WNY LAW CONFERENCE SPECIAL EDUCATION UPDATE

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U.S. SUPREME COURT REJECTED HIGHER BURDEN OF PROOF FOR STUDENTS WITH DISABILITIES

A.J.T. v. OSSEO – FACTUAL BACKGROUND

- A.J.T., a Minnesota student with epilepsy, experienced severe seizures that prevented her from attending school before noon.
- Student's parents requested that the district provide her with after-hours instruction to ensure she received the same amount of instructional time received by other students.
- The District denied the parents' repeated requests for this accommodation.

A.J.T. v. OSSEO – PROCEDURAL BACKGROUND

- A.J.T., through her parents, first filed (and won) a due process complaint under the IDEA and then sued the District for disability discrimination in federal District Court under Section 504 and the ADA.
- The District Court agreed with the district because A.J.T. had not shown that the school district acted in **bad faith or gross misjudgment**. The 8th Circuit Court of Appeals upheld the decision.
- The Supreme Court disagreed and ruled that students with disabilities do not have to meet a higher standard of "bad faith" or "gross misjudgment" to hold school districts accountable for disability discrimination.
- The Supreme Court stated that the lower **deliberate indifference** standard, which is applied in non-education-related Section 504 and Title II ADA claims, should apply to claims involving students with disabilities.

A.J.T. v. OSSEO – IMPLICATIONS

- The application of a "deliberate indifference" standard for monetary damages, however, will still be a high hurdle for parents to clear.
- To prove that the district acted with deliberate indifference, a parent must establish that the district *intentionally* disregarded a student's educational needs.
  - This requires a parent to prove that the district knew a particular service would aid in a student's educational achievement, but instead willingly chose not to provide these services.

A.J.T. v. OSSEO - IMPLICATIONS

- To avoid any potential liability, districts should ensure that each decision regarding the provision of special education services is well documented and explained.
- In showing reasonable care and thought for its decisions, school districts should be able to successfully fend off claims of deliberate indifference under Section 504 and the ADA.
- While schools may still be able to avoid liability in these cases, they will still need to expend significant resources defending them.

A.J.T. v. OSSEO - IMPLICATIONS

- When read in conjunction with the Supreme Court's decision in *Perez v. Sturgis*, 598 U.S. 142 (2023), parents will be incentivized to plead their claims under Section 504 and the ADA to avoid the IDEA's exhaustion of administrative remedies requirement and seek monetary damages as relief.

- Unfortunately, the net result of the *Osseo* and *Perez* cases is that parents will be more likely to initiate legal actions under Section 504 and the ADA and seek monetary damages as relief.

AJT v. OSSEO- IMPLICATIONS

- In addition to more litigation under Section 504 and the IDEA, Courts may be less willing to defer to administrative decisions.
- This is a consequence of the U.S. Supreme Court's decision in *Loper- Bright v. Raimondo*
- *Ferreira v. Aviles-Ramos* – The 2d Circuit Court of Appeals ruled that federal courts are not required to defer to the SRO when making equitable decisions regarding tuition reimbursement claims.

RECENT DEVELOPMENTS REGARDING THE AGE WHEN STUDENTS WITH DISABILITIES IN NEW YORK LOSE THEIR ELIGIBILITY FOR A FAPE

BACKGROUND

- In July 2023, NYSED issued a memorandum advising school districts to provide special education services to some students with disabilities through age 22
- NYSED's guidance was based on a 2021 U.S. Second Circuit Court of Appeals decision holding that Connecticut must make available a FAPE until age 22 for students with disabilities who had not received a high school diploma
- Extends the previous longstanding requirement in NY that students with disabilities are entitled to special education programs and services until they either receive a Regents or local high school diploma, or upon the conclusion of the school year in which they turn 21, whichever occurs first

A.R. v. CONNECTICUT STATE BD. OF EDUCATION 5 F.4TH 155 (2D CIR. 2021)

- Based on Connecticut statutes and federal IDEA – but the Second Circuit Court of Appeals also has jurisdiction over NY
- Connecticut requirements are similar to NY in that students with disabilities have a right to receive FAPE until they earn a high school diploma or the conclusion of the school year in which they turn 21, whichever occurs first
- Connecticut provides public education to nondisabled students over the age of 21 to age 22 through its adult education programs (GED high school equivalency course)

A.R. v. CONNECTICUT STATE BD. OF EDUCATION 5 F.4TH 155 (2D CIR. 2021)

- Second Circuit found the state is therefore required to provide educational programming to students with disabilities in the same age range, i.e., up to age 22
  - Such educational programming would be FAPE, thus extending the FAPE entitlement from the conclusion of the school year in which the student turns 21 to when they reach age 22
- Initially, there was uncertainty about the impact this Second Circuit decision would have on New York's longstanding requirement to provide students with disabilities a FAPE only until they receive a diploma, or the conclusion of the school year in which they turn 21

NYSED FORMAL OPINION – JULY 6, 2023

- NYSED issued a formal opinion to districts in which it fully embraced the A.R. decision as applicable to NY
- Explained that NY law defining eligibility for special education is “materially indistinguishable” from Connecticut law
- NY also offers publicly funded adult education programs to nondisabled students in the same age group as CT
- Therefore, NYSED Counsel concluded that the holding in A.R. regarding the interaction between federal law as set forth in the IDEA and state law requires NY public schools to provide special education and related services to resident students with disabilities at least until their 22nd birthday

NYSED FORMAL OPINION – JULY 6, 2023

- NYSED Office of Counsel went even further, stating that the students' 22nd birthdays may fall at any point during a school year which creates a complication not addressed in the A.R. decision
  - Office of Counsel added that, while not required by the applicable federal court decision, "SED's Office of Special Education recommends that school districts consider providing such services through the end of the school year in which the student turns 22 or upon receipt of a high school diploma, whichever comes first."

2024 COURT RULING BY ALBANY COUNTY SUPREME COURT

- On March 8, 2024, in *Katonah-Lewisboro Union Free School District v. Betty Rosa, et. al.,* a New York State Supreme Court in Albany County ruled that the Second Circuit's decision in A.R. v. Connecticut Board of Education was contrary to New York's Education Law and, as a result, should not be followed in New York. Based on this analysis, the Albany County Supreme Court ruled that in New York, students with disabilities are entitled to a FAPE until the conclusion of the school year in which they turn 21, as opposed to until their 22nd birthday

FURTHER GUIDANCE FROM NYSED – STATUS QUO REMAINS IN EFFECT

- On April 26, 2024, NYSED issued a memorandum to school districts advising that the Opinion of Counsel dated July 6, 2023 remains in effect and, by extension, students with disabilities shall continue to be entitled to a FAPE until their 22nd birthday
- On June 27, 2024, Associate Commissioner Christopher Suriano issued a "Dear Parents of Students with Disabilities" letter confirming NYSED's position that students with disabilities in New York State are entitled to a FAPE until their 22nd birthday. This letter was issued in response to reports that some school districts are choosing to end special education services prior to age 22.
  - This letter warns that school districts that refuse to follow this rule will likely be liable for compensatory education claims.
  - According to Associate Commissioner Suriano, this issue is particularly concerning for students waiting for the start of adult day or residential opportunities.

ANOTHER COURT RULING BY ALBANY COUNTY SUPREME COURT (2025)

- On March 10, 2025, in *Mahopac Central School District v. Betty Rosa*, et. al., a New York State Supreme Court in Albany County ruled that NYSED lacks jurisdiction to enforce the "FAPE 22" rule because it is only authorized to enforce New York Education Law, as written.
- Under the Court's analysis, NYSED may only enforce NY Education Law and, by extension, may not enforce the common law rule created by the Second Circuit.
- Decision only addressed NYSED's lack of right to enforce Second Circuit's A.R. decision, it did not address the applicability of the ruling to impartial hearings

2025 RULINGS BY THE APPELLATE DIVISION, THIRD DEPARTMENT

- NYSED appealed both the *Katonah-Lewisboro* and *Mahopac* decisions to the Appellate Division, Third Department.
- On May 29, 2025, the Appellate Division, Third Department reversed both decisions.

2025 RULINGS BY THE APPELLATE DIVISION, THIRD DEPARTMENT

Mahopac Reversal

- The Third Department's ruling in *Mahopac* focused on two issues: (i) the applicability of the Second Circuit's A.R. decision in New York; and (ii) the extent to which NYSED has jurisdiction to enforce the FAPE 22 rule despite contrary language in the Education Law.

2025 RULINGS BY THE APPELLATE DIVISION, THIRD DEPARTMENT

Mahopac Reversal

Applicability of the *A.R.* Decision in New York

- Since the Second Circuit's *A.R.* decision was based, in part, on Connecticut's provision of public education to nondisabled students up to age 22 through its GED program, the Third Department considered the extent to which New York provides such programming to nondisabled students.
- Upon review of the record on appeal, the Third Department noted, among other things, that in New York, over 200,000 adults participate annually in free high school diploma programs.
- The Third Department also noted New York State budgets more than $90 million annually for these programs. As a result, in New York there is no cost to participate in these programs or take the GED exam.

2025 RULINGS BY THE APPELLATE DIVISION, THIRD DEPARTMENT

Mahopac Reversal

- Applying these facts to the Second Circuit's rationale in the *A.R*. decision, the Third Department reversed the Albany County Supreme Court's *Mahopac* ruling. More specifically, the Third Department ruled that students with disabilities in New York should be entitled to a FAPE until their 22nd birthday because their non-disabled peers are able to receive an education at no cost until their 22nd birthday. In essence, the Third Department fully endorsed NYSED's 2023 formal opinion of counsel.

2025 RULINGS BY THE APPELLATE DIVISION, THIRD DEPARTMENT

Mahopac Reversal

NYSED's Jurisdiction

- The *Mahopac* decision arose from NYSED's direct enforcement of the *A.R.* decision, as opposed to a ruling by an impartial hearing officer or state review officer. As a result, the Third Department was forced to consider the extent to which a state agency (e.g., NYSED) is authorized to enforce rules that are not expressly stated or included in their corresponding regulations or statutes (e.g., New York's Education Law). In this instance, NYSED is seeking to enforce the FAPE 22 rule (i.e., a student with a disability is entitled to a FAPE until his 22nd birthday) despite language in the Education Law expressly stating that this right ends at the conclusion of the school year in which the student turns 21.

2025 RULINGS BY THE APPELLATE DIVISION, THIRD DEPARTMENT

Mahopac Reversal

- The school district argued that NYSED's position violates the separation of powers doctrine as it essentially gives a state agency (NYSED) the authority to circumvent the Education Law which was drafted by the state legislature.
- The Third Department disagreed with the school district, ruling that the Commissioner of Education and NYSED have broad authority to enforce all laws relating to the state's educational system and execute all educational policies. The Third Department further ruled that NYSED has authority to ensure compliance with federal and state law, as well as court decisions interpreting such law, and to advise schools accordingly. On these grounds, the Third Department ruled that NYSED's actions were not arbitrary and capricious in this instance. To the contrary, the Third Department ruled that NYSED acted within its authority by enforcing the court-created FAPE 22 rule.

2025 RULINGS BY THE APPELLATE DIVISION, THIRD DEPARTMENT

Katonah-Lewisboro Reversal

- The Third Department's ruling in Katonah-Lewisboro focused almost exclusively on the applicability of the Second Circuit's *A.R.* decision in New York. The extent to which NYSED has jurisdiction to enforce this rule was not an issue in this appeal.
- Notably, unlike in *Mahopac*, the underlying court record in *Katonah-Lewisboro* did not include much information about New York's GED program. However, the Third Department took judicial notice of certain information about New York's GED program (e.g., information in NYSED's websites) and determined that the underlying facts were not meaningfully different from those presented in the *Mahopac* case. On these grounds, the Third Department reversed the Albany County Supreme Court's Katonah-Lewisboro decision and once again ruled that students with disabilities in New York are entitled to a FAPE until their 22nd birthday.

PROPOSED LEGISLATION TO CODIFY FAPE 22

- On February 3, 2025, NY State Senator Harckham proposed New York State Senate Bill 4151
- This bill essentially proposes to codify FAPE 22 by amending the Education Law through the addition of language specifying that students with disabilities are entitled to a FAPE until their 22nd birthday (unless they receive a Regents or local diploma)
- Under this proposed legislation, non-disabled students continue to be entitled to an education until they turn 21
- This bill has been dormant since April 2025, but the recent rulings by the Appellate Division, Third Department in *Mahopac* and *Katonah-Lewisboro* could prompt further legislative action

TAKEAWAYS

- Second Circuit precedent continues to apply in New York
- Further appeals are possible
- There have yet to be any federal court decisions in New York on this issue
- Based on the decisions thus far, the FAPE 22 rule appears to be enforceable in New York

WHAT CONSTITUTES A *CLEAR AND UNMISTAKABLE WAIVER* OF THE JUNE 1 DEFENSE?

N.Y. EDUCATION LAW § 3602-C(2)(A)

- "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent or person in parental relation of any such student."
- "In the case of education for students with disabilities, such a request shall be filed with the trustees or board of education of the school district of location **on or before the first of June preceding the school year** for which the request is made."

SRO DECISION NO. 24-384

- In September 2023, a parent of a student with a disability unilaterally obtained special education itinerant teacher (SEIT) services and speech-language therapy from EDopt LLC, a private provider, for the remainder of the 2023-2024 school year.
- The parents alleged that the New York City Department of Education failed to provide mandated special education services to their child.
- EDopt was the only private provider willing to provide such services at the DOEs standard rates. The student received services from EDopt from October 2023 to May 2024.

SRO DECISION NO. 24-384

- In May 2024, the parents filed a due process hearing to seek reimbursement for these services.
- The parents claimed the DOE failed to implement an appropriate educational program for their child.
- The Impartial Hearing Officer found that the DOE was not obligated to reimburse the parents for any services provided prior to April 19, 2024, because the parents had failed to submit a written request for dual enrollment by the statutorily defined **June 1 deadline**.

SRO DECISION NO. 24-384

- However, the IHO ruled that the DOE waived its right to invoke the June 1 defense for the period of services rendered after April 19, 2024, by convening a CSE meeting to develop the student's ISEP.
- Thus, the IHO ordered partial reimbursement for services rendered after April 19 through June 30 only. In turn, both the parents and the DOE appealed this decision to the SRO.

SRO DECISION NO. 24-384

- On appeal to the State Review Office, the SRO reversed the IHOs decision in favor of the DOE.
- Since the DOE never actually provided services to the student, the SRO concluded that the DOE had not waived its June 1 defense by merely convening and implementing an ISEP.
- The SRO emphasized that developing an IESP does not constitute and clear and unmistakable waiver of statutory rights.
- Thus, the SRO found that the parent was not entitled to reimbursement for any portion of the school year.

SRO DECISION NO. 24-384

- The June 1 deadline is a strict deadline that school districts must be careful to enforce. Any actions by a school district to **provide** special education instruction and services after a parent fails to meet the June 1 deadline can be considered a waiver of such defense.

- However, Appeal No. 24-384 gives the school district the ability to, at minimum, conduct a CSE or CPSE meeting and still maintain later on the defense that a parent failed to request services and instruction by June 1.

HOW WILL NEW YORK'S CELL-PHONE BAN IMPACT STUDENTS WITH DISABILITIES?

CELL PHONE POLICY

- Governor Hochul and the New York State Legislature recently reached an agreement on a “bell-to-bell” smartphone ban in schools.
- This new legislation will take effect for the 2025-2026 school year and will apply to all schools in public school districts, as well as charter schools and Boards of Cooperative Educational Services (BOCES).
- The new smartphone ban is an amendment to Section 2803 of the New York State Education Law.
- Each public school district, charter school and BOCES must adopt an internet-enabled device policy by August 1, 2025.

CELL PHONE POLICY

- The law prohibits students from using smartphones and other internet-enabled devices on school grounds for the entire school day (from “bell-to-bell”).
- *“School day”* is defined as “the entirety of every instructional day…during all instructional time and non-instructional time, including but not limited to homeroom periods, lunch, recess, study halls, and passing time.”
- *“School grounds”* is defined as in or on or within any building, structure, athletic playing field, playground, or land contained within the real property boundary line of a district elementary, intermediate, junior high, vocational, or high school, a charter school, or a board of cooperative educational services facility.

CELL PHONE POLICY

Not an absolute prohibition:

- Students will still have access to internet-enabled devices officially provided by the school, such as laptops or tablets, for classroom instruction.
- Students will be allowed to carry simple phones that cannot access the internet but can send text messages and make phone calls (e.g., flip phones).
- Additionally, schools will be required to give parents a way to contact their children during the school day if necessary.

CELL PHONE POLICY

Exceptions

- The following students may still attend school with a smartphone or other internet-enabled device:
  - Students who require access to an internet-enabled device to manage a medical condition.
  - Students who need the device for purposes of translation.
  - Students who need the device for purposes of family caregiving.
  - Students who may need their device in the event of an emergency.
  - Students with IEPs (or Section 504 plans) that mandate access to their device.

CELL PHONE POLICY

Examples of appropriate cell phone use for students with IEPs/Section 504 plans include:

- Speech-to-text software
- Live captioning of discussions
- Use of camera as a magnifier
- Set timers
- Programs that assist with organization
- Assistive technology monitoring blood glucose levels

CELL PHONE POLICY

- *Unforeseen concern*: By limiting cell phone use in school only (or mostly) to students with disabilities (in accordance with their IEPs or Section 504 plans), are we revealing their disability status to the public?

CELL PHONE POLICY

Students with Anxiety

- Interactive Process – If the parent of a student with a disability requests an exemption based on anxiety (or another mental health concern), the district should attempt to identify the specific source of the anxiety as that will enable it to determine whether it can address the student's needs with other accommodations.
- If a parent submits a doctor's note stating that the student will experience anxiety in school without a cell phone, the district would be within its rights to ask the doctor for more specific information. This can be done by asking the parent for consent to speak directly with the doctor; or by drafting and sending a list of follow-up questions to the doctor.

CELL PHONE POLICY

In most instances, there would be two possible sources for the student's anxiety:

- not being able to communicate with parents; or
- not keeping in contact with the internet and/or social media.

CELL PHONE POLICY

- *Possibility No. 1* – If the student claims that he will feel anxious without his cell phone because he will be unable to contact his parents, this could potentially be accommodated without allowing the student to bring in a cell phone.
- For example, the district could create a plan that would allow the student to leave the classroom and go to the office to call his parent whenever he feels anxious.
- Also, students can still bring in cellphones that don't have internet access (e.g., flip phones). The district can remind the parent that the student can bring in such a phone, which would allow him to contact the parent (and vice versa) when necessary and, in turn, address the student's anxiety-related needs.

CELL PHONE POLICY

- *Possibility No. 2* – If the student claims that he will feel anxious without his cell phone because he will be unable to keep up with everything on the internet and social media, which would resemble a phone addiction, the district would need to work with the student's physician and other mental health professionals to determine how the student can get through the school day without cell-phone access.
- While assessing this need, the district may insist upon evidence that the student is unable to function in school without his phone. This could require the district to initially deny the parent's request and then see how the student performs in school without his phone. If the student is unable to participate in school (e.g., excessive absences; difficulty focusing in class,…) then the district may have grounds to grant this exemption request, but there may be other alternatives such as providing the student with counseling and/or providing the student with cell-phone access for only a limited time period, with the goal of reducing the student's phone access over time.

CELL PHONE POLICY

- If the student establishes that he is truly addicted to his phone, just like other types of addictions, then the district would need to accommodate based on the exhibiting needs. But if the student is able to function in school without his phone, his accommodation request is not likely to sustain the appropriate level of scrutiny.

CELL PHONE POLICY

Policies and Plans

- School districts will have flexibility to develop their own plans for storing cell phones during the school day. *E.g.*, a school may decide to purchase locking pouches to store these devices in.
- Governor Hochul has secured $13.5 million in funding to be made available to schools that need assistance with purchasing solutions so that they are able to comply with this policy requirement.

CELL PHONE POLICY

- *Enforcement-related issues*: The law states that each public school district, charter school and BOCES "shall not permit the suspension of a student if the sole grounds for the suspension is that the student accessed an internet-enabled device in violation of the policy adopted…" Therefore, when drafting policies, schools must carefully consider the ways in which it can lawfully enforce the new smartphone ban. *E.g.*, detention; loss of eligibility to participate in extracurricular activities.

CELL PHONE POLICY

- *Question*: When does possessing a cell phone in school become insubordination (which would potentially result in suspension from school)?
  - After multiple offenses?
  - After being expressly directed not to carry a cell phone in school?

QUESTIONS?