

THE MOTHER COURT

A NEWSLETTER OF THE SDNY CHAPTER OF THE
FEDERAL BAR ASSOCIATION

FALL 2022 · VOLUME 2 · ISSUE 4



Hon. Debra Ann Livingston
Chief Judge, United States Court
of Appeals for the Second Circuit



On October 19, 2022, the SDNY Chapter installation ceremony of the Directors and Officers was held at the Charles L. Brieant Jr. U.S. Courthouse in White Plains. The program was officiated by the Hon. Kim Berg, U.S. Magistrate Judge (SDNY).

A FALL WELCOME FROM THE HON. DEBRA ANN LIVINGSTON CHIEF JUDGE, 2D CIR.

This fall, for the first time since March 2020, oral arguments before the Court of Appeals at the Thurgood Marshall U.S. Courthouse are open to the public. Though remnants of pandemic procedures remain, the re-opening of in-person argument to the public is an important step towards regular operations.

As we re-open the building to the public, we are also excited to welcome students back into our Learning Center. Although the Second Circuit's civic education project, The Honorable Robert A. Katzmann Justice For All: Courts and the Community Initiative, offered virtual learning opportunities for students throughout the pandemic, my colleagues and I look forward to greeting students in person at the courthouse. I want to extend my deepest appreciation to the SDNY Chapter of the Federal Bar Association for its support of Justice For All's activities and programs, and encourage any attorneys interested in volunteering for upcoming programs to reach out to Alana Chill at alana_chill@ca2.uscourts.gov.

The Honorable Debra Ann Livingston was appointed to the United States Circuit Court for the Second Circuit on May 17, 2007, and became Chief Judge on September 1, 2020.

A MESSAGE FROM THE PRESIDENT

Dear Colleagues:

A big thank you goes out to SDNY Magistrate Judge Kim Berg for swearing in the new FBA Board of Directors and Officers on October 19, 2022. Thank you to Judge Berg for hosting our chapter in such a wonderful, intimate ceremony. A special thanks also goes out to Bill Dahill for MCing the ceremony and to Ret. Judge Maas for presenting an award to our outgoing president Nancy Morisseau.

I am thrilled to be leading the chapter at such an exciting time. With COVID becoming less of an impediment to being together in person, we are already at work planning many incredible events for the upcoming year. To further our goal of getting closer to our Westchester County members, we are planning a CLE to be held in Westchester in the coming months.

We are continuing our Trailblazer series which has been a great success, thanks to Padmaja Chinta. I won't ruin the surprise other than to say that Padmaja has some incredible Trailblazers in mind for future events, so stay tuned! We are planning a social event bringing together SDNY law clerks and law



firms to introduce participating firms to the brightest legal talent leaving clerkships next summer, and we will continue to sponsor and co-sponsor social and legal educational events, starting with the virtual November 16, 2022 False Claims Act Today-SDNY program, featuring the Hon. Judge Richard Sullivan and other prominent members of the SDNY legal community.

We are increasing our focus on raising the number of law school student members in our chapter so that we can groom our chapter's future leaders and hope you will join us at our chapter holiday party on Friday December 9th. We appreciate your continued support of our chapter and look forward to seeing you at an event soon.

In friendship,
Wendy Stein

THE IDEA AT (ALMOST) 50: THE INDIVIDUAL AND THE COLLECTIVE?

BY: LIZ VLADECK



“This is personal to me: prior to joining DOE, I had a crash course in this area of law navigating the system to ensure my older son, who had complex learning disabilities, got the education he needed.”

The Individuals with Disabilities Education Act (or “IDEA”), 20 U.S. §1400 et seq., will be 50 years old in 2025. IDEA requires all public-school districts to provide a “Free, Appropriate Public Education” (“FAPE”) for every student. Districts must develop Individualized Education Programs (“IEPs”) for any child with an educational disability. Where families believe a district cannot offer “FAPE” or otherwise fails to do so, they are entitled to a legal process to determine an equitable remedy for the deprivation of FAPE – often an alternative program or services – for which the school district generally must either pay directly or via reimbursement of a family’s expenses.

Within the body of civil rights law and practice, disability rights in general, and IDEA rights in particular represent a unique paradigm: while generally anti-discrimination laws covering protected classes set forth broadly applicable requirements, policies and practices, IDEA compliance requires affirmative development of specific terms and conditions for each individual child (the IEP).

THE IDEA AT (ALMOST) 50 (Continued)

Since 2012, the number of IDEA cases filed with NYC's Department of Education has almost quadrupled. As DOE's General Counsel, I am deeply committed to improving the legal process for families, and to supporting the creative, expert DOE staff developing and implementing cutting edge special education programs and services. This is personal to me: prior to joining DOE, I had a crash course in this area of law navigating the system to ensure my older son, who had complex learning disabilities, got the education he needed.

Now professionally focused on this topic, with much still to learn, I've observed a certain tension between the core tenet of "FAPE" with another bedrock of the IDEA: that students should be placed in the "least restrictive environments" necessary for their education. Put another way, inclusiveness is the objective, so that kids with all different strengths and challenges can learn side by side.

FAPE must be tailored to each specific child's individualized needs. But providing appropriate public education for these students in their neighborhood schools requires collective effort and funding. It requires collective models, like class and school-wide programs and services for NYC's 1600+ schools, such that children can find a program that works for them near their homes. The core commitment of the IDEA is sacred: special education must be personalized for each unique child. But as a legal framework, it does not sufficiently incentivize engagement of parents, students and resources in this collective project of public education to ensure districts allocate precious and contested resources for the development of holistic, school- and district- wide programs.

THE IDEA AT (ALMOST) 50 (Continued)

This includes things like preventive services, proactive interventions to identify and address early common challenges such as dyslexia, sufficient school psychologists to conduct the evaluations that determine a child's disabilities and concomitant needs, specific classroom models and training required for all teachers to implement them.

In the almost 50 years since passage of the IDEA, science and our society have made dramatic progress in our understanding, acceptance of and support for neurodiversity. Now we need the law, and legal practice on these issues, to catch up to and support the critical work in our schools to ensure every child receives an education that is right for them.

Liz Vladeck is the General Counsel of the NYC Department of Education, representing and advising the DOE on all legal matters, including general practice issues, labor and employment matters, equal opportunity, employee discipline, special education, administrative/state/federal law and compliance, and commercial transactions.



August 11, 2022, Summer Board Meeting/Happy Hour at Bryant Park Grill Rooftop. Good time and great conversation with Federal Bar Association SDNY Chapter members Wendy Stein, Zara Watkins, Jan Brown, Kersuze Morancy, Alexander Paykin, Eliyahu Kaploun , and Nancy Morisseau.

**FBA MEMBER KIM BERG SWORN IN AS MAGISTRATE JUDGE
BY: LISA MARGARET SMITH, UNITED STATES MAGISTRATE JUDGE, RET.**



Magistrate Judge Kim Berg and retired Magistrate Judge Lisa Smith at the Hon. Charles L. Brieant Jr. Federal Building and US Courthouse.

On September 12, 2022, SDNY Chapter member Kim Berg was sworn in as the newest Magistrate Judge for the Southern District of New York. Magistrate Judge Berg will serve part time, succeeding Magistrate Judge Martin R. Goldberg, who held the part time position for thirty years. In her new role Magistrate Judge Berg will assist the district judges in handling criminal matters occurring on federal lands in the northern part of the Southern District, including the West Point Military Academy (civilian matters only), the Roosevelt Home, and Veterans Hospitals, among other locations. Magistrate Judge Berg graduated from Pace University magna cum laude, and from Pace University School of Law cum laude. Judge Berg is a founding partner

of the White Plains firm Gould & Berg, which focuses on employment matters, civil rights cases, trusts and wills. She will continue her practice with the firm in state courts and before administrative agencies, including the EEOC and the New York State Division of Human Rights. Magistrate Judge Berg is a Part 146 certified mediator, regularly mediating cases for the Southern District of New York, New York State Supreme Courts, New York State Surrogate's Courts, and the Westchester County Human Rights Commission. Magistrate Judge Berg regularly presents continuing legal education programs for the bar associations in which she is an active member, including the Federal Bar Association, the Westchester County Bar Association, the Westchester Women's Bar Association, and the Women's Bar Association of the State of New York.

**REMARKS OF CHIEF JUDGE LAURA SWAIN (SDNY) AT THE
SEPTEMBER 7, 2022, RULE OF LAW CEREMONY HONORING
SONIA SOTOMAYOR, ASSOCIATE JUSTICE, U.S. SUPREME COURT**

This is an especially significant time in our nation's history to affirm and celebrate the Rule of Law, and to honor Justice Sotomayor as a person whose entire career has been, and continues to be, devoted to the protection of fundamental legal principles and the integrity of the judiciary.

It is fitting that this ceremony is taking place here in the Southern District of New York. The Southern District is the Mother Court, sworn to uphold the constitution since 1789. As many of you know, ours was the first federal court to hold a formal session after the enactment of the federal Judiciary Act of 1789, preceding even the Supreme Court of the United States. We who serve as judges here look back on this history with respect and pride, and we recognize the depth of our duty.



Photo Credit: Adam Gray/FBA SDNY © 2022

Justice Sotomayor's stellar judicial career began here in the Southern District, and she is a beloved permanent member of our Court family. We were not surprised when a different president appointed her as the first Latina on the Second Circuit in 1997. The strength of those ties was deeply felt when she did us all the honor of inviting the entire court family to join her in our conference center to watch the video feed of her Supreme Court confirmation vote and celebrate with her in August of 2009. She is now our Circuit Justice, and comes home to visit with us, formally and informally. We are delighted and deeply grateful.

Justice Sotomayor's commitment to the Rule of Law is deeply evident not only in her meticulous and candid work as a jurist—it shows in her commitment to civic education and in her literal embrace of students and their families. She is the archetype of someone who uplifts the law and her fellow human beings. And the benefits are shared – one of my great joys is to open my chambers each year to law student interns participating in the Sonia and Celina Sotomayor Judicial internship program. They do great work, receive support and training inside and outside of chambers, and are introduced to a network of support and advice that will follow them as they continue into the world of clerkships and practice. Justice Sotomayor's books have been deeply inspirational for adults and children, and her work in carrying on Justice O'Connor's groundbreaking digital iCivics platform has extended access to knowledge about government and civic engagement to children all over the country, building new generations of informed citizens.

Justice Sotomayor personifies a life dedicated to the Rule of Law. I thank her, on behalf of our Court and community, for her life and work, and for the example and inspiration she provides to the bench, the bar and the American people. And I congratulate the Federal Bar Association on its wise choice.

**RULE OF LAW AWARD CEREMONY
SEPTEMBER 7, 2022**



Above: Hon. Laura Swain,
Chief Judge (SDNY)



Top left: Wylie Stecklow,
Chair, Rule of Law
Committee

Middle left: Hon. Debra
Ann Livingston, Chief Judge
(2d Cir.)



Bottom left: Anh Le
Kremer, President, Federal
Bar Association

Bottom right: Hon.
Nicholas G. Garaufis, Sr.
Judge (EDNY)



**RECENT U.S. SUPREME COURT DECISIONS AND THEIR
POTENTIAL LONG-TERM IMPACTS ON WORKPLACE LAW
BY: MARY A. SMITH**

Three U.S. Supreme Court decisions issued in June of 2022 had immediate impacts on private sector employers and may result in lasting and surprising changes to how we navigate employment, our personal lives, challenges to administrative regulation, and caselaw interpreting statutory exemptions.



In *Dobbs v. Jackson Women's Health Organization*, the Court overturned 50 years of federal precedent and squarely placed abortion back into state domain. The impact on employment was striking. Facing state restrictions on reproductive services, national corporations adopted travel and reimbursement policies and implemented ERISA plan amendments directed at assisting employees seeking reproductive services across states. In response, litigation challenging corporate policies and plan amendments under equal employment opportunity laws have been filed across the country. *Dobbs*, employment policies directed at health services across states, and the post-pandemic proliferation of remote work arrangements will continue to drive private and possibly state-driven litigation on this highly personal subject.

While *Dobbs* has resulted in litigation for employers on a particularly divisive personal subject, the Court's *West Virginia v. Environmental Protection Agency* reflects a willingness to review regulatory authority and provides clear guidance on the Court's expectations for challenges to such regulatory authority. The Court held that the EPA lacked the

U.S. SUPREME COURT DECISIONS (Continued)

clear congressional authority to force by regulation a shift in U.S. energy from coal to wind and solar. The case provides a strong road map for challenges to regulations issued by such agencies as the Department of Labor, Occupational Safety and Health Administration, Equal Employment Opportunity Commission, and National Labor Relations Board.

The decision in *Southwest Airlines v. Saxon* is a significant and interesting case for employers. In determining if the transportation worker exclusion under the Federal Arbitration Act applied to an airline ramp supervisor, the Court provided a clear analysis of this issue. First, it rejected the proposition that simply because the employee worked for an employer in the transportation industry, the exception applied. Rather, the Court held that it was the work actually performed by the individual and the class of workers generally that will control. The Court concluded that, based on the evidence in the record, the actual work performed was directly connected to the movement of goods in interstate commerce. The decision was followed by the Second Circuit in *Bissonette v. LePage Bakeries* (20-1681).

The analysis is significant to employers within transportation industries as it reflects the Court's willingness to look at specific work tasks in a granular way in determining if an employee is actually involved in the movement of goods through interstate commerce. Certainly, the Court's decisions from its current term will continue to impact employment. The Court will be reviewing the admissions policies in two cases under Title VI of the Civil Rights Act, whether Colorado's law related to discrimination in public accommodation violates

U.S. SUPREME COURT DECISIONS (Continued)

the Free Speech clause of the First Amendment, and, last, but certainly not least, whether a supervisor fits the executive and highly compensated executive exemption or was misclassified and thus owed overtime.

Mary A. Smith is a principal and litigation manager in the White Plains, New York, office of Jackson Lewis P.C.



September 7, 2022 Rule of Law Reception



UPCOMING PROGRAMS

- **NOVEMBER 16, 2022** - "THE FALSE CLAIMS ACT TODAY (SDNY)" FBA QUI TAM SECTION AND FBA SDNY (VIRTUAL)
- **NOVEMBER 18, 2022** - FBA SDNY BOARD MEETING
- **DECEMBER 9, 2022** - FBA SDNY HOLIDAY PARTY



**Federal Bar
Association**

**Southern District
of New York Chapter**

Editorial Board

Christie R. McGuinness
Nancy Morisseau

Interested in writing for *The Mother Court*? Email us for more information.

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