

Special Education Year in Review 2023

Presented by:

Ryan L. Everhart, Esq. and Madeline G. Cook, Esq.

Albany | Buffalo | Greensboro | Hackensack | New York City | Palm Beach | Rochester | Saratoga Springs | Toronto

www.hodgsonruss.com

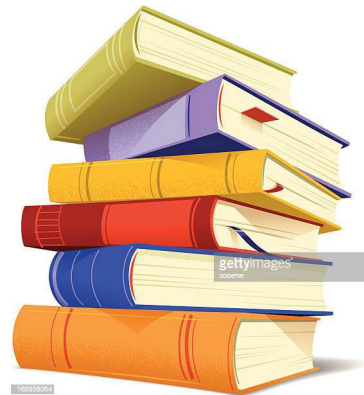


IDEA General Supervision Policy

- On July 24, 2023, the Office of Special Education Programs (“OSEP”) released updated policy guidance regarding the IDEA’s “general supervision” requirements.
- OSEP reminded state authorities of their duties to supervise local school districts and assure that they are in full compliance with the IDEA.
- NYSED may revise/increase their monitoring of local schools’ special ed programs in light of this policy guidance.

Section 200.5 Amendments

The State Education Department has proposed changes to Section 200.5 of the Commissioner regulations concerning impartial due process hearings. These proposals are currently scheduled to be reviewed by the Board of Regents this month.



Encouragement of Mediation in Special Ed Disputes

- SED commented that mediation is a “viable but underutilized” mechanism. Wants to encourage the use of mediation.
 - 18,200 hearing requests in 2021-2022 school year, but only 355 mediation requests.
- Proposed regulation (Section 200.5(h)) extends “pendency (or stay-put) placement” to matters where there is a pending mediation request.
- If the parties are unable to resolve the complaint with mediation, the parent “**must** file a due process complaint concerning the matter that is the subject of mediation within 14 days of such determination to continue their current placement, unless the parties otherwise agree.”

Encouragement of Mediation in Special Ed Disputes, *Cont'd*

- SED believes that parents tend not to use special education mediation because there are weak enforcement mechanisms.
- As a result, SED proposes that mediation agreements can be enforced by allowing parties to commence due process hearings to seek enforcement—no need to go to state or federal court.
- This is designed to discourage litigation and resolve disputes without extensive time and expense!!

New Limits to Extensions of Time in Due Process Hearings

- Under the current system, hearings are expected to be resolved within 75 days.
 - 30 day resolution period
 - 45 day hearing period
- The proposed regulation permits no more than a ***single extension*** unless there is a showing of ***exceptional circumstances***.
- If the parties are making substantial progress towards settlement, they may ***jointly apply*** for an extension of time.

Videoconferencing and Teleconferencing

- The proposed revisions to Section 200.5 will allow IHOs to determine, ***with the consent of the parent***, whether a hearing should be conducted in person, by teleconference, or videoconference.
- Addresses the increased use of video/teleconferencing since the pandemic and aims to reduce inefficiencies and confusion related to the use of these technologies for hearings.



Rules of Conduct for Non-Attorney Advocates

- SED is addressing complaints related to abusive or disorderly behavior of non-attorney advocates at impartial due process hearings.
- All attorneys *and representatives* must conduct themselves at all times in a “**dignified, orderly, and decorous manner....[they] shall not engage in abusive behavior or any disturbance that directly or indirectly disrupts, obstructs, or interrupts the proceedings.**”

Rules of Conduct for Non-Attorney Advocates, *Cont'd*

- IHOs may “take remedial measures” against disorderly parties in a due process hearing.
 - Take a break.
 - Adjourn the hearing.
 - Decline to allow an attorney or representative to be present during a hearing if he or she will not participate respectfully.

These proposed rules currently only apply to conduct at due process hearings—we need to extend these rules to conduct at CSE meetings!!!

FAPE Extended to Age 22

- NYSED issued a formal opinion of counsel on July 6, 2023, announcing the extension of FAPE through students' 22nd birthday.
- The Connecticut case: *A.R. v. Connecticut Board of Education*
 - **“3 through 21 inclusive”**
 - NY Law is “materially indistinguishable” from Conn Law
- The opinion *recommends* – yet does not mandate – that districts provide students with FAPE through the remainder of the school year in which they turn 22.

Updates to Restraint and Seclusion

- In March 2023, the US Department of Education issued a Dear Colleague Letter urging governors, school officers, and school district leaders to ***end corporal punishment in schools***.
 - Schools should instead use “evidence based strategies (such as multi-tiered systems of supports and positive behavioral interventions and support) to meet students’ social, emotional, and mental health needs.”
- Various amendments to the restraint and seclusion rules were adopted at the July 2023 Regents meeting. They became effective August 2, 2023.

Restraint and Seclusion Amendments

- Section 19.5 of the Regents Rules is amended to:
 - Establish definitions.
 - Prohibit the use of seclusion and prone restraint, in addition to corporal punishment, aversive interventions.
 - Schools should instead use “positive, proactive evidence and research based strategies through a multi-tiered system of supportsto reduce the occurrence of challenging behaviors.”
 - Timeout and physical restraint may be used when other less restrictive and intrusive interventions and de-escalation techniques would not prevent imminent danger of serious physical harm to the student or others; there is no known medical contraindication, and staff have been properly trained.
 - Timeouts and physical restraints may not be used as discipline or punishment, retaliation, or as a substitute for positive, proactive intervention strategies.

Restraint and Seclusion Amendments, *Cont'd*

- The Amendments provide details on when, where, and under what circumstances a school may use timeout and/or physical restraint. This includes:
 - The development of a written policy that establishes administrative practices and procedures regarding the use of timeouts and physical restraint.
 - Staff training on an annual basis.
 - Parent notification on the same day as the incident.
 - Documentation of incident.
 - Debriefing with staff after each incident.
 - Overall data collection to monitor patterns of use.
 - Annual data reporting to SED.

Other Anticipated Regulatory Changes to Watch Out For

Amendment	Notice of Proposed Rulemaking Anticipated
Section 504	?????
Title IX	October 2023
FERPA	November 2023



Court Rulings

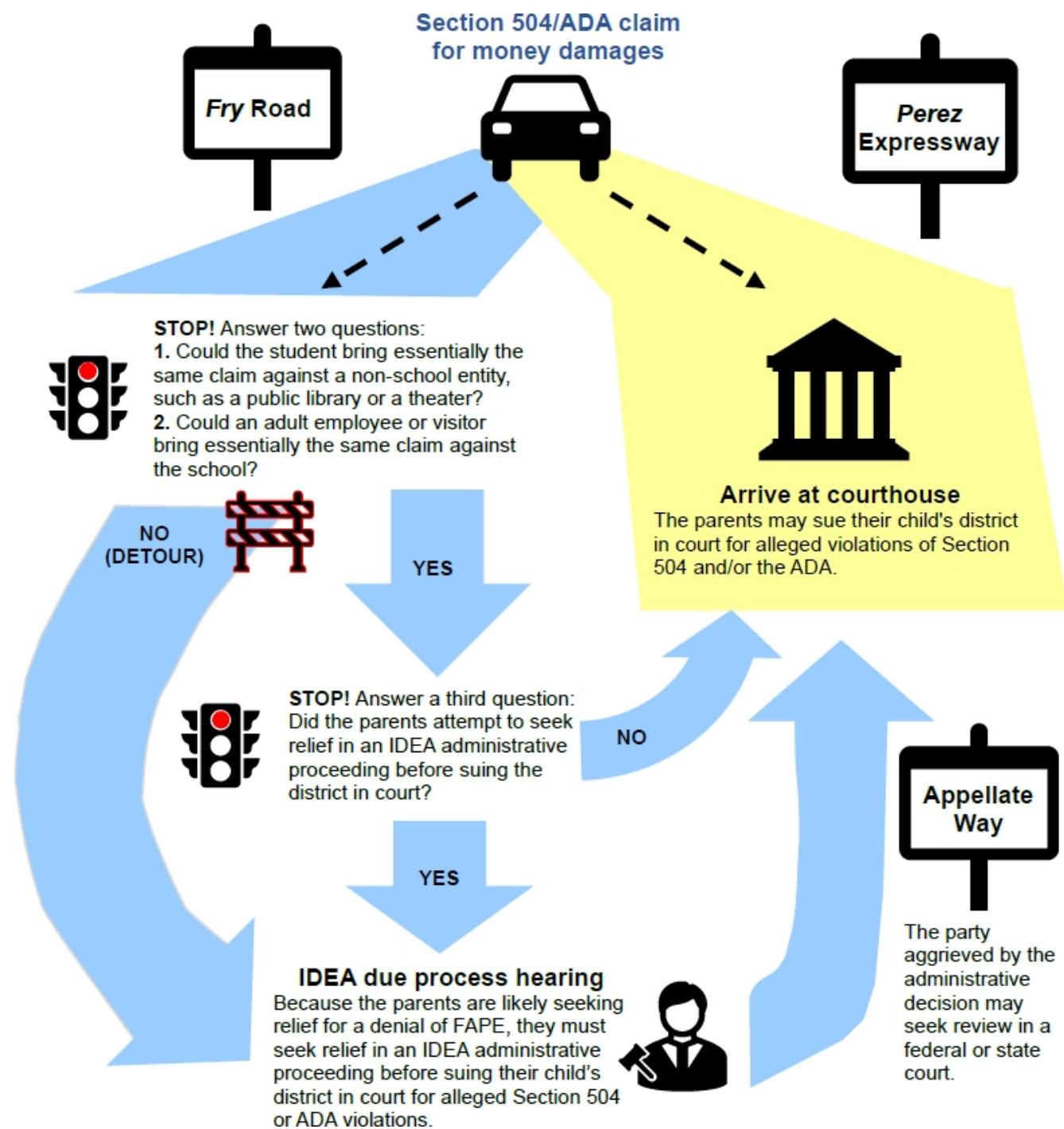


IDEA Exhaustion under *Perez*

- *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023)
 - 23 year old deaf student filed a due process hearing under IDEA.
 - After settling the IDEA case, student then filed a federal court action under Section 504 and the ADA—sought **compensatory damages**.
- School district moved to dismiss the federal court case on the basis that the parent **failed to exhaust administrative remedies**.
 - *Fry v. Napoleon*—Parents cannot avoid the IDEA exhaustion rule by cloaking an IDEA case as a Section 504 of ADA case.

IDEA Exhaustion under *Perez*, Cont'd

- The Supreme Court ruled that IDEA's administrative exhaustion requirement does not extend itself to similar federal anti-discrimination claims for **money damages** such as the ADA or Section 504. The exhaustive requirement is exclusive to claims that are **available** under the IDEA.
- The parent is allowed to commence a Section 504 and/or ADA federal court case that seeks relief that are not available under the IDEA without exhausting administrative remedies.



Future Impact of *Perez*

- *Perez* creates the **POTENTIAL** for more federal court litigation, with more exposure for relief, specifically monetary damages.
- Parents may still be keen on the administrative process, as opposed to court.
 - It is generally more favorable to parents.
 - It is could be perceived as less intimidating by parents.
 - Typically more accessible for parents.
 - Standard of proof for monetary damages is very high.
- Section 504/ADA and other claims without exhaustion requirements are likely to be used as the parents' second bite at the apple, as well as a bargaining chip for IDEA settlement.

Attorney's Fees

- *H.C. v. NYC Dept of Educ., 2023 WL 4094873, No. 21-1582 (2d Cir. 2023)*
 - The Second Circuit affirmed school districts' right to challenge excessive fee demands from parent attorneys.
 - The Court specifically makes clear that federal courts may consider the **complexity** of the underlying IDEA dispute when evaluating the reasonableness of the attorney fee claim.
 - A parent attorney is only entitled to “reasonable attorney fees.”



Methodology Disputes

- General Rule—School districts have the prerogative to decide what methodologies that it will use in its classrooms.
 - Peer reviewed.
 - Generally recognized by the Educational Community.
- *Falmouth School Department v. Mr. and Mrs. Doe ex rel Doe*, 44 F.4th 23 (1st Cir. 2022).
 - If a student is not making appropriate progress with a particular methodology, the district should reconvene the student’s IEP team to discuss whether a different methodology would be more effective.

Although schools still maintain this prerogative, if a student is not progressing, a school has to look at all options to secure such progress, even if it means using a different methodology.

Recycling Goals on IEPs

- A student having the same goals on an IEP for two (or more years) is a **RED FLAG**.
- Recycled goals can be used as proof that the student is not achieving *meaningful progress*, and therefore is being denied FAPE.
- *W.R. and A.R. v. Katonah Lewisboro Union Free School District*, 2022 WL 17539699, No. 21 Civ. 883 (S.D.N.Y. 2022).
 - Court held that recycled IEP goals did not automatically constitute a denial of FAPE.
 - Goals with only slight changes, too, are acceptable when they have been refined to become more closely tailored based on the specific student's progress and other circumstantial information.

Staffing and Placement Shortages

- There is a significant lack of staff and placements to service the demonstrated need of students with disabilities.
- *Bueno v. Bass Lake Joint Union Elementary School District*, 1:21-cv-0436 (E.D. Cal. 2023).
 - District court struck down a district's argument that its failure to comply with a student's IEP was due to staffing shortages related to the COVID-19 Pandemic.
 - The court noted that staffing shortages do not "excuse complete noncompliance with the IEP."

Staffing and Placement Shortages, *Cont'd*

- What can you do when you can't find a placement or staffing for a student?
 - Be transparent with the parents.
 - Reach out to BOCES, other school districts, etc.
 - Private providers may be an option (PT, OT, Speech)
 - Contact your peers!!
 - Document your efforts to find staff, placements.
 - Keep track of the date you sent packet, response to same.
 - Update evaluations of the student.
 - Consider a temporary placement/arrangement pending a long-term solution.

Medical v. Educational Needs

- There are parameters regarding a school's duty to address a student's mental health needs. Limited to his/her needs within the educational environment.
 - There's an increasing blurring of the lines considering a school's responsibility for addressing this.
- *N.N. v. Mountain View-Los Altos Union High School District*, 2022 WL 3109588, No. 20-cv-08010 (N.D. Cal. 2022).
 - When a residential program only addresses a ***child's medical or mental health needs, and not educational needs***, a school district may not be responsible for the costs of the residential program.



Questions

Questions?

Ryan L. Everhart, Esq.

Hodgson Russ LLP

140 Pearl Street, Ste. 100

Buffalo, NY 14202

716.848.1718

reverhar@hodgsonruss.com

Madeline G. Cook, Esq.

Hodgson Russ LLP

140 Pearl Street, Ste. 100

Buffalo, NY 14202

716.848.1691

mcook@hodgsonruss.com