SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns issues that were subject to recent court decisions of general significance: (a) transportation under a state open enrollment law, and (b) compensatory education and other relief from stay-put violation.

In an officially published decision in *Osseo Area Schools Independent School District No. 279 v. M.N.B.* (2020), the Eighth Circuit Court of Appeals addressed the issue of whether the IDEA requires a school district, upon accepting the application of a nonresident student with disabilities under a state open enrollment law, to provide transportation, as specified in the student's IEP, to and from school. Based on the parent driving the child and the open enrollment statute's provision for transportation within district boundaries, the district only reimbursed the parent for the segment of the round trip between the school and the intersection of the district border. Both the hearing officer and the federal district court ruled that under the IDEA the district was responsible for the cost of the full round trip between the home and the school. The district filed an appeal with the Eighth Circuit to challenge their interpretation of the IDEA.

One argument for the parent was the lower court's conclusion that once the district accepted the student's application, it was responsible for FAPE as documented in the IEP, which included transportation to and from school.	The Eighth Circuit relied on the Constitution's spending clause, which the Supreme Court interpreted as requiring Congress, if it intends to impose a condition on the grant of federal moneys, to do so unambiguously. The IDEA lacks such clear notice.
A second argument for the parent that the lower court had accepted was that the parents had filed a state complaint that resulted in a finding against the district's blanket policy.	The Eighth Circuit observed that the state complaint decision may have been a mistaken interpretation of state law but in any event lacked any preclusive effect on the court's IDEA interpretation.
The third argument for the parent is that in Letter to Lutjeharms (1990), OSEP supported her interpretation of the IDEA in relation to a state open enrollment law.	Pointing out that the OSEP interpretation neither addressed this state law nor the Spending Clause, the Eighth Circuit concluded that this guidance lacked not only a binding but also a persuasive effect.
Finally, the parent cited a Fifth Circuit decision that provided for transportation beyond a district's borders under certain specified circumstances.	The Eighth Circuit made short shrift of this argument based on rather distinct factual differences between those circumstances and the open enrollment situation at issue here.
As an officially published federal appellate ruling, this decision carries considerable weight. Nevertheless, it is not binding outside the states of the Eight Circuit and is limited to the specific provisions of the open enrollment law and IEP at issue in the case.	

In *Doe v. East Lyme Board of Education III* (2020), the Second Circuit Court of Appeals issued its third decision in litigation that dated back to the 2008-09 school year, when under the IEP the parents agreed to pay the tuition at their unilateral placement of their child with autism at a private religious school and the district agreed to pay for specified additional services, including Orton-Gillingham reading instruction, speech therapy, and PT/OT. In *Doe I* (2015), the Second Circuit ruled that (a) the district's IEP for 2009-10 was appropriate; (b) despite the district's failure to propose an IEP in 2010–11, the parent was not entitled to reimbursement because the religious school was not appropriate; (c) the district violated stay-put by not continuing to pay for the additional services in the 2008-09 IEP, and (d) the district had to not only reimburse the parent for the out-of-pocket costs ($97K) but also, via a compensatory education award, the remainder of services that the parent was not able to arrange. In *Doe II*, the Second Circuit dismissed the parents' appeal because the district court had not yet finalized its calculations of the reimbursement and compensatory education. After the lower court ordered the district to pay $48K plus interest in additional reimbursement and put an additional $192K in an escrow account for compensatory education, the parent challenged various aspects of this stay-put remedy.	
Her first challenge was these aspects of the compensatory education award: the escrow account, the escrow agent, and the six-year time limit.	The Second Circuit summarily rejected these claims, pointing out that the parent had requested an escrow arrangement, this specific escrow agent, and the specified six-year time limit.
Second, she challenged the district court empowering the escrow agent to not only review her claims from the account but also reduce the amount if the student no longer needed the services.	The Second Circuit upheld this challenge based on the principle that compensatory education is not subject to delegation beyond the final authority of impartial adjudication.
She also challenged the district court's order that she pay half of the escrow agent's administrative fee.	The Second Circuit agreed, reasoning that the district was responsible for FAPE, which must be "free" to the parent.
Next, she challenged the district court's interest calculation.	The Second Circuit roundly rejected this challenge.
Undeterred, she also challenged the original appropriateness rulings for 2009-10 and 2010-11.	The Second Circuit easily denied these challenges as decided by *Doe I* and unaffected by *Endrew F.*
Finally, she sought (a) further reimbursement, (b) expert witness fees, and (c) attorneys' fees.	The Second Circuit respectively ruled (a) no abuse of discretion, (b) no entitlement, and (c) improper appeal.
One cannot help but wonder at the transaction costs of litigation, including 12 years of time (with the "child" now in college) and hundreds of thousands of dollars for a stay-put violation (after a complete rejection of the original FAPE reimbursement claim), and the corresponding loss of perspective of this parent (who after *Doe I* proceeded without legal counsel).	