



## **Preliminary Review of Disability Cases of Judge Sonia Sotomayor**

Based on our very preliminary review of her disability rights cases, in general Judge Sotomayor has taken some strong positions protecting the rights of individuals with disabilities. We are struck by how she has often engaged in searching inquiries into the nature of plaintiffs' impairments – and into whether lower court or administrative proceedings were searching enough – apparently motivated by a genuine desire to accurately determine whether a plaintiff is protected by the law. She has not been afraid to dissent from a panel decision finding that plaintiffs did not have disabilities. She has not been afraid to overturn a jury verdict where jury instructions impeded a plaintiff's ability to gain relief.

In ADA cases concerning the definition of “disability,” Judge Sotomayor has participated in decisions combing through relatively voluminous or technical testimony to determine whether the plaintiff was substantially limited in a major life activity, or whether the employer regarded the plaintiff as so limited. Similarly, she has participated in, and in more than one case authored, decisions carefully weighing evidence to determine whether a plaintiff was qualified to perform the essential functions of a job.

Judge Sotomayor has also participated in several cases reversing grants of summary judgment for ADA defendants where there were questions of fact regarding whether the plaintiff's requested accommodations were reasonable. In another notable case, Sotomayor authored a decision reversing a jury verdict against the plaintiff for failure to give a jury instruction indicating that, in determining whether reassignment to a vacant position is a reasonable accommodation, an offer of an inferior position is not reasonable when a comparable, or lateral, position is available.

Judge Sotomayor has authored decisions holding, as a matter of first impression in the Second Circuit, that “mixed motive” analysis (allowing discrimination claims where there are both discriminatory and non-discriminatory motives for a challenged action) applies in ADA employment discrimination claims, and that a hostile educational environment claim can be brought under the Rehabilitation Act.

In IDEA cases, Judge Sotomayor has participated in important decisions holding, among other things, that parties prevailing in administrative “due process” proceedings are “prevailing parties” entitled to attorneys’ fees, and that claims under the IDEA’s “stay put” provision (requiring school districts to maintain students’ current services or placement pending resolution of a dispute over whether district’s proposed services or placement provide a free appropriate public education) are not subject to administrative exhaustion requirements. She also participated in a decision holding that the parents’ placement of their child in a private school was an appropriate placement for which the parents could be reimbursed, even though they did not first try the placement offered by the school district – the same issue currently under consideration by the Supreme Court this term in the *Forest Grove* case.

In a private right of action case, Judge Sotomayor authored a decision holding that FERPA’s provision allowing students to access their records did not create an individually enforceable right. In the same decision, however, the panel held that the student could maintain a similar claim for access to her records under the IDEA, even though she had not exhausted the administrative process required by the IDEA.

At both the district court and the Second Circuit, Judge Sotomayor has been vigilant in reviewing administrative decisions denying Social Security benefits, especially where applicants are unrepresented.

Less helpfully, in at least two cases at the district court Judge Sotomayor made incorrect ADA rulings, or took unnecessarily controversial positions. In the relatively well-known *Bartlett* case involving a person with learning disabilities who was denied accommodations in taking the bar exam, Judge Sotomayor first found that the plaintiff was not substantially limited in the major life activity of reading because of “self-accommodation” strategies she employed. The Second Circuit reversed, holding that Judge Sotomayor had improperly considered the plaintiff’s use of coping strategies, such as having others read to her, that did not actually affect her ability to read. Although Judge Sotomayor explained in her opinion on remand that the legal landscape with respect to how a court should analyze mitigating measures and corrective devices did not exist when she issued her first opinion in the case, her strict reading was not shared by most other courts at that time. (In her first opinion, however, she also held that the plaintiff was substantially limited in the major life activity of working, and as such was entitled to damages and injunctive relief.)<sup>1</sup>

We are also concerned by a statement Judge Sotomayor made in a case involving an employee with a psychiatric disability who was terminated apparently after violating a workplace conduct rule. In her decision granting summary judgment to the employer,

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<sup>1</sup> The attorney who represented Dr. Bartlett in this case strongly supports Judge Sotomayor as a brilliant jurist with a common touch, and has written to her Senators to support Sotomayor’s potential nomination.

she wrote that “whether [the employee’s] misconduct was a manifestation of his disability is immaterial because the ADA does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace.” The question of whether violations of workplace conduct rules that might be caused by an employee’s disability should be grounds for adverse employment action was (at the time of this decision) and continues to be a controversial one. Judge Sotomayor’s comment here appears to be unnecessary to her holding in the case, and so seems needlessly emphatic.

Still, those points aside, on preliminary review of her cases we believe that Judge Sotomayor could be a disability rights champion on the Supreme Court. She seems to understand the language and purpose of the ADA and other disability rights laws. She seems to understand that these laws are intended to have a broad remedial effect on the relationships between persons with disabilities and covered entities like employers, schools, state agencies, and public accommodations. She seems to understand that the decisions of judges, including Supreme Court justices, interpreting these laws have consequences for people with disabilities. And she has been unafraid of taking strong positions on issues where she believes her reading of the law and facts is correct. Based on what we know so far – including the fact that she has spoken in public about her own experience with insulin-dependent diabetes – we look forward to supporting her nomination for the Supreme Court.

### **ADA – Definition of disability**

***Capobianco v. City of New York*, 422 F.3d 47 (2d Cir. 2005)**: Panel reverses summary judgment for employer, holding that sanitation worker with visual impairment who “is unable to safely walk, run, or ride a bicycle outdoors at night ... must avoid altogether or plan with great care independent excursions in the evening twilight, lest he find himself outdoors alone as night falls; and [i]s severely restricted in terms of outdoor nighttime activities in general” may have a disability. (“Although some of these activities are less important than others, a reasonable jury could surely find that at least some of these activities are of central importance to most people’s daily lives.”) Additionally, panel finds substantial evidence that employer perceived plaintiff “as having a degenerating impairment that prevented him from doing much more than merely driving at night, and that [it] believed that Capobianco’s condition substantially limited his ability to see as compared to the average person in the general population.”

***EEOC v. J.B. Hunt Transp., Inc.*, 321 F.3d 69 (2d Cir. 2003) (Sotomayor dissenting)**: In this case Sotomayor dissents from the majority’s holding that plaintiffs, applicants for truck driving jobs, did not have disabilities. She concludes that they were regarded as disabled:

“[T]he EEOC provided significant evidence that Hunt believed that the applicants were unfit to drive trucks. Numerous drugs were listed on the [company’s drug panels] as ‘Not Permitted,’ reflecting [an incorrect] belief that the applicant was prohibited by DOT regulations from driving a commercial vehicle while taking that particular medication. Dr. Cooper, Hunt’s physician consultant, testified with respect to one applicant that he did not feel it was ‘in this patient’s best interest to pursue this profession.’ Interview records show that the company believed another applicant ‘would most likely have difficulty functioning in the lifestyle of a trucker.’ Similarly, Dr. Cooper indicated with regard to another applicant that her ‘problems with sleep and concentration under stress are not very compatible with the lifestyle expected of a driver.’ Applicant Joseph Lisa was told by a Hunt employee that he would ‘never drive for anybody,’ and numerous other applicants were told that the medications they were taking made it unsafe for them to drive a truck, or drive in general.”

Protesting the majority’s assertion that the persons reviewing applications for Hunt were not the ultimate decision makers, Sotomayor wrote “Hunt proffers no evidence that these unidentified ‘ultimate hiring authorities’ did not share the reviewers’ perceptions or rely upon their statements about the applicants’ limitations.”

***Bartlett v. New York State Bd. of Law Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997)**: After bench trial, court holds that applicant for law license who was denied accommodations for the bar exam is a person with a disability covered by the ADA. First, in deciding that plaintiff’s learning disability does not substantially limit her in major life activity of reading, the court holds that “plaintiff’s history of self-accommodation has allowed her to achieve great accomplishments, one of which includes roughly average reading skills (on some measures) when compared to the general population.” In deciding that plaintiff’s impairment does substantially limit her in major life activity of working, court holds that plaintiff’s reading skills, in comparison to persons of “comparable training, skills, and abilities” (a standard set out in the EEOC regulation for Title I of the ADA, interpreted by the court here as other law students), are substantially limited by her learning disability. Further, as required by the EEOC regulation, plaintiff is so limited in working “either a class of jobs or a broad range of jobs in various classes” – here, she is excluded from performing the “class of jobs” known as the practice of law.

The court also finds that the plaintiff is qualified to perform the functions of a practicing lawyer; she practiced as a law clerk in a law firm before being terminated due to her inability to pass the bar examination; also, speed in reading is not an essential function of lawyering. Finally, the accommodations plaintiff sought, including extra time to take the exam, were reasonable; “The Board may be within its rights to declare that extra time would impair the integrity of the bar examination, provided it can demonstrate that the ability to perform legal tasks under the bar examination’s time restraints is essential

to minimal competence in the practice of law, and that the bar examination actually intends to test this skill. ... [But] the visual ability to read and the ability to perform tests under time constraints are not 'essential functions' of a lawyer." The court rules that the Board violated plaintiff's rights under the ADA and § 504 of the Rehabilitation Act, and orders that plaintiff's requested accommodations must be provided should she decide to take the test again, and also that she receive as compensatory damages the costs she incurred in preparing for and taking prior administrations of the exam.

The court also finds that the Board's procedures for determining whether to grant plaintiff's accommodation request did not violate the equal protection guarantees of the Constitution, using the rational basis standard for examining government action affecting the rights of persons with disabilities. Nor did the Board's accommodations policies violate plaintiff's constitutional due process rights; "Dr. Bartlett has not shown that the existence of [a] statutorily-created right under the ADA and Section 504 is a sufficient liberty or property interest that qualifies as a 'fundamental right' requiring protection under the due process clause."

***Bartlett v. New York State Bd. of Law Examiners*, No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001):** On remand from the Supreme Court, in light of its decisions in the "*Sutton* trilogy" of ADA cases, and after 4-day "remand trial," court finds that plaintiff is substantially limited in the major life activity of reading. The court notes that its analysis in its first opinion on this issue was incomplete: "I did not distinguish, as I now believe I should, between the mitigating measures plaintiff uses that affect her ability to read and those ['self-accommodations'] that merely assist her in functioning in her daily life. ... coping strategies that have helped her be successful in her academic and work endeavors but that do not assist her in reading. ... I also did not examine the negative effects of the mitigating measures plaintiff employs, as [*Sutton*] now make[s] clear that I must." The court concludes:

[P]laintiff is substantially limited in the major life activity of reading when compared to most people. All of plaintiff's experts agree that most people do not read with the level of difficulty experienced by plaintiff. ... '[M]ost people' can do the following things that are extremely difficult or impossible for plaintiff: read and write quickly and automatically, recognize words and letters automatically, develop a sight vocabulary, and form letters without consciously thinking what they look like. ... [W]hile the coping measures that plaintiff employs [for reading] have the positive effect of increasing her decoding accuracy, they also have the negative effects of causing plaintiff fatigue, which prevents her from reading for sustained periods of time and affects her comprehension, and of decreasing her already slow reading rate.

## ADA – Who is a “Qualified” Individual

**Price v. City of New York, 264 Fed. Appx. 68, 2008 WL 399757, \*2 (2d Cir. Feb. 13, 2008):** In summary order, panel holds that district court did not allow sufficient discovery as to whether patrol duty constituted an essential function of plaintiff’s specific police department job; although City represented that it had an official policy that all full-time police officers must be able to perform patrol duties, “[p]roper analysis of a claim under the federal disability statutes[] must be focused on the fundamental job duties of the employment position the individual with a disability desires, rather than solely on the title held by a person occupying that position or the other positions occupied by most persons holding that title.” (quoting *Shannon v. New York City Transit Auth.*, 332 F.3d 95, 99 (2d Cir. 2003)).

**Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000) (Sotomayor authoring):** Following inquiry mandated by the Supreme Court in *Cleveland v. Policy Mgmt. Sys. Corp.*, panel reverses lower court’s grant of summary judgment to employer, finding that statements made by plaintiff in his applications for Social Security and for employer’s long-term disability benefit did not preclude his subsequent claim that he could perform essential functions of his job with reasonable accommodations. Although a “close question,” and although there was an apparent conflict between plaintiff’s earlier and later statements,

this facial conflict is not enough to warrant summary judgment in favor of [employer]. ... As the Supreme Court has noted, “[a]n SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely ‘I am disabled for purposes of [Social Security].’ ... Parker’s statement in his SSDI application that he ‘became unable to work’ in March 1995 and that he was ‘still disabled’ does not dictate the factual conclusion that he was incapable of returning on a part-time basis or with other accommodation.

Additionally, Parker adequately explained the apparent conflict between his benefits application and his affidavit to the court, such that a reasonable jury could find that he was capable of performing the essential functions of the job. The record reveals a genuine factual dispute on this point: Parker told his supervisor that he was capable of returning on a part-time basis, and his medical condition at the time of his termination is far from clear.

Additionally, as a matter of first impression the court finds that “mixed motive” analysis applies to ADA claims. As such, Parker’s allegations “that his termination resulted from [his supervisor’s] plan to replace current employees with employees who were loyal ‘only [to] her,’ but that, “among the allegedly disloyal employees, he was singled out for quick termination because of his disability,” were sufficient to satisfy his burden of claiming that his disability was a motivating factor in his termination.

***Valentine v. Standard & Poor's*, 50 F. Supp.2d 262 (S.D.N.Y. 1999):** Granting summary judgment to employer where plaintiff with manic-depressive disorder left an admittedly “threatening,” and “obnoxious and taunting” voice mail message for a co-worker, despite having received a warning less than a year earlier about threatening a fellow employee’s reputation. “[A] disabled plaintiff ceases to be otherwise qualified for a position when she or he engages in misconduct in violation of a workplace policy of the employer or poses a direct threat to the health or safety of others which cannot be eliminated by a reasonable accommodation. ... I further note that whether Valentine’s misconduct was a manifestation of his disability is immaterial because the ADA does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace.”

### **ADA – Reasonable Accommodation**

***Hartnett v. Fielding Graduate Inst.*, 198 Fed. Appx. 89, 2006 WL 2711956, \*3 (2d Cir. Sept. 21, 2006):** In summary order, panel reverses summary judgment for school, holding that student’s request to defer the start of her program due to a treatment “setback,” and a new treatment for which benefits would not be realized for six months, could be a reasonable accommodation. Panel also holds that school improperly relied on American Psychological Association’s (APA) rule requiring face-to-face contact with faculty in residency programs to justify denying student’s request to fulfill requirement through videoconferencing, since school did not contact APA to see whether an exception could be made in student’s case. Finally, court remands to district court to determine whether school participated in good faith in interactive process to determine whether student’s requested accommodations were reasonable (as well as whether “interactive process” requirement gives rise to independent cause of action under ADA (9th Cir. has held it does)), and whether the requirement, expressly stated in ADA’s employment provisions, extends to education cases.

***Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181 (2d Cir. 2006):** Panel vacates summary judgment for employer:

[I]t was imprecise to call the requested leave of absence ‘indefinite.’ A factfinder could find, based on Graves’s testimony that he asked for ‘more time’ to get a doctor’s appointment and that it would take a ‘couple of weeks,’ ... that Graves requested two weeks of leave – a finite amount of time – to see Dr. O’Connor and learn of his chances for rehabilitation. Granting this leave of absence would not require Finch Pruyn to hold open Graves’s position indefinitely.

***Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113 (2d Cir. 2004):** Panel concludes that physician plaintiff is not judicially estopped from claiming that he was qualified to perform job duties by statements made in earlier state court proceedings about the extent of his disability. Panel also reverses lower court’s holdings that

physician “failed to seek any accommodation for his disability from the Group ...; if he did seek an accommodation, it was unreasonable because it would have required relieving him from essential job functions; or even if his requested accommodation was reasonable, it nevertheless imposed an undue burden on the Anesthesia Group.”

***Norville v. Staten Is. Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999) (Sotomayor authoring)**: Reversing jury verdict for employer that refused to reassign an employee with a disability to an available comparable position and instead offered reassignment only to a lesser position. Panel held that:

the court should have instructed the jury that an offer of an inferior position does not qualify as a reasonable accommodation when a comparable position is available, and charged the jury with determining whether the positions [the hospital] proposed were in fact inferior and whether a comparable position was vacant. ... As delivered, the instruction implied that any proposed accommodation is reasonable, and satisfies the defendant’s obligation, so long as it does not pose an undue hardship for the defendant. When the employer proposes reassignment as a form of accommodation, however, the law is clear that the offer of an inferior position does not satisfy the employer’s duty of reasonable accommodation if a comparable position is vacant. The charge therefore may have misled the jury about the meaning of the term ‘reasonable’ under the ADA. Furthermore, it gives the misimpression that a disabled employee does not have the right to reject a proposed accommodation if it is inferior to her former job.

This was not harmless error, even though Norville’s counsel had a chance to argue its legal theory to the jury in closing argument.

### **ADA – Other Discrimination**

***Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003) (Sotomayor authoring)**: Police seizure and involuntary hospitalization of a woman with Down Syndrome did not violate the Constitution or the ADA. The woman’s half-sister and guardian, Magdalene Wright, had called 911 to report that she was being attacked by her husband and that he had weapons. When the police arrived, they found only Wright’s half-sister, Myra Anthony, in the apartment. One officer testified that Anthony sat calmly while they searched the apartment, while another officer testified that she was crying and screaming. They seized her and took her to a county psychiatric hospital. The court found that the officers could not be held personally liable for any Fourth Amendment violation stemming from their warrantless entry and seizure because they had qualified immunity. The court also found that the city was not liable because the plaintiff had not shown a custom or policy of arbitrarily arresting and hospitalizing people with disabilities.

The court rejected Anthony's ADA claim, holding that there was no evidence that the seizure and hospitalization were motivated by discrimination against persons with disabilities. The court held that the testimony of one of the arresting officers that Anthony was arrested because she "seemed to be needing of assistance because she appeared to be slow" was not sufficient to show discriminatory intent under the ADA.

Additionally, Anthony's involuntary confinement at Kings County Hospital, and the hospital's forcible administration of drug tests and anti-psychotic medication, did not violate her constitutional rights; "[hospital] staff reasonably believed that Anthony was a danger to herself or to others, and the involuntary hospitalization was therefore constitutional.... [further,] blood and urine tests were not conducted for any law enforcement purpose, but rather were undertaken to facilitate Anthony's diagnosis and treatment by ruling out drug use or other physiological conditions as a possible explanation for her delusional behavior. The tests were therefore constitutionally permissible."

***Pell v. Trustees of Columbia Univ. in City of New York*, 1998 WL 19989 (S.D.N.Y. Jan. 21, 1998):** Examining relevant case law and finding that hostile educational environment claim can be brought under § 504 of Rehabilitation Act. Denying Columbia's motion to dismiss where plaintiff alleged that she was repeatedly accused of faking her dyslexia, and was also repeatedly told that she was mentally retarded, that she should be in the mentally retarded Olympics, and that she was lazy and stupid. "[P]laintiff's complaint is replete with the 'sharply-pointed, crudely-crafted, and frequently-launched 'slings and arrows' that courts have found sufficient to establish severe and pervasive harassment that alters a plaintiff's working conditions." (citing *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 315 (D. Mass. 1997).)

#### **ADA – Procedural**

***Brown v. Parkchester South Condominiums*, 287 F.3d 58 (2d Cir. 2002)**  
**(Sotomayor authoring):** Reversing district court's dismissal of plaintiff's claims, including ADA discrimination, for failure to timely serve his complaint: "Although Brown did prepare and serve a summons on Parkchester in a timely fashion, there is evidence that his medical condition may have precluded him from appreciating that he had failed to attach a copy of the complaint to the summons. Certain mental and medical conditions, Brown argues, hinder him from following through on complex tasks. ... We therefore find that an evidentiary hearing is appropriate to determine to what extent, if any, Brown's condition did in fact inhibit his understanding or otherwise impair his ability to comply, such that equitable tolling would be in order."

***Simmons v. Moodt*, 36 Fed. Appx. 676 (2d Cir. June 10, 2002):** In summary order, panel reverses district court's ruling that plaintiff's administrative employment discrimination complaint was untimely: a letter to the plaintiff from the New York City Commission on Human Rights suggests that "its personnel might have misled Simmons

regarding the applicable filing deadline. ... [T]he letter expressly stated that the NYCCHR's office records were inaccessible at the time due to the aftermath of the events of September 11, 2001 .... Depending on the nature of the work-sharing relationship between the NYCCHR and the EEOC, the NYCCHR's advice to Simmons might be imputed to the EEOC and potentially could effect a tolling of the filing deadline."

***Lloret v. Lockwood Greene Engineers, Inc.*, 1998 WL 142326 (S.D.N.Y. Mar. 27, 1998)**: Although plaintiff did not allege it, court considers whether his depression was a sufficient basis to toll the time for filing his charge of discrimination with the EEOC. Noting case law both supporting and denying tolling on this basis, court rules that, even if equitable tolling based on mental disability might apply in some civil rights cases, "it is clear that at a minimum he must show significant difficulty with handling his daily personal affairs. Plaintiff was not so affected that he was unable to take care of his legal affairs, as evidenced by his filing of his bankruptcy claim in 1994. [He] has presented no basis for the Court to believe that had he heard about the possible reasons for his termination at an earlier time, he would have been incapable of bringing this action earlier. Therefore, plaintiff's post-termination depression is not sufficient to warrant tolling of the statutes of limitations on his claims." (Perhaps because the plaintiff did not argue for equitable tolling, the record is unclear whether episodic incapacity due to his depression might have provided a basis for tolling.)

## IDEA

***Somoza v. New York City Dep't of Educ.*, 538 F.3d 106 (2d Cir. 2008)**: Panel holds that parent's IDEA claim is time-barred, reversing district court's ruling permitting IDEA claim to go forward. District court had held that IDEA plaintiff's claim accrued in 2006, when it became clear to parent that her daughter needed to remain in private special education program beyond June 2006, and that the Department would not continue to fund this placement past that time. Instead, and following the general rule, plaintiff's claim accrued when the parent "knew or should have known about the alleged action that forms the basis of the complaint"—in this case, during 2002-03 school year when mother first observed daughter's rapid improvement in the program and program's director, a special education expert, opined that plaintiff had not previously received a free appropriate public education. As such, plaintiff's claims filed in March 2006 were time-barred, even though at that time the Department was providing her with the relief she would have sought had she timely filed.

***Frank G. v. Board of Educ. Of Hyde Park*, 459 F.3d 356 (2d Cir. 2006)**: Panel finds that parents' unilateral placement of child with disability in private school was appropriate, because (as school district admitted), private school provided student with appropriately small class size and appropriately modified instruction, and student's social and academic progress supported appropriateness of placement. As such, parents could be reimbursed for the placement – even though they did not first try public

school placement offered by school district: “Such a result, it has been suggested, ‘ensures that a parent’s rejection of a public school placement is not based on mere speculation as to whether the recommended school placement would have been appropriate.’ This suggestion turns on the erroneous assumption that parents would have to keep their child in a public school placement until it was clear that their ‘speculation’ was borne out by a wasted year of actual failure. Such a ‘first bite’ at failure is not required by the IDEA.” (internal citation omitted.) (This case involves the same issue being considered by the Supreme Court this term in the *Forest Grove* case.)

***A.R. ex rel. R.V. v. New York City Dep’t of Educ.*, 407 F.3d 65 (2d Cir. 2005)**: Panel holds that administrative hearing officer’s decision on the merits in an IDEA “due process” proceeding constitutes “administrative imprimatur” such that the party who prevails in the administrative proceeding is a “prevailing party” for attorneys’ fees purposes (citing *Buckhannon*).

***Vultaggio ex rel. Vultaggio v. Board of Educ.*, 343 F.3d 598 (2d Cir. 2003) (per curiam)**: Panel holds that state administrative complaints, an alternative to “due process” complaints for resolving differences over special education services, is not a “proceeding” under IDEA such that families filing such complaints can obtain attorneys’ fees when the state agency finds noncompliance with IDEA.

***Taylor v. Vermont Dep’t of Educ.*, 313 F.3d 768 (2d Cir. 2002) (Sotomayor authoring)**: Interpreting the Supreme Court’s decision in *Gonzaga Univ. v. Doe*, the panel holds that the provision of FERPA authorizing students to obtain access to their educational records does not create a private right enforceable under § 1983. Although the provision “combines elements of both the funding-prohibition language that the *Gonzaga* Court held does not confer an individual right and the individually focused language that evidences an intent to create an enforceable right,” the language including the term “rights,” “rather than directly conferring rights on parents, ... can be read as acting as a limitation on which records schools should make available.” Also, the provision, while more focused on individuals than the FERPA provision at issue in *Gonzaga* (which prohibited an “institutional policy or practice, not individual instances of disclosure”), does not contain “an unambiguous expression of congressional intent to confer an individual right enforceable by § 1983.”

However, the plaintiff may pursue a similar claim under the IDEA to get access to her educational records, even though she did not exhaust administrative remedies before suing in federal court:

[R]equiring exhaustion of administrative remedies would be futile in this case.... [P]laintiff did not learn that the ... defendants had denied her access to L.D.’s special education records until May 1999, after she had obtained the special education files from another source. No purpose would have been served by bringing a due process challenge against the

... defendants at that point. Taylor already had the withheld records, and she could not have benefitted from any procedural reforms that a victory might have brought because her daughter no longer attended the school – and in fact had left the school district.

***Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002)**

**(Sotomayor authoring):** Parent need not exhaust administrative remedies before filing suit to enforce IDEA’s “stay put” provision. “The administrative process is ‘inadequate’ to remedy violations of [the ‘stay put’ provision] because, given the time-sensitive nature of [the provision], ‘an immediate appeal is necessary to give realistic protection to the claimed right.’ ... If the child is ejected from his or her current educational placement while the administrative process sorts out where the proper interim placement should be, then the deprivation is complete. A belated administrative decision upholding a student’s stay-put rights provides no remedy for the disruption already suffered by the student.” (internal citations omitted.)

***M.S. ex rel. S.S. v. Board of Educ. Of the City Sch. Dist. Of the City of Yonkers*, 231 F.3d 96 (2d Cir. 2000):** Panel reverses the district court’s opinion that parent should be reimbursed for unilateral private school placement for son receiving special education services:

[T]he district court did not afford appropriate deference to the [administrative hearing officer]. ... [It] did not explain why it discredited the [hearing officer’s] interpretation of the objective evidence, and ... based its findings primarily on non-objective evidence, such as M.S.’s testimony that his son had an increased joy of reading and that he was happier with his friends. ... [T]he district court thus inappropriately substituted its own subjective judgment about what are appropriate measures for educational progress. ... An assessment of educational progress is a type of judgment for which the district court should defer to the [hearing officer’s] educational experience, particularly where, as was the case here, the district court’s decision was based solely on the record that was before the [hearing officer].

**Medicaid**

***Roach v. Morse*, 440 F.3d 53 (2d Cir. 2006) (Sotomayor authoring):** State Medicaid agency’s questions to applicants about \$287,000 loan made to son and daughter-in-law (check that) do not violate Medicaid Act: “If Vermont were to deny plaintiffs’ Medicaid application on the basis of Mr. Roach’s refusal to amend the loan agreement and make the loan negotiable [which would make the loan a resource that would disqualify plaintiffs from Medicaid benefit], a court might find that the State is using a more restrictive methodology [than the Act permits]. But there is no evidence in the record that the State uses or would use such a methodology, and, if it did, why it would do so.”

## Social Security

***Kohler v. Astrue*, 546 F.3d 260 (2d Cir. 2008) (Sotomayor authoring):** Reversing the administrative law judge's decision denying applicant with bipolar disorder Social Security disability benefits, because the ALJ failed to adhere to Social Security regulations requiring ALJs to undertake special methods to evaluate the severity of mental impairments. "First, because the decision contains no specific findings regarding Kohler's degree of limitation in the four functional areas by which disabling conditions are rated, the Court cannot determine whether there is substantial evidence for the ALJ's conclusion that Kohler's impairment, while severe, was not as severe as any listed disabling condition. Second, the ALJ's decision discusses much of the relevant evidence primarily in the context of Kohler's residual functional capacity to perform work and not in the context of the four functional areas identified by the regulations. Thus, it is not clear whether the ALJ adequately considered the entire record when determining the severity of Kohler's impairment, or whether he might have found it to equal the severity of a listed condition had he followed the regulations and made specific findings regarding Kohler's degree of limitation in each functional area. It also is not clear whether the ALJ would have arrived at the same conclusion regarding Kohler's residual functional capacity to perform work had he adhered to the regulations."

***Jasmin v. Callahan*, 1998 WL 74290 (S.D.N.Y. Feb. 20, 1998):** Reversing ALJ's denial of Social Security benefits to *pro se* plaintiff, where ALJ failed to question plaintiff about critical aspects of his claim, including how his back injury affected his ability to perform his job as a therapy aide, or any job; ALJ did not inform plaintiff of his ability to call or subpoena a doctor whose reports, submitted before the hearing, were adverse to plaintiff's claim; and ALJ relied on evidence submitted by plaintiff's chiropractor after the hearing, without giving plaintiff opportunity to respond to chiropractor's report. "[P]articularly where claimant appears *pro se*, the ALJ has an affirmative 'duty ... to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" (internal citation omitted.)

***Batista v. Chater*, 972 F. Supp. 211 (S.D.N.Y. 1997):** Reversing ALJ's denial of Social Security benefits to *pro se* plaintiff; where ALJ only relied on answers to questionnaire submitted by plaintiff's treating physician, and apparently did not consider other relevant medical evidence, "ALJ did not develop sufficient evidence of plaintiff's nonexertional psychiatric impairment(s) to properly evaluate plaintiff's residual functional capacity and accurately apply the [Social Security Act's regulation's] Medical Vocational Guidelines [the 'grids'] to this case." Court also raises question whether plaintiff, who was unable to communicate in English, was provided with adequate translation of the testimony of his treating psychiatrist, so that he might have questioned this witness at the hearing; this testimony about plaintiff's psychiatric impairments should have been developed.

## **P&A Access**

### ***Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006) (Sotomayor authoring):**

Federally-funded disability advocacy agency must have reasonable access to “therapeutic educational program for students who are seriously emotionally disturbed,” even though it is not a residential program, and even though agency is “monitoring” program, and not investigating specific incidents. Agency’s enabling statute also permits agency to obtain the names and contact information for parents or guardians of students in the program.

### ***Protection & Advocacy for Persons with Disabilities, State of Ct. v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor authoring):**

Federally-funded disability advocacy agency has access, under its enabling statute, to peer review records relating to services provided to decedent persons with disabilities who had resided at hospitals operated by Connecticut’s state mental health agency. The federal Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) authorized the agency to have access “to all records of ... any individual” whom it had probable cause to believe had been abused. This unambiguously includes peer review records, even though regulation issued by the federal Department of Health & Human Services stated that PAIMI was not intended to preempt state law protecting peer review records, and even though Connecticut law protects such records from discovery in some circumstances.