The Aftermath of R.E.: Prospective Challenges to a Child's Proposed Placement

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All men make mistakes. But a good man yields when he knows his course is wrong, and repairs the evil. The only sin is pride.

- Sophocles

I. INTRODUCTION

A. The Second Circuit's decision in *R.E. v. New York City Department of Education* is "less than a model of clarity."

B. Post *R.E.*, district courts in this Circuit, as well as the State Review Office, have held in unilateral placement cases that a student must physically attend a proposed placement before challenging the recommended school's ability to implement the IEP.

C. *R.E.*, however, does not foreclose all prospective challenges to a student's proposed placement.

D. This outline provides a current and concise overview of the case law addressing this specific issue.

II. *R.E.* AND ITS AFTERMATH

A. *R.E.* concerned reimbursement claims by several sets of parents of children on the autism spectrum. The parents primarily challenged the district's use of "retrospective testimony" to rehabilitate an otherwise deficient IEP.[1] The Court held that the district could not use retrospective testimony to rehabilitate an otherwise deficient IEP because the "IEP must be evaluated prospectively as of the time

[1] *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012). The Court defined retrospective testimony as, "testimony by district witnesses that certain services not listed on the student's IEP would have been provided to the student had s/he attended the district's proposed school." *Id.*

of its drafting."[2] The Court adopted a modified "four corners" rule – "testimony that materially alters the [IEP] is not permitted, testimony may be received that explains or justifies the services listed in the IEP."[3]

B. The Court's decision further observed that the parents of one of the children "d[id] not seriously challenged the substance of the IEP[] … [and] [i]nstead [] argue[d] that the written IEP would not have been effectively implemented at [the proposed placement school]."[4] Specifically, the parents argued that the IEP would not have been effectively implemented at the proposed school because a "large percentage of students at [the proposed school] have been and continue to be 'underserved' for related services."[5] The Court rejected the argument, "concluding that '[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement' because the provision of a FAPE must be evaluated 'prospectively.'"[6]

C. In this "unremarkable proposition" lies the confusion, resulting in some disagreement among district courts in implementing the holding in *R.E.*[7] Though most courts appear to agree that a "challenge to a proposed placement will be successful where the evidence establishes that the placement would be unable to satisfy the IEP's requirements,"[8] some courts have read *R.E.* to disallow any evidence regarding the proposed placement's ability or inability to provide services required by an IEP because they consider said

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[2] *Id.*
[3] *Id.*
[4] *M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015) *quoting R.E. v. New York City Dep't of Educ*, 694 F.3d 167 (2d Cir. 2012).
[5] *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012).
[6] *M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015) *quoting R.E. v. New York City Dep't of Educ*, 694 F.3d 167 (2d Cir. 2012).
[7] *M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015).
[8] *S.B. v. New York City Dep't of Educ.*, 65 IDELR 264 (S.D.N.Y. 2015) *citing D.C. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494) (S.D.N.Y. 2013) (holding that the student was denied a FAPE when the IEP required the student to be placed in a "seafood free environment" but the mother was informed during a school visit that the school cafeteria was not seafood free); *J.C. v. New York City Dep't of Educ.*, 65 IDELR 137 (S.D.N.Y. 2015) ("If the assigned school cannot meet the requirements of the IEP, then 'the Department has by definition failed to deliver a FAPE.'") (*quoting D.C. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494 (S.D.N.Y. 2013)); *Scott v. New York City Dep't of Educ.*, 6 F. Supp. 3d 424 (S.D.N.Y. 2014) (finding that the student was denied a FAPE when the parent was informed by school staff that the student would be enrolled in a 12:1:1 class rather than a 6:1:1 class required by the IEP).

evidence to be *retrospective* and not allowed.[9] Others have allowed it if the alleged defects were reasonably apparent to either the parent or the school district when the parent rejected the proposed school, even if the student never enrolled in the school.[10]

III. THE NEED FOR *M.O.*

A. A categorical ban on any evidence to determine if a proposed placement will be able to implement the IEP would allow a school district "carte blanche" to assign the student to a school that could not fulfill the requirements of the student's IEP[11] and "require parents to send their child to a facially deficient placement school prior to challenging that school's capacity to implement their child's IEP."[12] Though a school district is not required to designate a specific school on the IEP, it is also not free to assign the student to a school that cannot satisfy the IEP's requirements.[13]

B. Parents have a right not only to participate in the development of the student's IEP but also in the placement selection process by providing input.[14] Parents also have a continuing participatory right to obtain timely and relevant information about the school district's proposed school placement so as to enable them to assess and comment on the appropriateness of the proposed school and its ability to satisfy the IEP requirements.[15]

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[9] *See, e.g., J.C. v. New York City Dep't of Educ.*, 65 IDELR 137 (S.D.N.Y. 2015); *N.S. v. New York City Dep't of Educ.*, 63 IDELR 157 (S.D.N.Y. 2014).
[10] *See, e.g., Scott v. New York City Dep't of Educ.*, 6 F. Supp 3d 424 (S.D.N.Y. 2014) *citing E.A.M. v. New York City Dep't of Educ.*, 59 IDELR 274 (S.D.N.Y. 2012). *Cf. J.W. v. New York City Dep't of Educ.*, 65 IDELR 94 (S.D.N.Y. 2015) (rejecting the school district's suggestion that parents can never object to a recommended school where the parents choose not to enroll their child at that school); *J.F. v. New York City Dep't of Educ.* 61 IDELR 78 (S.D.N.Y. 2013) ("While it is possible to read *R.E.*'s holding broadly enough to exclude all prospective challenges to a student's classroom placement, the Court declines to do so absent more explicit instruction from the Second Circuit.").
[11] *S.B. v. New York City Dep't of Educ.*, 65 IDELR 264 (S.D.N.Y. 2015) *citing T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009).
[12] *Id.*
[13] *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009).
[14] *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009) *citing White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003).
[15] *F.B. v. New York City Dep't of Educ.*, 66 IDELR 94 (S.D.N.Y. 2015); *C.U. v. New York City Dep't of Educ.*, 23 F. Supp. 3d 210 (S.D.N.Y. 2014); *V.S. v. New York City Dep't of Educ.*, 25 F. Supp. 3d 295 (E.D.N.Y. 2014); *D.C. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494 (S.D.N.Y. 2013). *See also T.F. v. New*

C. The Second Circuit, therefore, found it necessary to clarify the proper reach of its holding in *R.E.* and it seems clear now that evidence regarding the proposed school may be considered when determining whether the proposed placement school is able to comply with the student's IEP. In *M.O. v. New York City Department of Education*,[16] the Court clarified that testimony explaining how the IEP would be implemented in the proposed school is sufficiently prospective (not retrospective) and may be considered by a court. Specifically, the Court explained that challenges to a district's proposed placement must be evaluated at "the time of the parents' placement decision."[17] The inquiry for the court is "whether, at the time [the parent] was actually considering the proposed placement, the school *could* offer [services] in line with the IEP."[18]

D. *M.O.*, however, makes a "distinction between deciding that a placement was inappropriate because 'a school with the capacity to implement a given student's IEP will simply fail to adhere to that plan's mandates …' and finding that the placement was inappropriate because 'a proposed school lacks the services required by the IEP."[19] Reaching the former conclusion would be sufficiently speculative and would not be an appropriate basis for unilateral placement.[20] But the same would not be true as to the latter, as the findings would not be "entirely 'speculative' in the same sense as vague predictions of IEP implementation failure."[21]

E. Accordingly, courts and hearing officers may consider relevant prospective information about the proposed placement gathered while the parent investigated the adequacy of the proposed

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York City Dep't of Educ., 66 IDELR 136 (S.D.N.Y. 2015) ("The [school district's] failure to respond to [parent's] letters [seeking information] is troubling.").
[16] *M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015).
[17] *Id.*
[18] *M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015) *citing B.R. v. N.Y.C. Dep't of Educ.*, 910 F. Supp. 2d 670 (S.D.N.Y. 2012) (emphasis added).
[19] *G.B. v. New York City Dep't of Educ.*, 115 LRP 52866 (S.D.N.Y. 2015) *quoting M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015).
[20] *See R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012). *Cf. J.F. v. New York City Dep't of Educ.* 61 IDELR 78 (S.D.N.Y. 2013) ("[T]he Court reads *R.E.* to hold that evidence of historical imperfection in a school's implementation of other students' IEPs is too speculative a basis to challenge the ability of a school to implement the IEP of a student who has never attended that school.").
[21] *E.P. v. New York City Dep't of Educ.*, 66 IDELR 49 (E.D.N.Y. 2015).

placement.[22] But only challenges in which it is established that the proposed school placement is wholly incapable of providing the services listed in the IEP will be successful.[23]

IV. REBUTTABLE PRESUMPTION

A. Courts presume that the placement school will fulfill its obligation under the IEP.[24]

B. Though the school district bears the burden of proof in the administrative hearing regarding the provision of FAPE to the student,[25] "it discharges its duty by establishing that a student's IEP is substantively and procedurally adequate,"[26] which would encompass placement inclusive of the designated school. The parents must then establish that the school district would not be able to implement the written plan.[27] Notably, the parents would have to identify a specific requirement in the IEP that the placement will not satisfy.[28] Such a challenge by the parents to the proposed placement would "trigger a duty on the part of the school district to provide evidence regarding [the placement school's] adequacy."[29]

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[22] *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012); *M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015); *S.B. v. New York City Dep't of Educ.*, 65 IDELR 264 (S.D.N.Y. 2015).
[23] *See id.*
[24] *See, e.g.*, *J.W. v. New York City Dep't of Educ.*, 65 IDELR 94 (S.D.N.Y. 2015); *N.S. v. New York City Dep't of Educ.*, 63 IDELR 157 (S.D.N.Y. 2014); *B.K. v. New York City Dep't of Educ.*, 12 F. Supp. 3d 343 (E.D.N.Y. 2014).
[25] N.Y. Educ. Law § 4404(1)(c). *But see F.L. v. New York City Dep't of Educ.*, 553 F. App'x 2, n.1 (2d Cir. 2014) (unpublished) ("[W]e need not decide the open question in this circuit as to whether N.Y. Educ. Law § 4404(1)(c) is binding on district court review of an IDEA claim.").
[26] *N.S. v. New York City Dep't of Educ.*, 63 IDELR 157 (S.D.N.Y. 2014).
[27] *See N.S. v. New York City Dep't of Educ.*, 63 IDELR 157 (S.D.N.Y. 2014) *citing M.O. v. New York City Dep't of Educ.*, 996 F. Supp. 2d 269 (S.D.N.Y. 2014), *aff'd*, 793 F.3d 236 (2d Cir. 2015); *A.M. v. New York City Dep't of Educ.*, 964 F. Supp. 2d 270 (S.D.N.Y. 2013); *R.C. v. Byram Hills Sch. Dist.*, 906 F. Supp. 2d 256 (S.D.N.Y. 2012). *But see B.R. v. New York City Dep't of Educ.*, 910 F. Supp. 2d 670 (S.D.N.Y. 2012) (finding an SRO opinion "legally erroneous, for it implicitly reversed the burden on the school district to prove that the proposed placement was adequate") (*citing* N.Y. Educ. Law § 4404(1)(c)).
[28] *See J.W. v. New York City Dep't of Educ.*, 65 IDELR 94 (S.D.N.Y. 2015).
[29] *B.P. v. New York City Dep't of Educ.*, 115 LRP 58656 (2d. Circuit 2015) (unpublished) *citing M.O. v. New York City Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015).

C. The parents' responsibility may be difficult to meet. "There should be few circumstances … in which parents can, if there is an adequate IEP, successfully challenge a placement if their child never attended the school."[30]

V. MATERIAL FAILURE TO IMPLEMENT

A. The failure to provide services in conformity with a student's IEP can constitute a denial of FAPE.[31]

B. *R.E.*, however, makes clear that parents cannot obtain reimbursement simply by hypothesizing that a school won't adhere to an IEP. "[T]he appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice.'"[32]

C. The Second Circuit has not squarely addressed the question of what standard governs failure-to-implement claims under the IDEA. The consensus approach among New York federal courts, including the Second Circuit, has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*[33] [34] Accordingly, "a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."[35]

D. Thus, in reviewing failure-to-implement claims, courts look to ascertain whether the aspects of the IEP that were not followed

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[30] *N.S. v. New York City Dep't of Educ.*, 63 IDELR 157 (S.D.N.Y. 2014). *See also J.W. v. New York City Dep't of Educ.*, 65 IDELR 94 (S.D.N.Y. 2015).
[31] *See* 34 C.F.R. 300.17(d).
[32] *F.L. v. New York City Dep't of Educ.*, 553 F. App'x 2 (2d Cir. 2014) (unpublished) *quoting R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, n.3 (2d Cir. 2012).
[33] 200 F.3d 341 (5th Cir. 2000), *cert. denied*, 531 U.S. 817 (2000).
[34] *See, e.g., A.P. v. Woodstock Bd. of Educ.*, 370 F. App'x 202 (2d Cir. 2010); *V.M. v. Colonie Cent. Sch. Dist.*, 954 F. Supp. 2d 102 (N.D.N.Y. 2013); *D.D-S. v. Southold Union Free Sch. Dist.*, 57 IDELR 164 (E.D.N.Y. 2011). *See also R.C. v. Byram Hills Sch. Dist.*, 906 F. Supp. 2d 256 (S.D.N.Y. 2012) (citing *D.D-S.* for support that the failure to provide resource room for a sixth day "is merely such a *de minimis* failure and does not constitute a denial of FAPE").
[35] *D.D-S. v. Southold Union Free Sch. Dist.*, 57 IDELR 164 (E.D.N.Y. 2011), *aff'd*, 506 F. App'x 80 (2d Cir. 2012) *quoting Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

were "material."[36] Only material failures to implement an IEP violate the IDEA.[37] "A material failure occurs when the services a school provides to a disabled child fall significantly short of the services required by the child's IEP."[38] Minor discrepancies are insufficient.[39]

E. "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail" on a failure-to-implement claim.[40] "Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld."[41]

F. This said, "the child's educational progress, or lack of it, may be probative of whether there has been a significant shortfall in the services provided."[42]

VI. PRACTICAL CONSIDERATIONS

A. In implementing *R.E.* and *M.O.*, keep the following in mind when –

1. preparing for the prehearing conference and/or hearing:

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[36] *See*, *e.g.*, *A.P. v. Woodstock Bd. of Educ.*, 370 F. App'x 202 (2d Cir. 2010); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, n.3 (8th Cir. 2003); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), *aff'd*, 114 LRP 32783 (D.C. Cir. 2007).
[37] *See id.*
[38] *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007).
[39] *Id.*
[40] *Id. Cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty.,* 303 F.3d 523, n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA).
[41] *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) *citing Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007); *S.S. v. Howard Road Acad.,* 585 F. Supp. 2d 56 (D.D.C. 2008); *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, (D.D.C. 2008); *Catalan,* 478 F. Supp. 2d 73 (D.D.C. 2007).
[42] *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. 2007). *See*, *e.g.*, *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F. Supp. 2d 996 (S.D. Tex. 2005) (rejecting the parents' implementation claim – "if the IEP would have been acceptable with the level of services actually provided, then the implementation must have been adequate").

a. review the decisions cited in this outline and these practical pointers.

b. review the due process complaint to identify whether the issue is one of placement (possibly among others) versus a failure to implement issue and organize your clarifying questions (e.g., those set forth below).

2. at the prehearing conference or hearing:

a. clarify whether the parties dispute the IEP itself (unless it is clearly being challenged in a separate claim).

b. note your understanding of the result of the *R.E.* and *M.O.* decisions and seek the parties' agreement or disagreement of your understanding. Discuss and try to resolve any disagreement.

c. confirm that the issue (possibly among others) is one of placement and not the failure to provide services included in the IEP.

d. ask the school district to identify the school(s) that was/were recommended/designated to implement the IEP, and confirm this information with the parents.

e. ask the school district whether the placement school is able to fulfill its obligation under the IEP as written.

f. ask the parents whether the identified school(s) is/are the one(s) they claim cannot implement the IEP. If so, ask the parents for <u>all</u> the specific reasons why they believe the identified school(s) cannot implement the IEP, and when they were made aware of their concerns.

g. ask the school district to respond to each reason regarding each school.

h. should any one or more of the reasons noted by the parents raise a question as to jurisdiction, ask the parties for authority in support of their respective viewpoint. Render a decision on the jurisdictional question then, or shortly thereafter in writing.

i. ask the parents to identify the placement they claim is appropriate.

B. In addressing a failure to implement claim –

1. in preparing for the prehearing conference and/or hearing:

a. review the standard set forth in *Bobby R.* and related cases, as well as these practical pointers.

b. review the due process complaint to tentatively identify the claimed failures to implement the IEP and organize your clarifying questions.

2. at the prehearing conference or hearing:

a. note your understanding of the standard in *Bobby R.* regarding the failures needing to be "material" and seek the parties' agreement or disagreement.

b. with respect to <u>each</u> IEP allegedly not implemented, ask –

i. what aspect(s) of the IEP was/were not implemented?

ii. with regard to <u>each</u> aspect not implemented, during what period of time chronologically did the failure occur?

iii. if the failure was regarding accommodations, in what classes/activities were the accommodations not provided?

iv. whether the failure to provide the program/service/accommodation potentially impacted any other aspects of the IEP and/or placement (in order to establish whether a broader remedy is required should you find a material failure).

v. what remedy is claimed to be appropriate for <u>each</u> alleged failure, should you find a material failure?

vi. if compensatory education is sought, for each alleged failure, ask the parents to identify the

form of services (e.g., tutoring, related services); how much is being sought (e.g., hours/minutes per day/week or monthly); by whom (e.g., teacher, aides, private provider); and, when (e.g., before school, during school, after school, over summer, as scheduled by parents).

3. in writing decision, do not look to or rely upon the findings of "material" and/or appropriate remedies in other cases involving what appear to be failures that are "similar" in terms of type or amount as a basis for your findings/remedies. Each case is fact specific and the determination of "material" and the appropriate remedy, if any, are totally dependent upon the context of the situation in which they occur.

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