SUMMER 2017 NEWSLETTER

Special Education Case Law Update

by Laura O'Leary

UNITED STATES SUPREME COURT

***Endrew F. v. Douglas County Sch. Dist.*, ___ U.S. ___, 137 S. Ct. 988 (March 22, 2017)**

Endrew F. is a student with autism who received special education services in the Douglas County School District. From preschool through fourth grade, Endrew made some advancement, but his parents were dissatisfied with the School District's proposed Individual Education Plan ("IEP") for Endrew's fifth grade year. His parents unilaterally withdrew Endrew from the School District and placed him in a private school for students with autism. Endrew made greater progress in the private school setting than he had at the School District. Midway through Endrew's fifth grade year, the School District offered a modified IEP which Endrew's parents again rejected. Endrew's parents then sought reimbursement of Endrew's private school tuition, arguing that the School District's proposed IEP was not reasonably calculated to enable Endrew to receive educational benefits. The administrative law judge, district court, and Tenth Circuit Court of Appeals all found in favor of the School District. The Supreme Court vacated the Tenth Circuit's opinion and remanded the case.

The Supreme Court rejected the Tenth Circuit's view that a school district complies with the IDEA and provides a free appropriate public education ("FAPE") as long as the child's IEP is calculated to confer an educational benefit that is merely more than *de minimis*. *Id*. at 997-1001. The Court also rejected the parents' contention that the IDEA requires school districts to provide "an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities." *Id*. at 1001.

Instead, the Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id*. at 999. For a child who receives special education and related services in a general education setting, an IEP normally should "'be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" *Id*. (quoting *Bd. of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 203-04 (1982). In other circumstances, a student's IEP "need not aim for grade-level advancement," but it "must be appropriately ambitious in light of his circumstances" because "every child should have the chance to meet challenging objectives." *Id*. at 1000. The Court described this standard as "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id*.

The Court emphasized that courts reviewing an IEP must consider whether the IEP is reasonable, not whether it is ideal and reemphasized that "'the courts should not substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Id*. at 999, 1001 (quoting *Rowley*, 458 U.S. at 206). This deference is "based on the application of expertise and the exercise of judgment by school authorities." *Id*. at 1001. Given the nature of the IEP process, the Court expects school authorities to "be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances" by the time any dispute reaches a court. *Id*. at 1001-02.

***Fry v. Napoleon Comty. Sch.*, ___ U.S. ___, 137 S. Ct. 743 (Feb. 22, 2017)**

Parents of a student who has cerebral palsy sued the School District after it refused to permit the student's service dog to attend school and assist the student during her classes. The School District argued that the service dog was superfluous because the School District provided a one-on-one aide to provide all support services for the student during the school day. The district court granted the School District's motion to dismiss, holding that the parents were required to exhaust their administrative remedies under IDEA before pursing claims for injunctive relief and money damages under the Americans with Disabilities Act ("ADA") or under Section 504 of the Rehabilitation Act ("Section 504"). A divided panel of the Sixth Circuit Court of Appeals affirmed, holding that administrative exhaustion is necessary when the injuries relate to the specific substantive protections of the IDEA and whenever the genesis and manifestations of the claimed injuries were educational in nature. The Supreme Court vacated the Sixth Circuit's opinion and remanded the case.

The Court explained that although some overlap exists between the protections of the IDEA and those of the ADA or Section 504, the Sixth Circuit applied too broad a reading of the IDEA's exhaustion provision. The IDEA requires a plaintiff to exhaust the IDEA's administrative procedures before filing an action under the ADA or Section 504 only when the suit seeks relief that is also available under the IDEA. To meet this standard, "a suit must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available.'" *Id*. at 752. However, "in determining whether a suit indeed 'seeks' relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint." *Id*. The Court noted that the IDEA "asks whether a lawsuit in fact 'seeks' relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit 'could have sought' relief available under the IDEA." *Id*. at 755. Thus, a court must look to the substance of a plaintiff's complaint to determine whether, regardless of the labels and terms it uses, it seeks relief for the denial of an appropriate education. *Id*.

In making this determination, the Court suggests consideration of two hypothetical questions: (1) "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school" and (2) "could an *adult* at

the school…have pressed essentially the same grievance?" *Id*. at 756 (emphasis in original). If the answer is yes, and the complaint does not expressly allege a denial of a FAPE, it is also unlikely to require IDEA administrative exhaustion. If the answer is no, the complaint probably does concern denial of a FAPE, and IDEA administrative exhaustion is likely required.

The Court also explained that a review of the history of the proceedings may also shed light on whether a denial of FAPE is the gravamen of the complaint, explaining that a plaintiff's initial choice to pursue IDEA's formal administrative procedures may indicate that the plaintiff is seeking relief for the denial of a FAPE, though this is a fact-based analysis, as a plaintiff may have legitimate reasons for abandoning the IDEA process. Justice Alito, joined by Justice Thomas, filed a concurrence, expressing disagreement with the Court's suggestions concerning the two hypothetical questions and the consideration of whether the plaintiff initially pursued IDEA's administrative procedures.

CIRCUIT COURTS OF APPEALS

Fifth Circuit

***Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251 (5th Cir. March 7, 2017)**

The mother of a student who had reached the age of majority, but who had severe intellectual disabilities and autism, sued the School District asserting claims under the IDEA and Section 504 of the Rehabilitation Act on behalf of the student, alleging physical abuse by the staff and failure to provide the student with appropriate education services. The district court applied a one year statute of limitations to the IDEA claims and dismissed the Section 504 claims due to failure to exhaust administrative remedies under the IDEA. The Fifth Circuit Court of Appeals affirmed.

The Court rejected the plaintiff's contention that a longer statute of limitations should apply based on a provision in the IDEA concerning appointment of an appropriate representative for students who had reached the age of majority who had not been determined to be incompetent but who were not able to provide informed consent with respect to their educational program. The Court rejected this argument because Texas had not set up a procedure for appointing such a representative and because the state's failure to create such a procedure did not prevent the student's parent from earlier obtaining a determination of incompetency from Texas courts which would have permitted the parent to seek a due process hearing under IDEA on the student's behalf.

As to the Section 504 claims, the Court found that these claims overlapped with the IDEA claims because both challenged the way the School District supervised the student and reacted to the student's violent outbursts and because both claims asserted that the School District's practices hindered the consideration of the student's individualized needs. The Court acknowledged the Supreme Court's recent holding in *Fry v. Napoleon Cmty. Sch. Dist*., 137 S. Ct. 743 (Feb. 22, 2017) and found that, in the case before it, the answer to both the hypothetical questions presented in *Fry* was "no." Thus, because all

of the student's claims directly related to the education he received at the School District, they all required administrative exhaustion.

The Court explained that exhaustion under the IDEA requires more than pleading claims before a special education hearing officer; it requires a plaintiff to obtain findings and decisions from the administrative body. Because the plaintiff did not address the Section 504 claims in his prehearing request for relief or otherwise obtain a decision on these claims from the hearing officer, he had not administratively exhausted these claims. The district court properly dismissed these claims.

***Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375 (5th Cir. November 23, 2016)**

A former student brought claims against a public technical school and various school officials under Section 504 and the ADA, asserting that the school discriminated against him on the basis of his disability by refusing to provide reasonable accommodations. The student suffers from an anoxic brain injury which causes him difficulty retaining and processing information.

Although the student received extended time on his examinations, as well as accommodations for notetaking, the student requested additional accommodations, including the ability to take tests two weeks after the other students had been tested. The student provided the school with a doctor's note explaining that he needed a week to two weeks to retain new information prior to being tested on that material. School officials determined that the additional accommodation was unreasonable because it would provide the student with an unfair advantage over his classmates and because it would burden his professors. The student then withdrew from the educational program, filed a grievance, rejected the school's subsequent offer of services, and filed suit. The district court granted summary judgment for the school on a number of bases. The Fifth Circuit affirmed, though it rejected much of the district court's reasoning.

The Fifth Circuit rejected the district court's holding that sovereign immunity barred the student's claim for money damages under Section 504, noting that in 2005, the Fifth Circuit, sitting *en banc*, clearly held that state entities who accept federal funding waive their sovereign immunity to suit under Section 504. The Court also rejected the district court's finding that the student's claims were moot based on the school's offer of services made prior to the lawsuit. The Court explained that because the student seeks compensatory damages for past actions, his claims are not moot.

Nevertheless, the Fifth Circuit rejected the student's claim for such compensatory damages. The Court acknowledged that discrimination includes a failure to make reasonable accommodations. However, if an institution's standards are reasonable, it is not required to lower or substantially modify its standards in order to accommodate disabled students. The Court noted further that "[a] disabled student does not have a right to his accommodation of preference," and that "[a]n institution is not duty bound to acquiesce in and implement every accommodation a disabled student demands." *Id*. at 380, 381.

In order to recover compensatory damages, the student needed to show intentional discrimination. Although the Fifth Circuit has not exhaustively defined what constitutes a sufficient showing of "intentional discrimination," many recent disability discrimination cases have focused on evidence, or the lack of evidence, demonstrating deliberate indifference—that is, the institution had actual knowledge of discrimination to which it responded in a manner that was clearly unreasonable in light of the known circumstances. In this case, however, the Court considered the lack of evidence of specific, disability-based, discriminatory intent, explaining that, "[w]hen the record is 'devoid of evidence of malice, ill-will, or efforts…to impede' a disabled student's progress, summary judgment must be granted in favor of the university." *Id*. at 380 (*citing Delano-Pyle v. Victoria County, Tex*., 302 F.3d 567, 574 (5th Cir. 2002)). Upon review of the student's evidence concerning the school officials' alleged discriminatory intent, the Court afforded deference to the school's decision to reject the student's request for additional accommodations, "because [the student] has not demonstrated that [the school] intentionally discriminated against him." *Id*.

Seventh Circuit

***Ostby v. Manhattan Sch. Dist. No. 114,* 851 F.3d 677 (7th Cir. March 16, 2017)**

The parents of an autistic child objected to the School District's recommendation that the student be placed in a self-contained program for first grade. Due to the IDEA's "stay-put" provision, the student remained in the general education setting pending review by the administrative law judge, the district court, and the Seventh Circuit Court of Appeals. By the time the case reached the Seventh Circuit, the student had entered third grade, and the School District and the parents had reached agreement regarding the student's continued placement in the general education setting. The Seventh Circuit found that the case had become moot because there was no longer an injury that could be redressed by a favorable decision concerning the School District's proposed placement for the student's first grade year, and because the School District had no current intention to change the student's placement from the general education setting.

The Seventh Circuit denied an award of attorney's fees to the parents, explaining that their *de facto* win—in that they had been able, through the IDEA's "stay-put" provision, to maintain their son's general education setting even though the administrative judge and the district court had found in favor of the School District—did not render the parents "prevailing parties" under the IDEA.

Eighth Circuit

***J.M. v. Francis Howell Sch. Dist.,* 850 F.3d 944 (8th Cir. March 7, 2017)**

Parent brought suit on behalf of her son, who was a special education student, asserting a variety of claims, including claims under Section 504 and the ADA, based on the School

District's alleged misuse of restraints and isolation. The plaintiff initially included claims under the IDEA but subsequently amended her complaint to remove those claims. The district court granted the School District's motion to dismiss for failure to exhaust administrative remedies. Applying the Supreme Court's analysis from *Fry*, the Eighth Circuit Court of Appeals affirmed.

Following *Fry*, the Eighth Circuit considered both the substance of the plaintiff's complaint and the history of the proceedings in determining that the parent's claims were actually based on denial of a FAPE under the IDEA, even though the parent had withdrawn her IDEA claims. The Eighth Circuit focused on the plaintiff's allegations that her child was entitled to special education services pursuant to the IDEA, that the student had been placed in restraints for significant periods during his time at school, and that the student was denied participation in and the benefits of a public education because of his disability. The Court found that the complaint was not based on disability discrimination but was based on how the use of isolation and restraints failed to provide the student with sufficient supportive services to permit him to benefit from instruction. Because the plaintiff's Section 504 and ADA claims essentially sought redress for alleged failure to implement the student's IEP with respect to discipline, the Court held that administrative exhaustion was necessary.

The Court rejected plaintiff's argument that administrative exhaustion was not necessary because she sought compensatory and punitive damages, which constitute relief not available under the IDEA. The Court acknowledged that the Supreme Court had, in *Fry*, declined to address the question of whether administrative exhaustion is required when a plaintiff complains of a denial of FAPE but seeks a type of damages not available under the IDEA. The Court then reviewed decisions from the First, Sixth, Eighth, Tenth, and Eleventh Circuits which hold that a plaintiff's claim for money damages is not sufficient to exempt her from the necessity of exhausting administrative remedies.

TEXAS DISTRICT COURTS

Southern District of Texas

***Krawietz v. Galveston Indep. Sch. Dist.*, No. 3:15-CV-203, 2017 WL 1177740 (S.D. Tex. March 30, 2017)**

The district court upheld the special education hearing officer's determination that the student had been denied a FAPE because the School District did not evaluate the high school student for special education services until more than six months after it should have suspected that the student was in need of such an evaluation, in light of the School District's knowledge of the student's academic decline, hospitalization, and incidents of theft.

Although most of the student's claims were time-barred by the one year statute of limitations which applies to IDEA claims in Texas, the plaintiff was the prevailing party because she obtained meaningful relief, including training and counseling for the student

and her parents and transition services, due to the School District's failure to provide a FAPE during the period which fell within the statute of limitations.