SELECTED DEVELOPMENTS IN SPECIAL EDUCATION LAW

NYS IDEA IMPARTIAL HEARING OFFICER TRAINING – WEBINAR 2
THURSDAY, MARCH 9, 2017

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Child Find

R.E. v. Brewster Cent. Sch. Dist., 180 F. Supp. 3d 262, 67 IDELR 214 (S.D.N.Y. Mar. 30, 2016) (in case of child with Tourette's Syndrome and other disabilities, holding that school district did not violate child find by not referring child for special education before December 2011, when child received accommodations under Section 504 plan and performed at average levels)

Dear Colleague, 116 LRP 34386 (OSERS Aug. 5, 2016) (stating that virtual schools, including virtual charter schools, must meet child-find and appropriate education requirements, and state and local educational agencies must ensure that child-find and appropriate education requirements are met despite limits on face-to-face interaction between students and instructors; noting obligations concerning state and local supervision, personnel standards, collection of data, confidentiality, schoolwide assessment, and disability accommodations)

Evaluation and Eligibility

B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 161, 68 IDELR 151 (2d Cir. Sept. 16, 2016) (rejecting disparate impact ADA and Section 504 claims that relied on statistical showing as to IDEA-identified students; stating, "[A]n IDEA disability is not equivalent to a disability as cognizable under the ADA and Section 504. Plaintiffs, therefore, cannot rely solely on receipt of special education to establish an ADA or Section 504 disability.") (internal quotation marks deleted)

A.W. v. Board of Educ. of the Wallkill Cent. Sch. Dist., No. 1:14–CV–1583, 2016 WL 4742297, 68 IDELR 164 (N.D.N.Y. Sept. 12, 2016) (in case of child diagnosed with dyslexia and ADHD, ruling that school district denied appropriate education to child by deeming child ineligible for special education when child tested in average range on various standardized tests but district possessed significant information about child's functional impairments including child's behavioral difficulties, and difficulties in preparation, focus, and attention and his dyslexia and ADHD diagnoses, yet did not offer IEP for 2011-12 school year), *appeal withdrawn*, No. 16-3464 (2d Cir. Nov. 23, 2016)

Paul T. v. South Huntington Union Free Sch. Dist., 14 N.Y.S.3d 627, 65 IDELR 273 (Sup. Ct. June 16, 2015) (upholding decision of IHO and SRO that student who was

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removed from school following making picture of acts of violence against someone purported to be a student who was harassing the student, was not IDEA-eligible, and denying tuition reimbursement for parochial school; applying de novo review on eligibility issue; noting testimony that student had been bullied, but reasoning that record did not show student was emotionally disturbed or other health impaired and stating that student's mental state did not affect student's educational performance in light of high level of performance; determining that district did not commit child find violation when it did not convene new meeting following receipt of evaluation that was consistent with previous information; stating that being bullied in and of itself does not constitute disability under IDEA)

State Directors of Special Education, 67 IDELR 272 (OSEP Apr. 29, 2016) (opining that response-to-intervention processes must not delay evaluation following referral for special education of preschool children, stating, "An LEA may not decline a child find referral from a preschool program until the program monitors the child's developmental progress using RTI procedures. . . . [I]t would be inconsistent with the evaluation provisions at 34 CFR §§ 300.301 through 300.311 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a preschool program has not implemented an RTI process with a child and reported the results of that process to the LEA.")

Dear Colleague, 66 IDELR 21 (OSEP July 6, 2015) (cautioning that some children with autism-spectrum conditions may not receive necessary speech and language services and that speech-language professionals may not be included in evaluations when needed, stating, "When conducting an evaluation under Part C of the IDEA, the evaluation must identify the child's level of functioning in each of the following developmental areas: cognitive development; physical development, including vision and hearing; communication development; social or emotional development; and adaptive development (34 CFR § 303.321(b)). Similarly, when conducting an initial evaluation under Part B, the public agency must ensure the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities (34 CFR § 300.304(c)(4)). In addition, the IFSP Team must include a person or persons directly involved in conducting the evaluations and assessments (34 CFR § 303.343(a)(1)), while the IEP team must include an individual who can interpret the instructional implications of evaluation results (34 CFR § 300.321(a)(5)). The IDEA's IEP and IFSP processes are designed to ensure that an appropriate program is developed to meet the unique individual needs of a child with a disability, and that services are identified based on the unique needs of the child by a team that include the child's parents.")

Blodgett, 65 IDELR 51 (OSEP Nov. 12, 2014) (opining that children with disabilities must be evaluated in accordance with 34 CFR §§ 300.304 through .311 before determination may be made that the child no longer is IDEA-eligible, stating, "Even though a child may no longer meet the criteria for 'child with a disability' under the

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‘hearing impairment’ category based on medically or surgically corrected hearing that is now in the normal range, the child may still meet the criteria for ‘child with a disability’ under one of the other disability categories specified in 34 CFR § 300.8. In OSEP's view, the child's language needs and whether he or she qualifies under the ‘speech or language impairment’ category would be important considerations when evaluating that child's continued eligibility for services, because hearing loss during the crucial early years can have a long-term impact on a child's speech and language acquisition and development.”)

Kotler, 65 IDELR 21 (OSEP Nov. 12, 2014) (“State eligibility guidelines and definitions for visual impairment and blindness may not exclude a child with convergence insufficiency or other visual impairment from meeting the definition in the IDEA for visual impairment and blindness if that condition adversely affects that child’s educational performance.”)

Independent Evaluation (IEE)

Savit, 67 IDELR 216 (OSEP Jan. 19, 2016) (“[U]nder 34 CFR § 300.502(e), if an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent’s right to an IEE.”)

Baus, 65 IDELR 81 (OSEP Feb. 23, 2015) (“When an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.”)

Savit, 64 IDELR 250 (OSEP Feb. 10, 2014) (“OSEP also recognizes that independent educational evaluators may need to have access to classrooms if the parents of a child with a disability invoke their right to an independent educational evaluation (IEE) of their child under 34 CFR § 300.502, and the evaluation requires observing the child in the educational placement. . . . [I]t would be inconsistent with the IDEA for a public agency to have a policy giving third party evaluators only a two hour observation window, because such a limitation may restrict the scope of the IEE and prevent an independent evaluator from fulfilling his or her purpose, unless the LEA also limits its evaluators to a two hour observation period.”)

IEP Process, Implementation, and Related Issues

L.O. v. New York City Dep’t of Educ., 822 F.3d 95, 110, 67 IDELR 225 (2d Cir. May 20, 2016) (in case of student with autism, mood disorder, OCD, and other impairments whose parents contested three IEPs dated December 2009, December 2010, and March

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2011, reversing lower court and administrative decisions in favor of defendant, reasoning that there was no evidence IEP team reviewed evaluative materials in developing IEPs, stating, "[T]he burden rested with the DOE to demonstrate which evaluative materials were reviewed during each CSE meeting in reaching the terms of the IEPs"; further holding that behavior plan should not have been considered adequate when it was not based on FBA and noting that March 2011 IEP did not include BIP at all; holding that frequency of speech-language sessions in December 2009 IEP did not meet state standards, that reliance on assertions about classroom speech-language instruction was erroneous because testimony was retrospective, and that speech-language services in subsequent IEPs were not sufficient to meet child's needs in light of lack of improvement; additionally ruling that goals in December 2009 IEP were adequate to address student's pica, toileting, and communication difficulties, and that inadequacy of December 2010 IEP as to pica and failure of March 2011 IEP to provide goals regarding physical therapy and pica and schedule for progress reporting, and failure of all three IEPs to provide for parent counseling and training did not deprive student of appropriate education, but procedural errors cumulatively denied appropriate education for three school years; remanding for proceedings on relief)

T.Y. v. New York City Dep't of Educ., No. 15–CV–1508, 2016 WL 6988811, --- F. Supp. 3d ----, 68 IDELR 182 (E.D.N.Y. Sept. 30, 2016) (in case of child with autism, adopting report and recommendation of magistrate judge that SRO decision against parents be overturned and tuition reimbursement awarded; determining that SRO was correct that functional behavioral assessment and behavior intervention plan were sound, that SRO's findings on assistive technology were proper, and failure of IEP to include plan for transition to new school was not procedural error, and SRO did not err in finding that failure to provide for parental training and counseling in IEP did not cause denial of appropriate education; but further determining that IHO's findings in favor of reimbursement for tuition and related services were proper, adopting report and recommendation that concluded, among other things, that SRO failed to consider evidence that IEP team refused to take into account relevant evidence about failure of methodologies other than Developmental Individual-difference Relationship-based (DIR) – Floor Time employed by private school student attended, and lack of justification for proposed reduction in speech-language therapy from seven hours to two hours and forty minutes per week; further affirming finding of IHO that private school program was appropriate and equities favored reimbursement)

S.Y. v. N.Y.C. Dept. of Educ., No. 14 Civ. 6277, 2016 WL 5806859, at *9, --- F. Supp. 3d ---, 68 IDELR 230 (S.D. N.Y. Sep. 28, 2016) (in case of teen with autism offered placement in 6:1:1 program at specialized public school, reversing SRO decision that had overturned IHO decision, and awarding tuition reimbursement for continued attendance at private school; stating that courts must defer to reasoned conclusions of SRO but if SRO rejects more thorough and carefully considered IHO decision, court may instead defer to IHO; holding that procedural violations including failure to observe three-year reevaluation timeline, failure to hold timely IEP meeting, failure to evaluate in all areas of suspected disability, any lack of functional behavioral assessment, failure

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to provide copy of psychosocial evaluation to parents before IEP meeting, absence of additional parent member at IEP meeting, and lack of parent counseling and training in IEP did not individually deny appropriate education; holding that failure to provide prior written notice of change of placement to 6:1:1 classroom without 1:1 paraprofessional was procedural violation that prejudiced parents by not giving reasoning for rejection of parents' proposal of 8:1:3 ratio program and change of educational placement, stating, "By leaving the Parents completely in the dark on a matter as fundamental as the reasoning behind R.Y.'s educational placement, the DOE significantly impeded the Parents' opportunity to participate in the decision making and, in turn, denied R.Y. a FAPE."; further holding that defendant failed its obligation to consider parents' proposal of 8:1:3 ratio program, which impeded parents' participation rights and denied student appropriate education; holding that delay in telling parents about school and classroom assignment violated IDEA but did not deny appropriate education; concluding that cumulative effect of procedural violations denied student appropriate education; further questioning substantive adequacy of IEP as to absence of 1:1 paraprofessional and assignment of classroom; finding that private school chosen by parents furnished appropriate education and that equities weighed in favor of parents)

J.E. v. Chappaqua Cent. Sch. Dist., No. 14-cv-3295, 2016 WL 3636677, 68 IDELR 48 (S.D.N.Y. June 28, 2016) (in case of child with autism and ADHD, denying parents' motion for summary judgment in appeal of IHO and SRO decisions holding that school district's 2011-12 and 2013-13 IEPs offered student appropriate education and denying tuition reimbursement; holding that parents were afforded opportunity to participate in creation of 2011-12 IEP, rejecting claim of predetermination and noting that parents agreed with recommendations in IEP; ruling that failure to generate separate written FBA did not constitute procedural violation when BIP included information that FBA typically includes; further ruling that IEP goals were sufficient and did not need to contain baselines; as to 2012-13 IEP, holding that use of 2011 BIP was appropriate, noting that child's behavioral problems were similar to those in past and district acknowledged BIP would need to be updated upon child's return to public school; further as to 2012-13 IEP, finding that parents' concerns over implementation of IEP goals were speculative and that IHO and SRO did not err in rejecting opinions of parents' experts), *appeal filed*, No. 16-2591 (2d Cir. July 26, 2016)

P.F. v. Board of Educ. of the Bedford Cent. Sch. Dist., No. 15-CV-507, 2016 WL 1181712, 67 IDELR 148 (S.D.N.Y. Mar. 25, 2016) (in case of largely nonverbal nine-year-old with dyspraxia and ADHD, reversing SRO decision that had overturned IHO decision in favor of parents, ruling that district denied child appropriate education by predetermining placement, writing IEP that did not contain listing of management needs and proper annual goals, and recommending placement in classroom that could not implement IEP goals; on predetermination, noting that evidence showed child did not make meaningful progress in four years in district's program; stating that IEP goals were not appropriate and were reduced following failure to meet previous goals; also stating that parents could rely on observation of placement for conclusion that it was unable to meet child's needs; affirming IHO reimbursement decision)

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M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 67 IDELR 92 (S.D.N.Y. Feb. 26, 2016) (in case concerning nonverbal seven-year-old with orthopedic impairment, legal blindness, and severe motor skill delays, affirming SRO decision that reversed IHO decision, and granting summary judgment for defendant on claim for tuition reimbursement; rejecting argument that IEP was procedurally deficient, stating that issue was not raised in due process complaint and that IEP team considered sufficient evaluative material and that parents and representatives of private school had meaningful opportunity to participate in IEP meeting; on substance of IEP, deferring to school's judgment that 12:1:4 ratio with 12 students to 1 teacher to 4 paraprofessionals and a 1:1 full-time paraprofessional was adequate and 1:1 teacher ratio not required; further upholding proposed placement in public school, stating that that if child does not enroll in public placement recommended by school system, adequacy of placement is to be determined on face of IEP even though not all prospective challenges to placement school are foreclosed; further stating that test of placement school's ability to implement IEP is limited to facts uncovered prior to parental rejection of placement)

S.B. v. New York City Dep't of Educ., 117 F. Supp. 3d 355, 65 IDELR 264 (S.D.N.Y. June 25, 2015) (in case of child with speech and language disabilities and central auditory processing disorder, overturning SRO decision and ordering tuition reimbursement when parent visited school proposed by school system, and assistant principal told her that program there was oversubscribed and school did not have secure funding for all its special education students, and parent observed that students in program functioned at ninth-grade level as opposed to child's third-grade level, and parent also learned that school's program did not include any multi-sensory instruction, scaffolding, modified instructional materials, pre-teaching, or re-teaching, all of which were provided for in child's IEP; further ruling that 15:1 classroom would not meet child's educational needs, and that private school was appropriate placement)

S.W. v. New York Dep't of Educ., 92 F. Supp. 3d 143, 65 IDELR 70 (S.D.N.Y. Mar. 12, 2015) (in case of 12-year-old with learning disability whose parents contested IEP calling for general education placement with integrated co-teaching services, affirming SRO decision of in favor of defendant, overturning IHO decision; ruling that absence of additional parent in IEP meeting in violation of then-current regulations did not deny appropriate education; holding that adoption of draft IEP without changes did not show predetermination when parent and parent's expert's concerns were considered before IEP meeting, and stating that report from teacher should not be ignored even though teacher was determined to have improperly assisted students on state testing; affirming SRO decision that IEP was substantively adequate, and that evidence of school's inability to implement IEP was insufficient)

B.P. v. New York City Dep't of Educ., No.14 CIV. 1822, 2014 WL 6808130, 64 IDELR 199 (S.D.N.Y. Dec. 3, 2014) (in case of 11-year-old with autism spectrum disorder, affirming SRO decision in support of IEP and placement proposed by defendant; stating that SRO correctly declined to address issues parents did not raise in due process complaint, that IEP was offered to parents before school year began, that parents had

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chance to participate in developing IEP, that failure to provide for parent counseling and training in IEP was procedural violation but did not deny appropriate education, and that present levels of performance listed in IEP were correct; further holding that measurability, detailed nature, and tie to annual goals of IEP's short-term objectives remedied claimed weakness in annual goals' measurability; also reasoning that goals regarding spatial and visual deficits were sufficient and objection to location of services was speculative), *aff'd*, 634 F. App'x 845, 66 IDELR 272 (2d Cir. Dec. 30, 2015) (stating that appropriateness of placement may be considered at hearing even though student never attended placement, but concluding that there was evidence that placement could implement IEP)

Andel, 67 IDELR 156 (OSEP Feb. 17, 2016) (stating that parent need not inform district in advance of IEP meeting that parent plans to be accompanied by individual who has knowledge or expertise about child, including attorney, and that "there is nothing in the IDEA or its implementing regulations that would permit the public agency to conduct the IEP meeting on the condition that the parent's attorney not participate, and to do so would interfere with the parent's right under 34 CFR §§ 300.321(a) and 300.322(a).")

Dear Colleague, 66 IDELR 227 (OSERS Nov.16, 2015) (stating as to 34 CFR § 300.320(a)(1)(i), "The Department interprets 'the same curriculum as for nondisabled children' to be the curriculum that is based on a State's academic content standards for the grade in which a child is enrolled."; as to 34 CFR § 300.39(b)(3), "The Department's interpretation of the regulatory language 'general education curriculum (i.e., the same curriculum as for nondisabled children)' to mean the curriculum that is based on the State's academic content standards for the grade in which a child is enrolled is reasonable."; further stating, "[A]n IEP Team must ensure that annual IEP goals are aligned with the State academic content standards for the grade in which a child is enrolled. The IEP must also include the specially designed instruction necessary to address the unique needs of the child that result from the child's disability and ensure access of the child to the general education curriculum, so that the child can meet the State academic content standards that apply to all children, as well as the support services and the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals.")

Appropriate Education in General

J.D. v. New York City Dep't of Educ., No. 15-4050-CV, 2017 WL 391952, --- F. App'x ---- (2d Cir. Jan. 27, 2017) (in case of student who could not read until, in sixth grade, his parent took him out of public school and placed him in private school that gave him classes with nine students to two teachers plus additional one-on-one instruction, so that at end of school year child was reading at mid-first grade level, and for whom public school system offered new IEP similar to that offered in previous public school placement but with additional 45-minute sessions of special education teacher support services five times per week in setting of eight or fewer students per instructor, reversing

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decision of district court that affirmed IHO and SRO determinations that IEP offered by school system afforded appropriate education; reasoning that record did not support conclusion that addition of support services was enough to render IEP adequate, noting that evaluation from Psychological Center at City College of the City of New York during student's fifth grade year recommended 90-minute sessions four or five times per week with no more than three students per group, and that student did not progress as reader until enrolled in program as intense as that called for in evaluation)

M.B. v. New York City Dep't of Educ., No. 14 CV3455, 2017 WL 384352, 117 LRP 3552 (S.D.N.Y Jan. 25, 2017) (in case of third-grader with cerebral palsy for whom parent sought placement in state-approved specialized school, affirming SRO decision that reversed IHO decision and upheld school system's IEP offering 12:1:1 classroom, with 1:1 paraprofessional to assist with mobility, and offering additional services; noting that IEP team considered evaluations including one requested by parents; affirming SRO decision that annual goals were adequate though one physical therapy goal was from prior IEP; upholding determination that 12:1:1 ratio was appropriate largely on basis of testimony of school psychologist; further noting that parent did not allege placement could not implement IEP, and that IEP team considered more restrictive placement than 12:1:1 class)

C.R. v. New York City Dept. of Educ., No. 15 Civ. 3051, 2016 WL 5793415, 68 IDELR 225 (S.D.N.Y. Sep. 30, 2016) (in case of five year old child with speech and language impairment, behavioral and other challenges, and some features of autism, whose IEP provided for 12:1:1 class, speech-language and occupational therapy, and counseling, but whose parents rejected proposed IEP and enrolled him in private school, affirming review officer decision; holding that IEP was substantively adequate in that it accurately described child's needs and IEP team considered extensive materials, IEP's goals targeted identified areas of need even though some were copied from prior IEP and record did not show child had met goals as of time of IEP meeting; further finding recommendation of 12:1:1 class to be adequately supported and challenge to placement at particular school to be based on impermissible presumption IEP would not be implemented properly)

Class Size and Age Range Issues

L.R. v. New York City Dep't of Educ., 193 F. Supp. 3d 209, 68 IDELR 13 (E.D.N.Y. June 20, 2016) (in case of student with learning disability offered 15:1 academic classes at Clara Barton public high school, whose parent was informed by person at school that school was not appropriate for student and placed child in private school, sought tuition, and received favorable ruling from IHO that was reversed by SRO, reversing SRO order, noting that SRO failed to consider any testimony or other evidence showing that 15:1 class was appropriate and did not consider evidence that it was inappropriate and that student needed individual support in reading; stating that in contrast, IHO relied on evidence of student's need for significant support based on experience of previous six

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years in smaller class; further upholding IHO's determination on appropriateness of private placement and balance of equities)

S.C. v. Katonah-Lewisboro Cent. Sch. Dist., 175 F. Supp. 3d 237, 67 IDELR 184 (S.D.N.Y. Mar. 30, 2016) (in case of teen with multiple disabilities including cognitive impairment and distractibility, reversing SRO decision and granting tuition reimbursement; granting deference to IHO rather than SRO on issue of suitability of district's proposed 12:1:2 class when evidence did not support SRO's conclusion that student's attention issues could be managed in class with that ratio or that 12:1:2 would be as effective as 8:1:1 given student's distractibility; further noting lack of support for conclusion student could work independently; noting support in evidence for IHO's conclusion that proposed class size would not permit student to achieve progress, but instead one-on-one instruction was needed in light of student's slow information processing speed as well as attention problems; ruling that private placement offered appropriate education with trained special education teachers and individualized and small group instruction resulting in progress in that setting even though test scores were low; further noting that parents are not held to same mainstreaming requirements as districts but finding level of participation with general education students at private placement to be appropriate; further finding equities to favor reimbursement, even though parents entered into private school enrollment contract before IEP was offered, in light of fear of losing enrollment slot)

M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 67 IDELR 92 (S.D.N.Y. Feb. 26, 2016) (in case concerning nonverbal seven-year-old with orthopedic impairment, legal blindness, and severe motor skill delays, affirming SRO decision that reversed IHO decision, and granting summary judgment for defendant on claim for tuition reimbursement; on substance of IEP, deferring to school's judgment that 12:1:4 staffing ratio with 12 students to 1 teacher to 4 paraprofessionals and a 1:1 full-time paraprofessional was adequate and 1:1 teacher ratio was not required)

H.W. v. New York State Educ. Dept., No. CV 13-3873, 2015 WL 1509509, 65 IDELR 136 (E.D.N.Y. Mar. 31, 2015) (in case of child with autism, affirming SRO finding that 2010-11 IEP was appropriate, relying on evidence child made progress despite poor test results; reversing SRO decision that approved mainstreaming of child into fourth grade general education program that was twice as large as previous class without 1:1 assistant, with push-in consultant teacher and some pull-outs; finding placement not to provide appropriate education; further ruling that private placement was appropriate and equities favored reimbursement)

J.F. v. New York City Dept. of Educ., No. 14-CV-3724, 2015 WL 892284, 65 IDELR 35 (S.D.N.Y. Mar. 3, 2015) (in case of child with speech or language impairment whose parents objected to proposed IEP calling for placement in public school with 12:1:1 ratio and kept child in private placement, affirming SRO decision denying tuition reimbursement; finding that objection as to implementation of IEP was speculative when there had been no attempt to implement it; stating that review officer correctly

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concluded that age range of greater than 36 months, even if contrary to state regulations, did not deny appropriate education under circumstances of case)

P.L. v. New York City Dep't of Educ., 56 F. Supp. 3d 147, 64 IDELR 100 (E.D.N.Y. Sept. 29, 2014) (in case of student with autism, reversing SRO decision in favor of school district; reasoning that lack of vocational assessment and functional behavioral assessment and failure to offer parent counseling and training did not deny appropriate education, but holding that school system failed to show that 6:1:1 class would permit student to make meaningful educational progress, and that student instead needed one-on-one instruction, that SRO improperly relied on retrospective testimony about one-on-one services that were not provided for in IEP, that private placement provided appropriate education, and equities supported reimbursement)

<u>Educational Placement Decisions</u>

S.Y. v. N.Y.C. Dept. of Educ., No. 14 Civ. 6277, 2016 WL 5806859, at *9, --- F. Supp. 3d ---, 68 IDELR 230 (S.D. N.Y. Sep. 28, 2016) (in case of teen with autism offered placement in 6:1:1 program at specialized public school, reversing SRO decision that had overturned IHO decision, and awarding tuition reimbursement for continued attendance at private school; holding that failure to provide prior written notice of change of placement to 6:1:1 classroom without 1:1 paraprofessional was procedural violation that prejudiced parents by not giving reasoning for rejection of parents' proposal of 8:1:3 ratio program and change of educational placement, stating, "By leaving the Parents completely in the dark on a matter as fundamental as the reasoning behind R.Y.'s educational placement, the DOE significantly impeded the Parents' opportunity to participate in the decision making and, in turn, denied R.Y. a FAPE."; further holding that defendant failed its obligation to consider parents' proposal of 8:1:3 ratio program, which impeded parents' participation rights and denied student appropriate education; holding that delay in telling parents about school and classroom assignment violated IDEA but did not deny appropriate education; concluding that cumulative effect of procedural violations denied student appropriate education; further questioning substantive adequacy of IEP as to absence of 1:1 paraprofessional and assignment of classroom)

W.W. v. New York City Dep't of Educ., 160 F. Supp. 3d 618, 67 IDELR 66 (S.D.N.Y. Feb. 8, 2016) (in case involving child with speech and language impairment, ADHD, and other disabilities, whose IEP provided for 12:1 class for English, social studies, and sciences, and integrated co-teaching class for math, art, music, and physical education, whose mother was told by placement school parent coordinator that school could not provide programs called for on IEP and who wrote IEP team about problem and then continued child's placement in private school and pursued reimbursement for tuition, reversing SRO decision in favor of defendant and holding that defendant failed to show school had capacity to implement IEP; further ruling that private school was appropriate, and equities favored parent; reading *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015), to place burden on school system to show placement school has

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ability to implement IEP; stating that department of education never contradicted parent's letter)

FB v. New York City Dep't of Educ., 132 F. Supp. 3d 522, 538, 66 IDELR 94 (S.D.N.Y. Sept. 21, 2015) (in case of child with autism, reversing SRO and awarding tuition reimbursement; stating that parents did not prove predetermination, given that some options were rejected and some draft goals changed, but parents were denied opportunity to participate in placement decision, for school assignment was not issued until June, their letters to set up visits were ignored, information that the parents asked for related to assessing the proposed placement's ability to implement IEP, deadline loomed for reenrolling child at private school, and parents were diligent; stating, "[P]arents have the right to obtain relevant information in a timely fashion about the DOE's proposed placement of their child, so as to enable them to assess and comment on that placement"; finding substantive challenge to IEP regarding child's sensory needs waived and failure to provide transitional support services to be not a denial of appropriate education, but finding that placement school could not implement IEP, stating that IEP called for DIR/Floortime methodology in which teachers at placement school were not trained, therapists were present at school only two days per week but IEP provided for sessions five days per week, noise, lighting, and temperature levels were not suitable, and calming facilities not present)

Y.F. v. New York City Dep't of Educ., No. 15 Civ. 6322, 2015 WL 4622500, 66 IDELR 11 (S.D.N.Y. July 31, 2015) (in case of teen with intellectual disability assigned to public school that parent believed could not implement IEP, affirming decision of SRO in favor of defendant, rejecting argument that report concerning school indicating failure to provide all required related services in past established school's inability to provide services to student, that quality review support critical of school's math instruction did not show inability to help student meet her IEP math goals, and that other objections to placement did not relate to specific requirements of IEP, making challenges speculative), *aff'd*, 659 F. App'x 3, 4, 68 IDELR 92 (2d Cir. Aug. 24, 2016) ("Y.F., having conceded the adequacy of the IEP, cannot now complain that the placement school does not provide services not required by the IEP. Further, the challenges that are tethered to the IEP are based on mere speculation that the McSweeney School would not implement the IEP.")

S.B. v. New York City Dep't of Educ., 117 F. Supp. 3d 355, 65 IDELR 264 (S.D.N.Y. June 25, 2015) (reversing SRO and ordering reimbursement in case of child with central auditory processing disorder and speech and language deficits, whose parent visited placement school proposed by defendant and assistant principal informed her that special education program was oversubscribed and school did not have secure funding for all its special education students, and parent observed that students in proposed class functioned at ninth-grade level when child was at third-grade level, and parent additionally learned that school's program did not offer multi-sensory instruction, scaffolding, modified instructional materials, pre-teaching, and re-teaching, all of which were specified on IEP)

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K.R. v. New York City Dep't of Educ., 107 F. Supp. 3d 295, 302, 65 IDELR 173 (S.D.N.Y. Apr. 20, 2015) (in case of 13 year old with autism, reversing SRO and reinstating IHO decision; regarding procedural violation of denying meaningful opportunity for parental participation, overturning SRO's rejection of IHO's credibility determination premised on father's account of IEP meeting instead of that of school official who did not remember specific meeting; also holding that hearing request raised child's sensory requirements and deferring to conclusion that proposed placement failed to include access to sensory equipment required by IEP; stating, "while the IEP must be evaluated prospectively and cannot be *altered* by retrospective testimony about what a school district might have done, testimony explaining how the IEP would be implemented is sufficiently prospective and may be considered by the Court."; granting reimbursement)

J.W. v. New York City Dep't of Educ., 95 F. Supp. 3d 592, 65 IDELR 94 (S.D.N.Y. Mar. 27, 2015) (in case of primarily nonverbal child with autism and developmental delay, affirming SRO decision that defendant offered child appropriate education despite parent's argument that placement school used ABA methodology, which had not benefited child, rather than developmental individual difference relationship model (DIR-Floortime) used by private school child attended; holding that teaching methodology was adequately raised when it was subject of extensive examination of witnesses and was discussed in IHO and SRO decisions, but ruling that parent did not show that ABA methodology would have been used by public school even if parent proved that it was not consistent with IEP, noting that testimony of teacher that she would have used ABA was retrospective, and only prospective showing was statement of person who took parent on school tour that school employed ABA methodology)

<u>Autism Programs</u>

A.M. v. New York City Dep't of Educ., 845 F.3d 523, 69 IDELR 51 (2d Cir. Jan. 10, 2017) (in case of six-year-old with autism placed by parent in private school offering 1:1 ABA therapy upon parent's dissatisfaction with IEP offered by school system when child finished private preschool, ruling that proposed IEP offering student-teacher-paraprofessional ratio of 6:1:1 and no commitment to use ABA or other particular methodology did not offer appropriate education; finding that behavior intervention plan based on functional behavior assessment from private school was deficient but did not deny child appropriate education, that failure to include parent counseling and training in IEP violated law but did not deny appropriate education when services were made available, and that transitional support services were required under New York law and failure to provide them violated IDEA, but their absence from child's IEP did not deprive child of appropriate education, nor did cumulative effect of procedural errors do so; ruling nonetheless that failure to follow clear consensus of evaluative reports that addressed child's needs, which specifically recommended continued need for ABA therapy and 1:1 support constituted substantive IDEA violation denying appropriate education, particularly when combined with failure to conduct new FBA and develop adequate BIP, and other procedural errors; stating, "[W]hen the reports

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and evaluative materials present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits, and the state's determination to the contrary is thus entitled to no deference because it is unsupported by a preponderance of the evidence. . . . This remains true whether the issue relates to the content, methodology, or delivery of instruction in a child's IEP.") (internal quotation marks and citation omitted)

E.H. v. New York City Dep't of Educ., 611 F. App'x 728, 65 IDELR 162 (2d Cir. May 8, 2015) (in case of child with autism, in which parent sought tuition reimbursement for private placement, affirming district court decision that behavioral intervention plan was procedurally and substantively adequate even though formal assessment had not been made, and that claim school lacked space for child was unsupported, but holding that SRO improperly failed to evaluate whether child could progress toward IEP goals without DIR/Floortime methodology used by private school, failing to note that due process complaint contained at least three objections to IEP's failure to adopt DIR/Floortime, and district court should not have relied on SRO's general conclusion that IEP was sufficient to address child's needs; remanding for SRO to determine whether child was denied appropriate education by adoption of private school's IEP goals without also adopting DIR/Floortime methodology)

J.E. v. New York City Dep't of Educ., No. 15-CV-7799, 2017 WL 354181, 69 IDELR 93 (S.D. N.Y. Jan. 23, 2017) (in case seeking tuition funding for child with autism, reversing SRO decision in favor of school system, which offered child IEP calling for 6:1:1 classroom, speech-language therapy, occupational and physical therapy, and 1:1 health paraprofessional; noting that IEP team did not meaningfully consider options more intensive than 6:1:1 ratio, denying parent opportunity to participate in IEP process, denying appropriate education; questioning substantive sufficiency of IEP in light of parent's and prior teacher's support for more intensive ratio; finding private school to be appropriate, relying on IHO determination; finding equities to support parent)

T.Y. v. New York City Dep't of Educ., No. 15–CV–1508, 2016 WL 6988811, --- F. Supp. 3d ----, 68 IDELR 182 (E.D.N.Y. Sept. 30, 2016) (in case of child with autism, determining that IHO's findings in favor of reimbursement for tuition and related services were proper, adopting report and recommendation from magistrate judge that concluded, among other things, that SRO failed to consider evidence that IEP team refused to take into account relevant evidence about failure of methodologies other than Developmental Individual-difference Relationship-based – Floor Time employed by private school student attended, and lack of justification for proposed reduction in speech-language therapy from seven hours to two hours and forty minutes per week)

S.Y. v. N.Y.C. Dept. of Educ., No. 14 Civ. 6277, 2016 WL 5806859, at *9, --- F. Supp. 3d ---, 68 IDELR 230 (S.D. N.Y. Sep. 28, 2016) (in case of teen with autism offered placement in 6:1:1 program at specialized public school, reversing SRO decision that had overturned IHO decision, and awarding tuition reimbursement for continued

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attendance at private school; holding that failure to provide prior written notice of change of placement to 6:1:1 classroom without 1:1 paraprofessional was procedural violation that prejudiced parents by not giving reasoning for rejection of parents' proposal of 8:1:3 ratio program and change of educational placement, stating, "By leaving the Parents completely in the dark on a matter as fundamental as the reasoning behind R.Y.'s educational placement, the DOE significantly impeded the Parents' opportunity to participate in the decision making and, in turn, denied R.Y. a FAPE."; further holding that defendant failed its obligation to consider parents' proposal of 8:1:3 ratio program, which impeded parents' participation rights and denied student appropriate education; further questioning substantive adequacy of IEP as to absence of 1:1 paraprofessional and assignment of classroom; finding that private school chosen by parents furnished appropriate education and that equities weighed in favor of parents)

M.T. v. New York City Dep't of Educ., No. 15-cv-2912, 2016 WL 4198199, --- F. Supp. 3d ---, 68 IDELR 65 (S.D.N.Y. Aug. 5, 2016) (in case of child with Asperger's Syndrome and ADHD, removed by parent from general education public school class that had teacher support services and placed at private school, whom defendant subsequently recommended placing in 12:1:1 specialized class at community school with four month 1:1 transitional paraprofessional and various related services, affirming decision of SRO that reversed IHO decision in favor of parent's private placement; reasoning that SRO decision upholding IEP in general was comprehensive and persuasive, and deserved deference; further upholding second SRO decision that ruled that if 1:1 paraprofessional was discontinued after four months, IEP would still offer appropriate education; noting that student had average intelligence and would benefit from general education curriculum and student had made progress in self-regulation)

W.S. v. City Sch. Dist. of N.Y., 188 F. Supp. 3d 293, 67 IDELR 242 (S.D.N.Y. May 23, 2016) (in case of seven-year-old with autism who received early intervention program with center-based ABA therapy and extra 10 hours per week of home-based ABA, but in preschool was provided 6:1:2 sessions for physical, occupational, and speech therapy and 10 to 15 hours each week of 1:1 ABA, then attended program with 1:1 ABA and additional 1:1 services, but for 2011-12 was offered IEP calling for 6:1:1 class and 1:1 behavior management professional and some additional 1:1 related services, deciding in favor of tuition reimbursement for private placement, reasoning that child in past regressed when in 6:1:2 class, and school system did not show 6:1:1 class would satisfy child's needs; also noting that school system relied on reports from private providers when it devised IEP but private providers did not recommend 6:1:1 class, and IEP failed to call for ABA therapy; also stating that private placement met child's needs)

S.B. v. New York City Dep't of Educ., 174 F. Supp. 3d 798, 67 IDELR 140 (S.D.N.Y. Mar. 30, 2016) (in case of eight-year-old child with autism, who was in public school special education class, then was removed by parent and placed in private program after independent evaluations recommended 1:1 ABA, intensive speech-language services, and intensive occupational therapy, who was offered 6:1:1 class with speech and language, occupational therapy, and physical therapy, but no 1:1 ABA, reversing SRO

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decision and affirming IHO decision; ordering reimbursement; noting that SRO did not consider non-district witnesses and that IHO decision was better reasoned and more thorough; finding private placement to be appropriate and equities to favor parents)

M.G. v. New York City Dep't of Educ., 162 F. Supp. 3d 216, 66 IDELR 276 (S.D.N.Y. Jan. 4, 2016) (certifying class in case alleging that education departments of state and city adopted policies hampering provision of needed special education services to students with autism and alleging violations of IDEA, Section 504, and state law; noting that plaintiffs asserted systemic challenge to directive restricting use of related services from outside sources for students in private schools, and systemic challenge to alleged policy forbidding IEP teams to recommend 1:1 instruction, ABA, and extended-day, after-school, or home-based services)

GB v. New York City Dep't of Educ., 145 F. Supp. 3d 230, 66 IDELR 223 (S.D.N.Y. Nov. 5, 2015) (in case of student with autism and conditions including susceptibility to neurological effects of strep and temperature- and hydration-related seizures, reversing SRO decision and ordering tuition reimbursement; holding that failure to provide IEP to parents before school began violated IDEA but did not impede parental participation, that district representative to IEP meeting was acceptable, program and placement were not predetermined, and IEP's performance levels, sensory processing disorder management strategies, and annual goals were sufficient, but ruling that IEP's description of medical issues and needs was so deficient that it denied student appropriate education, noting lack of identified need for climate-controlled bus and school environment and recognition of dehydration and infection risks; stating that taking goals from private school IEP without adopting private school's methodology heightened difficulties of proposed public school placement)

FB v. New York City Dep't of Educ., 132 F. Supp. 3d 522, 66 IDELR 94 (S.D.N.Y. Sept. 21, 2015) (in case of child with autism, reversing SRO and awarding tuition reimbursement; stating that parents did not prove that predetermination given that some options were rejected and some draft goals changed, but parents were denied opportunity to participate in placement decision, for school assignment was not issued until June, their letters to set up visits were ignored, information that the parents asked for related to assessing the proposed placement's ability to implement IEP, deadline loomed for reenrolling child at private school, and parents were diligent; finding that placement school could not implement IEP, stating that IEP called for DIR/Floortime methodology in which teachers at placement school were not trained, therapists were present at school only two days per week but IEP provided for sessions five days per week, noise, lighting, and temperature levels were not suitable, and calming facilities not present; also holding that parental placement was appropriate, noting child's actual progress at private school, and that parents prevailed on equities)

J.W. v. New York City Dep't of Educ., 95 F. Supp. 3d 592, 65 IDELR 94 (S.D.N.Y. Mar. 27, 2015) (in case of primarily nonverbal child with autism and developmental delay, affirming SRO decision that defendant offered child appropriate education despite

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parent's argument that placement school used ABA methodology, which had not benefited child, rather than developmental individual difference relationship model (DIR-Floortime) used by private school child attended; ruling that parent did not show that ABA methodology would have been used by public school even if parent proved that it was not consistent with IEP, noting that testimony of teacher that she would have used ABA was retrospective, and only prospective showing was statement of person who took parent on school tour that school employed ABA methodology)

M.L. v. New York City Dep't. of Educ., No. 13-CV-2314, 2015 WL 1439698, 65 IDELR 96 (E.D.N.Y. Mar. 27, 2015) (in case of child with autism and other disabilities, affirming decision in favor of public school system, stating that FBA was adequate and that failure to quantify frequency and duration of child's behavior did not cause substantive harm, that parents had sufficient opportunity for input, that not including parent training in IEP did not deny child appropriate education, that IDEA does not require transition plan, that IEP's failure to specify one-on-one paraprofessional did not deny appropriate education, and that parents did not identify any part of IEP that proposed placement could not meet)

P.L. v. New York City Dep't of Educ., 56 F. Supp. 3d 147, 64 IDELR 100 (E.D.N.Y. Sept. 29, 2014) (in case of student with autism, reversing SRO decision in favor of school district; holding that school system failed to show that 6:1:1 class would permit student to make meaningful educational progress, and that student instead needed one-on-one instruction, and that SRO improperly relied on retrospective testimony about one-on-one services that were not provided for in IEP)

<u>Extended School Year</u>

I.B. v. New York City Dep't of Educ., No.15-CV-01309-LTS, 2016 WL 1069679, 67 IDELR 113 (S.D.N.Y. Mar. 17, 2016) (in case of child with multiple disabilities who was at second percentile in overall cognitive functioning, ruling that denial of 12-month school services was erroneous in light of risk of regression; requiring reimbursement)

<u>Post-Secondary Transition Services</u>

M.M. v. New York City Dep't of Educ., 655 F. App'x. 868, 68 IDELR 32 (2d Cir. July 26, 2016) (in case of student with autism, holding that failure to determine and specify in IEP frequency, location, and duration of transition services, and failure to conduct three-year evaluation including required vocational and transition assessment did not deny student appropriate education when SRO determined that IEP's provision for transitional and vocational services gave sufficient information to allow school to create adequate vocational program and parent and student had ability to assess adequacy of IEP)

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Peer Harassment and Bullying

T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877, 67 IDELR 1 (2d Cir. Jan. 20, 2016) (ruling that school system denied child appropriate education by refusing to discuss severe bullying that child experienced at school, noting that her parents raised it in IEP meetings and bullying could have substantially interfered with her learning; also holding that parents proved private placement was appropriate and equities favored reimbursement; emphasizing parental rights to participate in process for provision of education to their child; assuming without deciding that bullying constitutes appropriate consideration in child's educational program when it substantially restricts learning opportunities; finding that procedural violation denied child appropriate education, stating "Here, Plaintiffs were reasonably concerned that bullying severely restricted L.K.'s educational opportunities, and that concern powerfully informed their decisions about her education. By refusing to discuss that bullying during the development of the IEP, the Department significantly impeded Plaintiffs' ability to assess the adequacy of the IEP and denied L.K. a FAPE."), *aff'ing* 32 F. Supp. 3d 405, 411, 63 IDELR 256 (E.D.N.Y. July 23, 2014) ("FIRST, where there is a legitimate concern that bullying will severely restrict a disabled student's educational opportunities, as a matter of law the IEP team is required to consider evidence of bullying in developing an appropriate Individual Education Program ("IEP"). . . . SECOND, where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP. . . . THIRD, if a school district purports to address bullying in an IEP, it may not, as a matter of law, do so in abstract terms incomprehensible to lay parents, effectively preventing them from meaningful participation in developing the IEP and from comprehending that the issue was addressed.")

Paul T. v. South Huntington Union Free Sch. Dist., 14 N.Y.S.3d 627, 65 IDELR 273 (Sup. Ct. June 16, 2015) (upholding decision of IHO and SRO that student who was removed from school following drawing of acts of violence against someone purported to be a student who was harassing the student, was not IDEA-eligible, and denying tuition reimbursement for parochial school; applying de novo review on eligibility issue; noting testimony that student had been bullied, but reasoning that record did not show student was emotionally disturbed or other health impaired and stating that student's mental state did not affect student's educational performance in light of high level of performance; stating that being bullied in and of itself does not constitute disability under IDEA)

Related Services and Assistive Technology

I.B. v. New York City Dep't of Educ., No.15-CV-01309-LTS, 2016 WL 1069679, 67 IDELR 113 (S.D.N.Y. Mar. 17, 2016) (in case of child with multiple disabilities who was at second percentile in overall cognitive functioning, reversing SRO decision that had

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denied child services of 1:1 special education itinerant, reasoning that child could not attend to tasks without assistance and needed intense support, and made progress with 1:1 aide; requiring reimbursement)

Least Restrictive Environment

D.N. v. Board of Educ. of Ctr. Moriches Union Free Sch. Dist., No. CV 14-99, 2015 WL 5822226, 66 IDELR 163 (E.D.N.Y. Sept. 28, 2015) (in case of child with autism, reversing SRO decision and ruling that proposed placement was not appropriate when child had IEP goal involving social interaction with peers but 1:1:1 class provided by IEP offered no contact with peers; concluding that testimony child would be moved to 8:1:1 classroom later on, or students from 8:1:1 classroom would be brought into child's placement was retrospective; rejecting conclusion that placement in public school is necessarily less restrictive than private placement, emphasizing that private placement had peer interaction), *appeal withdrawn*, No. 15-3253 (2d Cir. Nov. 30, 2015)

H.W. v. New York State Educ. Dept., No. CV 13-3873, 2015 WL 1509509, 65 IDELR 136 (E.D.N.Y. Mar. 31, 2015) (in case of child with autism, reversing SRO decision that approved mainstreaming of child into fourth grade general education program that was twice as large as previous class without 1:1 assistant, with push-in consultant teacher and some pull-outs; finding placement not to provide appropriate education; further ruling that private placement was appropriate)

S.W. v. New York Dep't of Educ., 92 F. Supp. 3d 143, 65 IDELR 70 (S.D.N.Y. Mar. 12, 2015) (in case of 12-year-old with learning disability whose parents contested IEP calling for general education placement with integrated co-teaching services, affirming SRO decision of in favor of defendant, overturning IHO decision)

Behavioral Services and Related

L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110, 67 IDELR 225 (2d Cir. May 20, 2016) (in case of student with autism, mood disorder, OCD, and other impairments whose parents contested three IEPs dated December 2009, December 2010, and March 2011, reversing lower court and administrative decisions in favor of defendant, reasoning that there was no evidence IEP team reviewed evaluative materials in developing IEPs, stating, "[T]he burden rested with the DOE to demonstrate which evaluative materials were reviewed during each CSE meeting in reaching the terms of the IEPs"; further holding that behavior plan should not have been considered adequate when it was not based on FBA and noting that March 2011 IEP did not include BIP at all; remanding for proceedings on relief)

A.W. v. Board of Educ. of the Wallkill Cent. Sch. Dist., No. 1:14–CV–1583, 2016 WL 4742297, 68 IDELR 164 (N.D.N.Y. Sept. 12, 2016) (in case of child diagnosed with dyslexia and ADHD, ruling that IEPs offered for 2012-13 and 2013-14 were inadequate in failing to consider behavior that impeded learning and adequately address behavioral

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needs; further holding that Kildonan school was appropriate program for child, overturning SRO determination that upheld placement for only one of three years, even though placement did not completely resolve child's behavioral issues), *appeal withdrawn*, No. 16-3464 (2d Cir. Nov. 23, 2016)

J.E. v. Chappaqua Cent. Sch. Dist., No. 14-cv-3295, 2016 WL 3636677, 68 IDELR 48 (S.D.N.Y. June 28, 2016) (in case of child with autism and ADHD, denying parents' motion for summary judgment in appeal of IHO and SRO decisions holding that school district's 2011-12 and 2013-13 IEPs offered student appropriate education and denying tuition reimbursement; ruling that failure to generate separate written FBA did not constitute procedural violation when BIP included information that FBA typically includes; as to 2012-13 IEP, holding that use of 2011 BIP was appropriate, noting that child's behavioral problems were similar to those in past and district acknowledged BIP would need to be updated upon child's return to public school), *appeal filed*, No. 16-2591 (2d Cir. July 26, 2016)

Dear Colleague, 68 IDELR 76 (OSERS & OSEP Aug. 1, 2016) ("[T]he failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the LRE."; further stating, "Incidents of child misbehavior and classroom disruptions, as well as violations of a code of student conduct, may indicate that the child's IEP needs to include appropriate behavioral supports. This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the child's present levels of performance and needs. To the extent a child's behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures) impede the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE.")

Student Discipline

Snyder, 67 IDELR 96 (OSEP Dec. 13, 2015) ("There is no provision in the Part B regulations that would give a hearing officer conducting an expedited due process hearing the authority to extend the timeline for issuing this determination at the request of a party to the expedited due process hearing. . . . [I]n some cases, a due process hearing may include both a disciplinary and non-disciplinary matter. . . . [I]n this circumstance, a hearing officer could decide that it is prudent to bifurcate the hearing, thus allowing for an expedited hearing on the discipline and removal issues, and a separate hearing on any other issues.")

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Due Process Hearing Complaints

M.B. v. New York City Dep't of Educ., No. 14 CV3455, 2017 WL 384352, 117 LRP 3552 (S.D.N.Y Jan. 25, 2017) (in case of third-grader with cerebral palsy for whom parent sought placement in state-approved specialized school, affirming SRO decision that reversed IHO decision and upheld school system's IEP offering 12:1:1 classroom, with 1:1 paraprofessional to assist with mobility, and offering additional services; ruling that 12-month program ordered by IHO was outside scope of complaint as was claim for barrier-free environment, stating that complaint may not incorporate arguments by reference to letters or other documentation outside complaint)

C.W.L. v. Pelham Union Free Sch. Dist., 149 F. Supp. 3d 451, 66 IDELR 241 (S.D.N.Y. Dec. 9, 2015) (in case of student classified emotionally disturbed, affirming SRO decision that IHO exceeded jurisdiction by ruling on district's child-find obligations during 2010-11 school year when due process complaint did not address that year and district evidence on RTI strategies during that year did not have to do with child-find obligations; ruling that alleged procedural failings did not deny student appropriate education, and that district's therapeutic support program reflected student's evaluation and was adequate to permit progress in areas of need), *appeal withdrawn*, No. 16-97 (2d Cir. Feb. 1, 2016)

K.R. v. New York City Dep't of Educ., 107 F. Supp. 3d 295, 302, 65 IDELR 173 (S.D.N.Y. Apr. 20, 2015) (in case of 13 year old with autism, reversing SRO and reinstating IHO decision; holding that hearing request raised child's sensory requirements and deferring to conclusion that proposed placement failed to include access to sensory equipment required by IEP; further holding that social and management needs raised in IEP could include issue of functional grouping but deferring to SRO determinations that having one nonverbal student in class did not make placement inappropriate and related services were sufficient; stating, "while the IEP must be evaluated prospectively and cannot be *altered* by retrospective testimony about what a school district might have done, testimony explaining how the IEP would be implemented is sufficiently prospective and may be considered by the Court."; granting reimbursement)

H.W. v. New York State Educ. Dept., No. CV 13-3873, 2015 WL 1509509, 65 IDELR 136 (E.D.N.Y. Mar. 31, 2015) (in case of child with autism, ruling that one-on-one services were properly considered by IHO when complaint's main focus was on nature of program but it nevertheless referred to child's problems learning even with one-on-one assistance; affirming SRO finding that 2010-11 IEP was appropriate, relying on evidence child made progress despite poor test results; reversing SRO decision that approved mainstreaming of child into fourth grade general education program; further ruling that private placement was appropriate and equities favored reimbursement)

J.W. v. New York City Dep't of Educ., 95 F. Supp. 3d 592, 65 IDELR 94 (S.D.N.Y. Mar. 27, 2015) (in case of primarily nonverbal child with autism and developmental delay, affirming SRO decision that defendant offered child appropriate education despite

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parent's argument that placement school used ABA methodology, which had not benefited child, rather than developmental individual difference relationship model (DIR-Floortime) used by private school child attended; holding that teaching methodology was adequately raised when it was subject of extensive examination of witnesses and was discussed in IHO and SRO decisions, but ruling that parent did not show that ABA methodology would have been used by public school even if parent proved that it was not consistent with IEP, noting that testimony of teacher that she would have used ABA was retrospective, and only prospective showing was statement of person who took parent on school tour that school employed ABA methodology)

Mediation, Resolution, and Settlement in General

Campbell-Ewald v. Gomez, 136 S. Ct. 663, 117 LRP 4461 (Jan. 20, 2016) (regarding named individual plaintiff's claim in uncertified class action, holding that unaccepted offer of settlement does not make case moot even if offer would provide full relief to which individual plaintiff is entitled; stating that unaccepted offer is legal nullity)

Dervishi v. Stamford Bd. of Educ., 653 F. App'x 55, 68 IDELR 3 (2d Cir. June 27, 2016) (upholding IEP offered by school district, reasoning that parents had opportunity to participate in decision about educational placement and that placement and services were appropriate, but reversing lower court decision and finding that IEP did not create stay-put placement; holding that placement established by settlement was stay-put placement, and ordering reimbursement; further determining that district did not breach settlement agreement), *aff'ing in part and vacating in part* No. 3:11CV1018, 2015 WL 4647900, 66 IDELR 6 (D. Conn. Aug. 5, 2015) (in case of child with autism in which parents entered into settlement with school district by which independent consultant would conduct evaluation of child and recommend program, granting school district's motion for summary judgment and affirming administrative determination that district tried to include parents in IEP team meetings before holding meetings without them, and that school reviewed independent evaluation; also affirming that IEP offered appropriate education; further affirming decision that parents did not prove that home placement and parental placement were appropriate; also finding no breach of settlement agreement by school district and ruling that settlement agreement providing for temporary funding for home placement did not create stay-put placement)

Cohen, 67 IDELR 217 (OSEP Sept. 16, 2015) ("Unlike mediation, the IDEA and the implementing regulations contain no requirement for discussions in resolution meetings to be kept confidential and not be introduced in a subsequent due process hearing or civil proceeding. . . . Absent an enforceable agreement by the parties requiring that these discussions remain confidential, either party may introduce information discussed during the resolution meeting at a due process hearing or civil proceeding when presenting evidence and confronting or cross-examining witnesses consistent with 34 CFR § 300.512(a)(2).")

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Due Process Hearing Limitations

Zirkel, 66 IDELR 288 (OSEP Dec. 9, 2015) (as to G. L. v. Ligonier Valley School District Authority, 802 F.3d 601 (3d Cir. 2015), "On September 22, 2015, the Court issued its decision . . . , holding that both provisions [sections 615(b)(6)(B) and 615(f)(3)(C) of the Act] reflect the same two-year deadline for filing a due process complaint after the date plaintiffs knew or should have known about the alleged violations (the "KOSHK date"). The Court also held that neither provision limits remedies to injuries that occurred within two years before the KOSHK date, and that, if parents timely file a complaint and liability is proven, the entire period of the violation should be remedied. In light of the Court's decision, the Department is continuing to deliberate to determine whether further guidance is necessary.")

Scope of Due Process Hearing

M.O. v. New York City Dep't of Educ., 793 F.3d 236, 65 IDELR 283 (2d Cir. July 15, 2015) (stating that parents may make prospective challenges to placement school's ability to implement child's IEP, and child does not have to attend school proposed by local educational agency in order for parents to challenge school's capacity to implement IEP; nonetheless holding that due process complaint in case challenged IEP itself rather than placement's capacity to provide services on IEP, so school system did not have to present evidence about adequacy of proposed placement school, and ruling in favor of defendant)

Conduct of Due Process Hearing

J.E. v. Chappaqua Cent. Sch. Dist., No. 14-cv-3295, 2016 WL 3636677, 68 IDELR 48 (S.D.N.Y. June 28, 2016) (in case of child with autism and ADHD, denying parents' motion for summary judgment in appeal of IHO and SRO decisions holding that school district's 2011-12 and 2013-13 IEPs offered student appropriate education and denying tuition reimbursement; rejecting claim of bias on part of non-attorney IHO who was former state superintendent of schools but who met state standards for hearing officers; finding claim that IHO slept during parts of hearing to be unsupported by record; finding challenge to six-day class cycle not properly raised before IHO and SRO), *appeal filed*, No. 16-2591 (2d Cir. July 26, 2016)

M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 67 IDELR 92 (S.D.N.Y. Feb. 26, 2016) (in case concerning nonverbal seven-year-old with orthopedic impairment, legal blindness, and severe motor skill delays, affirming SRO decision that reversed IHO decision, and granting summary judgment for defendant on claim for tuition reimbursement; rejecting argument that IEP was procedurally deficient, stating that issue was not raised in due process complaint and that IEP team considered sufficient evaluative material and that parents and representatives of private school had meaningful opportunity to participate in IEP meeting; stating that that if child does not enroll in public placement recommended by school system, adequacy of placement is to

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be determined on face of IEP even though not all prospective challenges to placement school are foreclosed; further stating that test of placement school's ability to implement IEP is limited to facts uncovered prior to parental rejection of placement)

J.C. v. New York City Dep't of Educ., No. 15CIV3345LAKAJP, 2015 WL 8940044 (S.D.N.Y. Dec. 16, 2015) (magistrate judge recommendation) (in parent's challenge to reclassification of child from child with autism to intellectually disabled and proposal to move child from private placement to 12:1:1 public school class, remanding for new hearing on ground that hearing officer ordered direct testimony of witnesses to be by affidavit and then excluded affidavits submitted by parent at 5 p.m. on day they were due, which due date was not changed when hearing officer rescheduled hearing to begin the following day; reasoning that exclusion of affidavits was error of law and was not harmless, noting that witnesses questioned adequacy of evaluation, appropriateness of IEP, and conduct of IEP meeting leading to reclassification and proposed placement; also stating that affidavits supported argument that school system predetermined IEP, as well as parent's claim that evaluation was not comprehensive and 12:1:1 program was not appropriate for child), *adopted*, 2016 WL 828138 (S.D.N.Y. Feb. 29, 2016)

<u>Timeliness of Due Process Decisions</u>

H.B. v. Byram Hills Cent. Sch. Dist., No. 14 CV 6796, 2015 WL 5460023, 66 IDELR 47 (S.D.N.Y. July 20, 2015) (in case of 17-year-old placed by parents in private school, alleging denial of due process when plaintiffs did not receive timely due process hearing decision, hearing request having been made on Oct. 5, 2012 but IHO decision not issued until Oct. 15, 2014 following removal of first hearing officer for not issuing decision within timeline, granting motion to dismiss for want of administrative exhaustion; rejecting application of futility exception, stating that new IHO was appointed and announced plan to decide case in six weeks, and parents subsequently appealed IHO decision to SRO who completed exhaustion of case after district court action had been filed; further reasoning that exhaustion would be futile with regard to requested relief of removal of non-attorneys from hearing officer list, but finding that parents lacked standing to make claim; denying motion to amend to include challenge to review officer decision on ground that action as filed was not within court's jurisdiction); denying motion to amend complaint to challenge SRO decision issued after filing of district court action but noting that plaintiffs could refile case), *aff'd*, 648 F. App'x 122, 67 IDELR 196 (2d Cir. May 6, 2016) (noting that delay was occasioned by medical condition of first IHO and recusal by two later-appointed IHOs)

Walsh v. King, No. 1:14-CV-1078 LEK/RFT, 2014 WL 4630691, 64 IDELR 39 (N.D.N.Y. Sept. 12, 2014) (reserving decision on motion for preliminary injunction to place child at private residential school, but enjoining SRO to issue decision within 14 days in case in which IHO issued decision in December, 2013 holding that district should fund private placement, district appealed to SRO on Jan. 21, 2014, parents answered and cross-appealed on Jan. 31, 2014, briefing was completed by end of February, 2014, but

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decision had not been issued as of September, 2014, and district did not instate child into private placement)

Content of Due Process Decisions

P.C. v. Rye City Sch. Dist., No. 15-CV-6006, 2017 WL 507298, 117 LRP 4653 (S.D. N.Y. Feb. 7, 2017) (in case of child with ADHD, developmental coordination disorder, and sensory integration dysfunction, whose family sought three school years of tuition, affirming decisions of IHO and SRO in favor of school district; reasoning that 2010-11 IEP offered greater services than previous IEP and would likely have yielded educational progress in mainstream setting; further reasoning that SRO did not rely on testimony on availability of psychologist for extra counseling that was characterized by parents as retrospective; as to 2011-12, noting that many goals were changed from previous IEP even though same services were offered, and goals that were unchanged had not been met during previous year; also finding that parents participated meaningfully in decision making process; as to 2012-13, concluding that information about profile of district's proposed class placement was known to parents before specific program was announced and so evidence was not retrospective; further reasoning that inadvertent omission of speech-language goals from IEP was procedural error but did not impede parents' ability to participate, and that relevant services were adequate; deferring to SRO decision; criticizing IHO decision as rambling, incoherent, contradictory, and incomplete and directing counsel for defendant to send copy of judicial decision and IHO decision to NYSED official responsible for IHO certification)

State Level Appeals

C.R. v. New York City Dept. of Educ., No. 15 Civ. 3051, 2016 WL 5793415, --- F. Supp. 3d ---, 68 IDELR 225 (S.D.N.Y. Sep. 30, 2016) (in case of five year old child with speech and language impairment, behavioral and other challenges, and some features of autism, whose IEP provided for 12:1:1 class, speech-language and occupational therapy, and counseling, but whose parents rejected proposed IEP and enrolled him in private school, reversing IHO decision and affirming SRO decision, holding that SRO is to review IHO decision de novo and that SRO clearly explained basis for her conclusions)

S.Y. v. N.Y.C. Dept. of Educ., No. 14 Civ. 6277, 2016 WL 5806859, at *9, --- F. Supp. 3d ---, 68 IDELR 230 (S.D. N.Y. Sep. 28, 2016) (in case of teen with autism offered placement in 6:1:1 program at specialized public school, reversing SRO decision that had overturned IHO decision, and awarding tuition reimbursement for continued attendance at private school; stating that courts must defer to reasoned conclusions of SRO but if SRO rejects more thorough and carefully considered IHO decision, court may instead defer to IHO)

S.B. v. New York City Dep't of Educ., 174 F. Supp. 3d 798, 67 IDELR 140 (S.D.N.Y. Mar. 30, 2016) (in case of eight-year-old child with autism, who was in public school special education class, then was removed by parent and placed in private program after

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independent evaluations recommended 1:1 ABA, intensive speech-language services, and intensive occupational therapy, who was offered 6:1:1 class with speech and language, occupational therapy, and physical therapy, but no 1:1 ABA, reversing SRO decision and affirming IHO decision; ordering reimbursement; noting that SRO did not consider non-district witnesses and that IHO decision was better reasoned and more thorough)

J.E. v. Chappaqua Cent. Sch. Dist., No. 14 CIV. 3295, 2015 WL 4934535, at *5, 66 IDELR 37 (S.D.N.Y. Aug. 17, 2015) (in case of 14-year-old with autism in which parents sought tuition reimbursement, denying school district's motion for judgment on pleadings based on parents' failure to comply with procedural requirements for SRO appeal of IHO decision by filing 21 page appeal, 1 page beyond page limit, and using smaller than 12-point font, reasoning that appeal was timely and that SRO resolved merits of case in extensive written decision, stating, "It is illogical to conclude that Plaintiffs have failed to exhaust administrative remedies when their claims were fully assessed on the merits by the SRO."; further stating that goals of exhaustion were achieved)

E.E. v. New York City Dep't of Educ., No. 13 CIV. 06709, 2014 WL 4332092, 64 IDELR 15 (S.D.N.Y. Aug. 21, 2014) (in case of child with autism spectrum disorder, feeding disorder, speech apraxia and other disabilities, affirming SRO decision that found defendant's proposed program appropriate; stating that delay in issuing SRO decision long past deadline did not support giving less deference to determination)

<u>Maintenance of Placement</u>

Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456-57, 65 IDELR 255 (2d Cir. June 26, 2015) (in case of child with autism whose public school services were terminated after dispute in which parent placed child in private school outside school district and privately purchased some but not all related services previously provided by school district, reversing district court order reimbursing parent only for services that parent paid for upfront during period in which stay-put right applied; affirming decision in favor of district on underlying procedural and substantive claims regarding IEP; also holding that failure to offer IEP after enrollment in private school violated IDEA but that school selected by parent was not appropriate; stating that stay-put claim is not subject to exhaustion and that stay-put applied despite temporary nature of IEP, stating, "We therefore conclude 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. In this case, the Board owes reimbursement in the amount the Parent expended for services the Board was required to provide, plus compensatory education to fill the gap of required services that the Parent did not fund."; also stating that nature of compensatory services should be adjusted to meet present needs of child), *cert. denied*, 136 S. Ct. 2022 (May 16, 2016)

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Dervishi v. Stamford Bd. of Educ., 653 F. App'x 55, 68 IDELR 3 (2d Cir. June 27, 2016) (upholding IEP offered by school district, reasoning that parents had opportunity to participate in decision about educational placement and that placement and services were appropriate, but reversing lower court decision and finding that IEP did not create stay-put placement; holding that placement established by settlement was stay-put placement, and ordering reimbursement)

A.W. v. Board of Educ., Wallkill Cent. Sch. Dist., No. 1:14–CV–1583, 2015 WL 3397936, 65 IDELR 237 (N.D.N.Y. May 26, 2015) (in case of child with dyslexia and behavior problems, denying injunction to maintain child at private school and pay tuition there, reasoning that although IHO ruling on case filed in 2013 found that school district failed to offer child appropriate education during school years from 2011 to 2014, SRO in 2014 affirmed decision as to 2011-12 but found that private school was not appropriate for 2012-13 and 2013-14, so SRO decision did not constitute agreement with parents; rejecting parents' argument that they relied on IHO decision and incurred obligation for costs), *adopting* 65 IDELR 211 (N.D.N.Y. Apr. 21, 2015) (magistrate judge recommendation)

<u>Standard of Review of Due Process Decisions</u>

A.M. v. New York City Dep't of Educ., 845 F.3d 523, 534, 69 IDELR 51 (2d Cir. Jan. 10, 2017) ("[A]lthough courts must defer to the reasoned conclusions of the SRO as the final state administrative determination, should we find the SRO's conclusions unpersuasive even after appropriate deference is paid, we may consider the IHO's analysis, which is also informed by greater educational expertise than that of judges, rather than rely exclusively on our own less informed educational judgment." (quotation marks, citations, brackets and ellipses omitted))

T.K. v. New York City Dep't of Educ., 810 F.3d 869, 875, 67 IDELR 1 (2d Cir. Jan. 20, 2016) ("We review de novo a district court's award of summary judgment in an IDEA case. C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 77 (2d Cir.2014). With respect to state administrative decisions, we engage in an independent, but circumscribed, review, 'more critical ... than clear-error review but . . . well short of complete de novo review.' Id . (quotation marks omitted). We give 'due weight' to the state proceedings, affording particular deference where 'the state hearing officers' review has been thorough and careful.' *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 240–41 (2d Cir.2012) (quotation marks omitted). We are also mindful that federal courts lack "the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Id.* at 240 (quotation marks omitted)")

<u>Preclusion Doctrine</u>

Luo v. Baldwin Union Free Sch. Dist., No. 16-421-cv, 2017 WL 391991, --- F. App'x. ----, 69 IDELR 88 (2d Cir. Jan. 27, 2017) (affirming district court's holding that parent was collaterally estopped from challenging reliance by school district on evaluation, when

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reliance on evaluation was upheld in prior action that challenged school district's reliance on same evaluation in formulation of earlier IEP), *aff'ing* No. 12–CV–3073, 2014 WL 3943099 (E.D. N.Y. Aug. 12, 2014), 2016 WL 154091 (E.D.N.Y. Jan. 12, 2016)

Tuition Reimbursement Issues

A.M. v. New York City Dep't of Educ., 845 F.3d 523, 534, 69 IDELR 51 (2d Cir. Jan. 10, 2017) (describing tuition reimbursement test as "'(1) the DOE [Department of Education] must establish that the student's IEP actually provided a FAPE; should the DOE fail to meet that burden the parents are entitled to reimbursement if (2) they establish that the unilateral placement was appropriate and (3) the equities favor them.'" (quoting M.W. v. New York City Dep't of Educ., 725 F.3d 131, 135 (2d Cir. 2013))

Hardison v. Board of Educ. of the Oneonta City Sch. Dist., 773 F. 3d 372, 387, 64 IDELR 161 (2d Cir. Dec. 3, 2014) (overturning district court's partial reversal of SRO decision, which had reversed IHO's tuition reimbursement order; reasoning that district court should defer to SRO determination that parents failed to put forward adequate information about services at private placement and how services related to student's educational progress; stating, "After marshalling the evidence, the SRO concluded that to make an appropriate determination he needed more specific information as to the types of services provided to A.N.H. and how those services tied into A.N.H.'s educational progress. Expertise in an area speaks not only to the ability to reach the right conclusion about a given factual situation but also the ability to discern how much evidence is required to reach a supportable conclusion at all.")

A.W. v. Board of Educ. of the Wallkill Cent. Sch. Dist., No. 1:14–CV–1583, 2016 WL 4742297, 68 IDELR 164 (N.D.N.Y. Sept. 12, 2016) (in case of child diagnosed with dyslexia and ADHD, overturning SRO determination that upheld placement for only one of three years, even though placement did not completely resolve child's behavioral issues, and granting full tuition reimbursement for all three years despite financial assistance to parents from Kildonan, when parents remained legally obligated to pay), *appeal withdrawn*, No. 16-3464 (2d Cir. Nov. 23, 2016)

S.C. v. Katonah-Lewisboro Cent. Sch. Dist., 175 F. Supp. 3d 237, 67 IDELR 184 (S.D.N.Y. Mar. 30, 2016) (in case of teen with multiple disabilities including cognitive impairment and distractibility, reversing SRO decision and granting tuition reimbursement; finding equities to favor reimbursement, even though parents entered into private school enrollment contract before IEP was offered, in light of fear of losing enrollment slot)

Reimbursement for Related Services

Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456-57, 65 IDELR 255 (2d Cir. June 26, 2015) (in case of child with autism whose public school services were terminated after dispute in which parent placed child in private school outside school district and

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privately purchased some but not all related services previously provided by school district, reversing district court order reimbursing parent only for services that parent paid for upfront during period in which stay-put right applied; affirming decision in favor of district on underlying procedural and substantive claims regarding IEP; stating, "We therefore conclude 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. In this case, the Board owes reimbursement in the amount the Parent expended for services the Board was required to provide, plus compensatory education to fill the gap of required services that the Parent did not fund."; also stating that nature of compensatory services should be adjusted to meet present needs of child), *cert. denied*, 136 S. Ct. 2022 (May 16, 2016)

L.K. v. New York City Dep't of Educ., No. 14-cv-7971, 2016 WL 899321, 67 IDELR 123 (S.D.N.Y. Mar. 1, 2016) (in case of child with autism, pervasive development disorder, and apraxia, challenging determination of SRO that although parental placement of child in private school was appropriate, equitable considerations supported reduced reimbursement for some services provided child at home, affirming SRO decision on ground that services provided at home solely for purpose of generalizing child's skills outside of school context need not be reimbursed; stating that in order to reduce reimbursement, particularized finding would need to be made whether child needed as many sessions as received in order to make meaningful educational progress, but concluding determination did not need to be made because services were paid for as part of pendency entitlement; collecting and analyzing cases on reduction in reimbursement due to equitable considerations; finding parents to be prevailing party for purposes of fees), *aff'd in part and remanded in part*, No. 16-746, 2017 WL 219103, --- F. App'x ----, 69 IDELR 90 (2d Cir. Jan. 19, 2017) (remanding for determination whether parents should be reimbursed for additional occupational therapy obtained for child but not covered under pendency order, whether amount offered by school system to reimburse parents for costs of services covered by pendency order was reasonable given New York City market rates for service providers, and what home and community based services child needs in order to receive appropriate education going forward, considering current information about child's condition)

Services for Students in Juvenile Detention Facilities and Penal Settings

Handberry v. Thompson, No. 96 Civ. 6161, 2015 WL 10570793, 66 IDELR 286 (S.D.N.Y. Dec. 2, 2015) (magistrate judge recommendation) (modifying injunction covering services for school-eligible inmates in jails, in accordance with special master's amended report and with court of appeals mandate applying Prison Litigation Reform Act, which requires relief to be based on violations of federal law, rather than exclusively state law; requiring minimum three hours of educational services be given each eligible inmate per school day, including inmates in restricted housing, requiring escorts for travel to instruction site, if needed; requiring special education and related services for

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students who have been identified as students with disabilities, allowing least restrictive modifications of IEPs or service plans as necessitated by legitimate penal objectives; appointing monitor), *adopted*, 2016 WL 1268265, 116 LRP 48785 (S.D.N.Y. Mar. 31, 2016)

Dear Colleague, 64 IDELR 249 (OSEP & OSERS Dec. 5, 2014) (detailing requirements for education of children with disabilities in correctional facilities, stating: "Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities and their parents.")

Selected Cases from Other Jurisdictions

Appropriate Education-Behavioral Services: *Endrew F. v. Douglas Cnty. Sch. Dist. RE 1*, 798 F.3d 1329, 66 IDELR 31 (10th Cir. Aug. 25, 2015) (in case of child with autism and ADHD, affirming decision that school district offered child appropriate education; holding that reporting of progress toward IEP goals was adequate to permit meaningful parental participation; further holding that failure to conduct FBA and make formal BIP did not deny child appropriate education, noting that when district considered child's behavioral needs and did not make any disciplinary change in child's placement; also affirming ALJ's conclusion that district provided child appropriate education when modifications of IEP objectives showed educational progress even though some objectives carried over from year to year; reaffirming some-benefit standard for appropriate education challenges and rejecting meaningful-benefit standard), *petition for cert. granted*, No. 15-827 (Sept. 29, 2016)

Evaluation. *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 67 IDELR 227 (9th Cir. May 23, 2016) (in case of child ultimately determined to have autism spectrum disorder, ruling that district violated IDEA by not evaluating child in all areas of suspected disability, specifically by failing to assess him for autism on basis of informal observation by district staff member that he did not appear autistic, despite district's awareness of child's symptoms of autism; further holding that district may not rely on another agency's assessment without guaranteeing that the other agency has complied with IDEA requirements; also holding that procedural violations denied child appropriate education in that not assessing child for autism deprived IEP team of needed information concerning developmental abilities and impaired IEP team's ability to recommend appropriate services, while also limiting parents' ability to participate in IEP development), *petition for cert. filed*, No. 16-672 (U.S. Nov. 21, 2016)

Independent Evaluation. *Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961, 67 IDELR 2 (5th Cir. Jan. 13, 2016) (in case of child with autism whose parents obtained school district approval for independent evaluation at public expense, but whose request for reimbursement was rejected on ground evaluation did not meet state criteria, vacating and remanding district court decision in favor of school district; stating that rejection of reimbursement for evaluation should be reviewed under de novo standard; holding that school district did not waive right to contest reimbursement by not initiating hearing,

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that it did not delay in demonstrating evaluation's noncompliance, and that burden of persuasion in district court challenging administrative decision that independent evaluation was not proper fell on parents, but that independent evaluation's substantial compliance with educational agency criteria suffices for reimbursement; applying $3,000 cap when parent failed to respond when asked to demonstrate unique circumstances supporting exemption from cap)

Eligibility. *L.J. v. Pittsburg Unified Sch. Dist.*, 835 F.3d 1168, 68 IDELR 121 (9th Cir. Sept. 1, 2016) (in case of child with diagnoses of bipolar disorder, oppositional defiant disorder and ADHD who displayed suicidal behavior, noting that parties agreed child met standards for specific learning disability, other health impairment, and serious emotional disturbance, and concluding that child should have been found eligible for special education because he was in need of special education, as shown by fact that his successful academic performance occurred when he was provided special services, including specially designed mental health services, one-on-one paraeducator, extensive clinical interventions from behavior specialist, and accommodations such as teacher oversight, additional time for classwork or tests, shortened assignments, permission to leave classroom, and being assigned teacher with special education experience, services not provided to general education students; noting student's academic performance in average or above average range, but also noting troubling behavior and academic issues interfering with his education; further holding that failure to disclose assessments, treatment plans, and progress notes interfered with parent's opportunity to participate IEP development)

Doe v. Cape Elizabeth Sch. Dist., 832 F.3d 69, 81, 68 IDELR 61 (1st Cir. Aug. 5, 2016) (vacating district court decision that found student not eligible for special education on basis of overall academic achievement and various above-average reading test results but without taking into account reading fluency deficit said to constitute specific learning disability; further holding that district court did not make independent judgment regarding additional evidence proffered by parents, such as recent reading fluency data, and deferred inappropriately to hearing officer determinations; stating that eligibility inquiry for student said to have reading fluency deficit should consider measures relevant to reading fluency, and adequacy of achievement must be in area of reading fluency, not academic record as whole, concluding, "[W]hen the risk is high that a child's overall academic performance could mask her learning disability because of innate or ancillary factors specific to that child, and the regulations included that disability category to mitigate such masking, . . . generalized academic measures—even when proven to be a fair indicator of the child's learning disability—must have high probative value to outweigh specific disability measures in identifying an SLD." (citation omitted))

Compensatory Education. *M.S. v. Utah Sch. for the Deaf & Blind*, 822 F.3d 1128, 67 IDELR 195 (10th Cir. May 10, 2016) (in case of student with blindness, hearing impairment, autism, and cognitive impairment, vacating decision of district court that had remanded issue of residential placement at which compensatory services would be

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delivered to IEP team, and directing district court to resolve issue of residential placement, stating that delegating choice to IEP team effectively puts employees of school in position of hearing officer and could snare student in endless litigation cycle)

Boose v. District of Columbia, 786 F.3d 1054, 1058, 65 IDELR 191 (D.C. Cir. May 26, 2015) (in case in which parent alleged that school did not comply with child-find obligations and in failing to evaluate child with ADD, ADHD, and other conditions, hearing officer ruled that school system had not denied child appropriate education up to point of hearing, but parent then asked for evaluation and had to wait three months before school system evaluated child, ultimately conducting evaluation and producing IEP that parent does not challenge, reversing dismissal of action seeking compensatory education for delay in evaluation and delivery of services; determining that case was not moot; stating: "DCPS, moreover, conflates the compensatory education Boose seeks with the evaluation and IEP it offered. Specifically, it argues that the evaluation and the IEP satisfied Boose's request for compensatory education. But that cannot be. As noted above, and as DCPS concedes, the IEP included no compensatory education. IEPs are forward looking and intended to "conform[ ] to . . . [a] standard that looks to the child's present abilities," whereas compensatory education is meant to "make up for prior deficiencies." *Reid* [*v. District of Columbia*], 401 F.3d at 522–23. Unlike compensatory education, therefore, an IEP "carries no guarantee of undoing damage done by prior violations," *Reid*, 401 F.3d at 523, and that plan alone cannot do compensatory education's job. So the mere fact that DCPS offered A.G. an IEP cannot render moot Boose's request for compensatory education.")

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