

## **FALL 2016 NEWSLETTER**

### **Special Education Case Law Update**

by Laura O'Leary

#### **UNITED STATES SUPREME COURT**

***Endrew F. v. Douglas County Sch. Dist.*, No. 15-827, 2016 WL 5416228 (U.S. Sept. 29, 2016)**

On September 29, 2016, the Supreme Court granted certiorari in *Endrew F. v. Douglas County Sch. Dist.*, No. 15-827, 2015 WL 9412874 (Dec. 22, 2015). The Court will consider the question of what level of educational benefit a school district must confer on children with disabilities in order to provide them with the free appropriate public education guaranteed by IDEA.

In requesting review, the Petitioner asserted that there is a split among the circuit courts concerning the level of educational benefit school districts must provide under the IDEA. The Petitioner argued that some circuits hold that an individual education program ("IEP") satisfies the requirements of the IDEA if it provides a student with "a just-above-trivial educational benefit" while other circuits hold that the IDEA imposes a higher standard, requiring that IEPs must be calculated to provide "a meaningful educational benefit to children with disabilities."

The Petitioner also argued that an inconsistent standard regarding what constitutes a FAPE under IDEA is untenable for schools and for parents of children with disabilities, and that greater certainty with respect to this standard would enable parents and schools to collaborate more effectively in the development of IEPs and would reduce the risk of parental decisions to seek tuition reimbursement for private schooling when they are dissatisfied with a school district's proposed IEP.

#### **CIRCUIT COURTS OF APPEALS**

##### **Sixth Circuit**

***Gohl v. Livonia Pub. Sch.*, \_\_\_ F.3d \_\_\_, No. 15-2301, 2016 WL 4698279 (6<sup>th</sup> Cir. Aug. 4, 2016)**

The mother of a severely disabled student brought a variety of claims against the school district, including claims under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"). The Court affirmed the district court's decision which granted summary judgment to the school district.

The Plaintiff argued that the school district violated the student's rights because his teacher abused both her child and other children in the special-needs classroom her three

year old child attended. The school had received multiple complaints about the student's teacher from staff members who provided services in the teacher's classroom, including complaints that the teacher was overly harsh and physically rough with the children. Several months after the school district met with the teacher and provided her with a warning letter, a social worker reported to the school that she saw the teacher grab the Plaintiff's child by the top of his head, jerk it back aggressively, and yell in his face. The teacher denied this report and was sent back to the classroom after discussion with school district personnel. Later during this month, the teacher and her paraprofessional were investigated concerning an incident involving spanking of another student; after the investigation, the teacher and her aide were placed on administrative leave.

The Sixth Circuit upheld the district court's grant of summary judgment to the school district, explaining that the Plaintiff had not provided enough evidence to permit a reasonable jury to find that her child was denied participation in or a benefit of his education program and that Plaintiff had failed to show that any of the teacher's challenged actions occurred because of the child's disabilities. The Plaintiff had testified that her child began to exhibit anxiety and panic during the summer after he left this teacher's classroom, but the Court found that the Plaintiff was not qualified to establish that her child's behavioral changes are evidence of harm at all, rather than cognitive development. Additionally, the Court explained that the evidence showed that the student had made exactly the progress during the school year that his education committee, including his mother, hope he would make. Under these circumstances, a reasonable jury could not find that the student was discriminated against, excluded, or denied the benefits of his special education program.

Furthermore, the Sixth Circuit held that the Plaintiff's claims under the ADA and Section 504 fail because she cannot meet the causation requirement. The Court noted that the ADA "requires the plaintiff to present sufficiently 'significant' evidence of animus toward the disabled that is a but-for cause of the discriminatory behavior," and the Court noted further that the causation standard under Section 504 is even higher. The Court explained that, in order to make out a prima facie case of discrimination based on indirect evidence, the Plaintiff needed to present evidence that a comparable non-protected person was treated better than her child, and, in the absence of evidence of a well-treated comparator, the Plaintiff cannot prove that discrimination against the disabled was the reason for the teacher's mistreatment of Plaintiff's child.

***Gibson v. Forest Hills Local Sch. Dist.*, \_\_\_ Fed. Appx. \_\_\_, Nos. 14-3575, 14-3833, 14-3834, 15-3833, 2016 WL 3771843 (6<sup>th</sup> Cir. July 15, 2016)**

A student with a significant intellectual impairment was denied a free appropriate public education ("FAPE") because the school district failed to take appropriate steps to ensure that the student's preferences and interests were considered during transition planning, because the school district did not timely conduct age appropriate transition assessments, and because the school district did not include measurable postsecondary goals in the student's IEPs.

The parents of a former student who suffers from severe cognitive impairment brought suit charging that the school district violated IDEA's requirements for transition services. The Sixth Circuit affirmed the district court's findings that the school district violated IDEA's transition-related procedural requirements by not inviting the student to any transition-related IEP meetings, by failing to take appropriate steps to enable the school district to identify and consider the student's transition-related preferences and interests, and by failing to include appropriate measurable postsecondary goals in the student's transition plan.

The Court held that, because the student lacked the cognitive ability to participate meaningfully in her IEP meetings, the school district's procedural violation of IDEA's requirement that the student be invited to attend transition-related IEP meetings did not result in a denial of FAPE to the student. However, the record included evidence to support the contention that adherence to IDEA procedures concerning the provision of timely transition assessments, consideration of the student's preferences and interests, and use of measurable postsecondary goals, would have enabled to school district to design a work-oriented educational plan that would have allowed the student to be more self-sufficient, the Court found that the student had been denied a FAPE.

### **Ninth Circuit**

***L.J. v. Pittsburg Unified Sch. Dist.*, \_\_\_ F.3d \_\_\_, No. 14-16139, 2016 WL 4547316 (9<sup>th</sup> Cir. Sept. 1, 2016)**

The Ninth Circuit reversed the district court's determination that, although a student met the qualifying criteria as a student with a disability under IDEA, the student did not need special education services because he performed satisfactorily in a general education program.

From second through fourth grade, the student evinced significant mental health and behavioral issues, including multiple suicide attempts and multiple incidents in which he was disciplined for inflicting injury on classmates or school personnel. During this period, the student missed six school days when he was confined to a psychiatric hospital. Nevertheless, because the student was bright and made satisfactory academic progress, the school district declined to find the student eligible for special education services.

At various points during this time period, the school district provided significant behavioral supports for the student, including a one-on-one paraprofessional, accommodations concerning classroom rules, and extensive mental health services. The Ninth Circuit determined that the student's academic performance was attributable at least in part to the school district's provision of these services and that, because he received these accommodations and services at school, the student could not reasonably be categorized as participating in a general education program. Therefore, the student could not properly be said to be progressing satisfactorily in a general education program, and his status as a student with a disability under IDEA meant that he was entitled to

receive special education services. The Ninth Circuit did not address whether the student received, or could have received, these services pursuant to a Section 504 plan.

The Ninth Circuit rejected the district court's reasoning that the student's psychiatric hospitalizations and suicide attempts were not relevant to his eligibility for specialized instruction because they occurred outside of school. The Court explained that the issue is whether the student's disabilities interfered with his education and necessitated special education and related services. The Court noted, "[i]t is hard to imagine how an emotional disturbance so severe that it resulted in repeated suicide attempts would not interfere with school performance." The Court further explained that the student's emotional disturbance adversely affected his attendance which, in turn, hurt his academic performance. In this circumstance, the fact that his suicide attempts occurred outside of school is immaterial.

## **TEXAS DISTRICT COURTS**

### **Southern District of Texas**

***Gregory G. v. Houston Indep. Sch. Dist.*, No. H-14-2768, 2016 WL 5661701 (S.D. Tex. Sept. 30, 2016)**

Parents of two special education students who attended Houston ISD schools brought claims under the False Claims Act against the school district, asserting that the district submitted fraudulent claims to Medicaid for services to special education students.

The Plaintiffs alleged that, under the Texas School Health and Related Services ("SHARS") program, Houston ISD tailored individual education plans to include medically unnecessary services in order to maximize Medicaid billing.

The Court dismissed Plaintiffs' claims with prejudice, finding that the Plaintiffs had not pled fraud with sufficient specificity because they relied only on conclusory and vague allegations that the school district had billed Medicaid for services that were either not provided or not medically necessary.

***Garcia v. McAllen Indep. Sch. Dist.*, No. 7:15-CV-332, 2016 WL 4527539 (S.D. Tex. Aug. 30, 2016)**

Plaintiffs are not prevailing parties and are not, therefore, entitled to an award of attorney's fees when, after parents had filed a request for a due process hearing, but before any consideration on the merits, the school district agreed to the parents' request for special education services, and the parents dismissed their due process action with prejudice.

The Court rejected the Plaintiffs' argument that they were prevailing parties because they achieved an alteration in the legal relationship between themselves and the school district, albeit through the school district's voluntary agreement with their demands,

rather than through a hearing on the merits of the Plaintiffs' claims. The Court explained that the Plaintiffs were essentially offering the "catalyst theory" in support of their claims to prevailing party status—that is, they were arguing that a plaintiff is the prevailing party if he or she achieves a desired result because his or her lawsuit brought about a voluntary change in a defendant's conduct. The Court further explained that the catalyst theory has long been rejected by the U.S. Supreme Court, who determined that a defendant's voluntary change in conduct lacks the judicial imprimatur necessary to create prevailing party status.

### **Northern District of Texas**

***Doe v. Dallas Indep. Sch. Dist.*, \_\_\_ F. Supp.3d \_\_\_, No. 3:15-CV-3811-B, 2016 WL 3669889 (N.D. Tex. July 11, 2016)**

A severely disabled student who alleged that she had been sexually harassed and raped at school by a special education classmate sued Dallas ISD, asserting a variety of claims, including claims under Title IX. Plaintiff's claim under Title IX was dismissed because she had not exhausted her administrative remedies under IDEA by requesting a due process hearing prior to filing suit.

The Court held that, because Plaintiff asserted a claim alleging sexual harassment that was so severe, pervasive, and objectively offensive that it deprived the victim of access to the educational benefits provided by the school, Plaintiff was seeking relief available under IDEA, which requires the school district to provide the student with a free, appropriate public education. The Court explained that the fact that Plaintiff also sought money damages did not change the substance of the claim, and it is the substance of the claim, not the relief requested, which determines whether administrative exhaustion is required.