the unilateral placement did not render the parents "passive observers" or evidence any predetermination on the part of the CSE.

Attorney's Fees

- ***K.L. v. Warwick Valley Cent. Sch. Dist.***, 584 F. App'x 17 [2d Cir. 2014]. The Second Circuit upheld the determination that the parents were the prevailing party despite obtaining limited relief and also reduced the hourly rate per hour, the number of hours, and the hours for drafting the petition for fees.

- ***C.G. v. Ithaca City Sch. Dist.***, 531 F. App'x 86 [2d Cir. 2013]. The Circuit Court held that a reduced attorneys' fees award of $17k to parent was appropriate, to the extent that the relief was more favorable than the district's timely settlement offer, although the IHO sua sponte awarded the relief that tipped the balance.

Exhaustion

- ***A.W. v. Bd. of Educ.***, 2015 WL 1579186, at *4 [N.D.N.Y. Apr. 9, 2015]. The Court granted the parents' motion to supplement the administrative record with additional evidence, namely, a post-hearing IEE with the expectation that they could establish the appropriateness of the unilateral placement. The IHO and SRO found that because the district did not provide the parents with an IEE, there was no reason to for the parents to obtain an evaluation. However, the Court held that the district should not benefit from the exclusion of a report that both the IHO and the SRO found it had improperly prevented the parents from obtaining and thus, the improper exclusion of evidence by the administrative agency, particularly caused by the action of one of the parties, might provide reasons to supplement the record with the post-hearing IEE such as in this case.

Standing

- ***E.M. v. New York City Dep't of Educ.***, 758 F.3d 442 [2d Cir. 2014]. In a unilateral placement case, the Court held that although they did not front the costs of the student's private school tuition, the parents had standing to pursue a claim for direct payment of tuition costs through the IDEA's due process procedures based on their contractual obligation to pay tuition at the private school. The Court determined that as a result of the district's failure to provide the student with a FAPE, the parent incurred a financial obligation to the private school under the terms of the enrollment contract, which constituted an "injury in fact" for Article III purposes, one that is "redressable" by direct payment.

Pendency

- ***A.W. v. Bd. of Educ.***, 2015 WL 3397936, [N.D.N.Y. May 26, 2015]. In a case of first impression, the District Court was called to rule upon the student's stay-put placement. The final administrative decision at the State level concluded that the district had failed to offer the student a FAPE for three school years but that the unilateral placement selected by the parents was appropriate for only the first of the three school years in question. The District Court rejected the parents argument that the private school should be the student's stay-put placement subsequent to the administrative decision, explaining that "the predominance of the entire determination consequently affects the most current school year and what is considered to be the last agreed upon placement, which is none."
- ***D.M. v. New Jersey Dep't of Educ.***, 801 F.3d 205 [3d Cir. 2015]. The student was attending the Learning Center for Exceptional Children (LCEC), a private school for students with disabilities. The student's proposed IEP indicated that the student would attend LCEC and integrated classes with students from Today's Learning Center (TLC), which is a private school for nondisabled students that shared classroom space with LCEC. The New Jersey DOE determined that it did not approve either LCEC or TLC to teach integrated classes and directed LCEC to confirm that it would not educate the public school special education students alongside the private school general education students, to which the LCEC agreed under protest. The parents sued the DOE in District Court and invoked the IDEA's "stay put" provision, arguing that the Department's directive violated the LRE. District Court granted an injunction, permitting the student to attend the integrated class as planned and the DOE appealed. The Third Circuit indicated that exhaustion was not required where there was no administrative remedy under the state scheme but remanded the case for further development, leaving the District Court's "stay put" injunction in place, which enjoined the district from interfering with the mainstreaming component of a student's IEP. The Third Circuit left open the possibility that the student could be educated at another location capable of implementing the IEP.