School Law for Administrators

Special Education

Parents argue that lower court erred in accepting state review officer's adverse findings over impartial hearing officer's positive findings

Citation: *D.A.B. v. New York City Dept. of Educ., 2015 WL 7273409 (2d Cr. 2015)*

The Second U.S. Circuit of Appeals has jurisdiction over Connecticut, New York, and Vermont.

The Second U.S. Circuit Court of Appeals recently affirmed a lower court's decision in favor of a school district, finding that there was no clear error in a state review officer's (SRO) conclusion overturning the impartial hearing officer's (IHO) earlier decision that had awarded a disabled student's parents reimbursement for private school costs they incurred when they unilaterally removed him from public schools after failing to reach agreement on an individualized education plan (IEP) for their son. The appeals court found that the SRO's conclusion was well-reasoned and thorough and the parents' objection to the adverse ruling was not sufficient to show that the lower court should have overridden the SRO's decision in favor of the IHO.

D.B. was an 11-year-old student in the New York City school system who has autism. During his preschool years, he was in settings where he had a 1:1 student-teacher ratio. When D.B.'s parents met with the school district to develop an IEP for the 2010-2011 school year, the district proposed extended year services that would have him in a classroom twelve months a year, with no more than five other students, a special education teacher, a classroom paraprofessional, and a behavior management paraprofessional dedicated soley to him. D.B. was also to receive 1:1 related services for at least 10 hours each week. This option was chosen by the district over a 12:1:1 setting that was also considered.

D.B.'s parents objected to this proposal, arguing that he needed a 1:1 sudent-teacher ratio in order to be successful in school. Because of this disagreement, the parents unilaterally removed D.B. from public school and enrolled him in a private school. They initiated a due process hearing seeking reimbursement for the private school tuition based on the contention that the IEP was not adequate to provide D.B. with educational benefit because their past experience showed that he needed one-on-one teaching.

The IHO found in the parents' favor, awarding them tuition reimbursement and agreeing with them that the IEP proposed by the district would not have allowed D.B. to make educational progress. On appeal to the state administrative level, the SRO overturned the IHO's decision. The SRO found that there was evidence from D.B.'s preschool years that he would succeed in an interactive classroom with other students, and that the 1:1 behavior management professional would help address concerns about D.B.'s behavior. The SRO also found that while the parents' witnesses seemed to testify that a 1:1 student-teacher ratio would help D.B. to make the most progress or be the most successful, the law does not require a school district to maximize as student's potential, but rather to provide special education and related services that will allow the student to make some educational progress.

The parents appealed this decision to a federal court, which affirmed the decision, giving due deference to the SRO's conclusions. The parents again appealed, arguing that the lower court made several errors, including in taking the SRO's conclusion over the IHO's, not factoring in procedural violations, and coming to an incorrect conclusion about the district's compliance with the Individuals with Disabilities Education Act (IDEA's) substantive requirements regarding provision of an adequate IEP to meet their child's needs. They also argued that the lower court inappropriately placed the burden of proof on them.

The appeals court affirmed the lower court's decision however, rejecting each agreement.

As a first matter, the appeals court disagreed that the lower court should have given deference to the IHO's decision over the SRO's, noting that it was a well-reasoned, thorough decision that was based on the record. Therefore there was no error. The fact that the parents preferred the IHO's decision did not mean that the lower court should overlook the SRO's decision.

Regarding the burden of proof argument, the appeals court found that the lower court did not place the burden of proof on the parents, as they argued. Rather in its decision, the lower court specifically referenced the burden of proof provision of the law, noting that the burden of proof rested with the "school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement."

Moving on the parents' arguments about the adequacy of the IEP, the appeals court noted that they had two flavors. The first was that the district did not follow procedural requirements

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You Be the Judge

Has standard for FAPE changed to "meaningful" educational benefit, as parents argued?

The Facts

A student attended public school for kindergarten and first grade. He had several medical disorders including Doose Syndrome (a seizure disorder), Atrial Septal Defect (a hole in his heart), and Ankyloglossia (a disorder commonly referred to as tongue-tied). Because of these things, he was qualified for special education under the other health impairment category for special education. For kindergarten and first grade, the child's school developed and revised individualized education plans (IEPs) for him with his parents' approval.

Over the course of kindergarten and first grade, the IEPs were amended to adjust services and to add goals in communication, reading readiness, and adapted physical education. The IEPs also shifted so that the child spent a majority of his hours of special education and related services in a special education classroom rather than a general education setting.

The child missed a significant number of school days or partial days in his first grade year, and when it came time to develop his IEP for his second grade year, the school district and his mother disagreed on several points. His parents wanted him to have a one-on-one aide, extended school year services, and full-time nurse in the school, in addition to the therapy and other special education services the parties had agreed to implement. Because the district did not agree to these requests, the parents rejected the proposed IEP.

They then filed a due process request alleging the district denied their son a FAPE based on providing him an inadequate education on six grounds, including: 1) inadequate instruction in reading, math, and writing; 2) inadequate occupational therapy and speech and language services; 3) lack of extended school year services; 4) lack of a one-on-one aide; 5) failure to program for his safety (lack of a full-time nurse); and, 6) failure to develop an appropriate IEP for second grade. They pointed to the results from several tests and evaluations showing that their son had regressed academically.

The hearing officer heard from 14 witnesses, many of whom were the child's teachers who testified that he did not need the accommodations his parents wanted in order to make progress. They also testified to the progress that he had made in school. The hearing officer also looked at the IEPs, paying particular attention to the IEP progress reports, and eventually concluded that the district had offered the child a FAPE and that the IEPs and the IEP process met the requirements of the law. The parents appealed to federal court and the court, giving deference to the hearing officer's findings, concluded that the district provided a FAPE. The parents again appealed, arguing that the lower court applied an incorrect standard when evaluating whether their son received a FAPE. They argued that while the lower court looked to see if "some" educational benefit was provided, it should have asked whether there was a "meaningful" educational benefit.

The Question

The question for the appeals court was whether the FAPE standard requires that a school district provide a "meaningful" educational benefit. *(See the answer on Page 3.)*

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of the IDEA. The second was that the IEP did not meet the substantive requirements of the law.

On the procedural matter, the parents argued that the IEP was not procedurally adequate because it did not contain "measurable annual goals" for D.B. as required. The annual goals mentioned in the IEP lacked specificity and measurability. But the lower court had been persuaded by the SRO's findings (as the appeals court was) that any vagueness in the annual goals was "ameliorated by the specificity and measurability of D.B.'s short-term goals." The court noted also that this is exactly the type of thing that courts are expected to defer to the findings of the hearing officers, who are education experts, rather than substituting their own opinions.

Finally, on the adequacy, the court noted that although D.B.'s parents (and their witnesses) believed D.B. would be best served in a 1:1 teaching placement, the school district was not obligated to "maximize" his potential or offer the very best placement. Rather, the IDEA requires that school districts offer education and services that will allow disabled children to get some educational benefit. The plan outlined by the school district called for a classroom with a low student-to-teacher ratio, a 1:1 behavior management professional, and more than 10 hours a week of 1:1 related services. The appeals court concluded, again, that it found no error with the SRO determination that this was adequate under the law.

Thus it affirmed the lower court's decision.

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Headlines on School Law

Every Student Succeeds Act (ESSA) becomes law

By Rob Taylor, Ph.D.

Finally, after years of acrimonious gridlock in Congress which meant ongoing failure to reauthorize the 2001 No Child Left Behind (NCLB) version of the Elementary and Secondary Education Act, both chambers came to agreement on an historic compromise measure—Every Student Succeeds Act (ESSA)—which President Obama signed into law on December 10. The House had passed the bill on December 2 by a 359 to 64 margin and the Senate gave its approval seven days later 85 to 12.

Most observers see the essence of the compromise as a wrestling of control from the federal government—with authority over key education issues going to the states—along with continued testing requirements and legal protections being offered to subgroups including racial minorities, special ed. students, and English-language learners.

Taking stock of ESSA as a compromise, no one seems to love the whole complex thing but few appear ready to throw major stones. Not only did the bill win approval by overwhelming

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You Be the Judge (Answer)

Has standard for FAPE changed to "meaningful" educational benefit, as parents argued?

The Judgment

The appeals court concluded that the standard for a Free Appropriate Public Education (FAPE) has not changed to "meaningful" educational benefit and therefore affirmed the lower court's decision.

Congress laid out the requirement that school districts must provide a disabled student with a FAPE and defined FAPE as "special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under § 1414(d) of this title."

In *Board of Education v. Rowley*, the U.S. Supreme Court found that schools are not required to maximize a disabled child's potential with the services offered, but instead must provide access to instruction that is "individually designed to provide educational benefit." The access to education must be "meaningful" under this standard, and schools must provide "some educational benefit" to fulfill Congress' intent.

But while courts have continued to follow this standard since 1982, the parents in this case argued that 1997 and 2004 amendments to the law by Congress had resulted in new standards, with the law focusing more on results than access. In these amendments, Congress spoke to the need to have "high expectations" for students "to the maximum extent possible."

But, according to the appeals court, the focus on results over access did not necessarily change the meaning of a FAPE from providing some educational benefit to providing a meaningful educational benefit. Indeed, the court noted, "rather than articulate a new definition of FAPE, Congress amended the IDEA in other ways," including by requiring the IEP to document academic achievement and functional performance in lieu of educational performance. Other changes saw school districts required to include disabled students in statewide assessments and can give alternative assessments only with proper justification.

The examples of changes, the court found, showed that Congress intentionally implemented the higher expectations it had sought in specific ways, but specifically did not alter the standard for providing a FAPE, which it could have easily explicitly done. The reason might be that Congress believes the standard used by courts has been appropriate. The court noted: "we have never held 'some' educational benefit means only 'some minimal academic advancement, no matter how trivial' . . . . Rather, we have used the word 'meaningful' to describe what a FAPE requires, even before the 2004 amendments."

Though the parents cited cases from other circuits in support of their view, the appeals court here found that it would avoid finding that Congress abrogated Supreme Court precedent without any express acknowledgement of its intent to do so. The Tenth Circuit also recently rejected that the standard had changed from "some" to "meaningful" educational benefit.

The parents also argued that the lower court erred in finding that he received a FAPE even under the "some educational benefit standard. However, given that the record supported the hearing officer's findings, and courts are required to give due weight to such decisions (avoiding substituting their opinion for that of the educational experts at the administrative level), the appeals court found that it could not conclude that the child had been denied a FAPE.

This scenario is based on *O.S. v. Fairfax County School Bd., 804 F.3d 354, 323 Ed. Law Rep 70 (4th Cir. 2015).*

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majorities in Congress, and strong support by the current administration, but it has been praised by the two national teachers unions, the National Governors Association, many groups supporting minorities and students with disabilities, advocates of after-school activities, superintendents, and the Council of Chief State School Officers (CCSSO).

Chris Minnich, executive director of CCSSO, had this to say: "This legislation is essential to bringing stability to federal education law and wiping away the unpredictability of operating waiver to waiver."

Waivers to NCLB dates when states were required to demonstrate student success in English and math (2013-14) have been used the last couple of years by the U.S. Department of Education (ED) and its Secretary Arne Duncan. ESSA will now bring with it the end to the waiver strategy; and, of course, Duncan, too, is going away, having recently resigned in the face of blistering criticism from the NEA and AFT over the use of waivers and grants under Race to the Top to enforce his philosophy in support of frequent testing and use of standardized tests in new state-crafted schemes of teacher evaluation. (ESSA will not require use of such tests in teacher evaluation, leaving the philosophic arguments to the states).

But back to the nearly unanimous support being voiced for ESSA. David Schuler serves as superintendent of High School District 214 in the suburbs of Chicago and also as president of ESSA, the national School Superintendents Association. "Some people might try to portray this as a free-for-all, or the wild, wild west, but that's not the case," he was quoted in an *EdWeek* article. "This would allow those conversations [over states holding districts accountable] to move from D.C. in most cases, to our state capital, and that's where they should be."

The shift of control was in fact the driving tenet of the bill's lead architect, Republican Senator Lamar Alexander from Tennessee, who for years has chaired the Senate Health, Education, Labor and Pensions Committee. "This agreement, in my opinion, is the most significant step towards local control in 25 years," he said.

However, the Senate panel's top Democrat, Patty Murray from Washington, is quick to attest that all federal authority is not about to disappear, a problematic situation which would leave many vulnerable student subgroups at the mercy of uncertain state policy. There is really under ESSA, she said, a new framework which includes "strong federal guardrails. . . so that students don't get left behind."

The word commonly used to refer to what is required of states in terms of academic achievement and how that is overseen is "accountability." Since ESSA removes broad oversight provisions from the U.S. ED—and very specifically from its Secretary—some analysts and subgroup advocates express concern that federal officials might end up handcuffed in enforcing federal mandates. Others see ESSA as foretelling a more balanced approach.

Under the broad realm of accountability, testing mandates have not diminished. States will still need to guarantee testing of students on English/language arts and math annually in grades three-8 and once in high school.

However, under ESSA, states will see new flexibility in deciding how the tests will count in evaluating schools in their academic effectiveness. And states will have much more authority in determining both long-term and interim goals at the district level.

Yes, states will still be required to submit accountability plans to ED, plans starting in the 2017-2018 school year. And those plans must address proficiency on tests, English-language proficiency, and graduation rates. Plans will also be required to determine which student subgroups have slipped behind and define methods for closing gaps between those groups and the larger student population.

But under ESSA, states are given more flexibility in how to address required academic standards. And a further "non-academic indicator" of school achievement has been added to the mix. States will be allowed to define their own chosen nonacademic indicator, which could include such possibilities as student engagement, teacher engagement, completion of advanced coursework, school climate/safety, or anything else that seems a priority to the state.

There are very many hefty issues which have found their way into FSSA through dynamic conference committee process. Some of these highlights include: a) For high schools, graduation rates are now a key required indicator of academic effectiveness; b) States will need to develop plans for high schools graduating 67% or less of students; c) States will be required to identify and intervene in the bottom 5% of low-performing schools; d) States must identify struggling student subgroups and develop "evidence-based plans" to make school improvements; e) NCLB's School Improvement Grant program will now be consolidated under the Title I poverty-based funding pot and now states can set aside up to 7% (up from 4%) of Title 1 monies for school improvement; f) In a new program on testing, a pilot will allow seven states to experiment with local tests; g) States still need to adopt standards but not necessarily the Common Core, and ED is prohibited from providing incentives favoring the Core; h) A new $1.6 billion block grant will consolidate over 50 programs but not including after school education, which will continue to have its own dedicated line item; i) The Preschool Development Grant Program will now be mandated; and j) Title I funds will not be portable, that is, cannot follow a student to a new school, and maintenance of effort will remain in place, requiring districts and states to keep up their own funding share in order receive federal grants.

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2015 Sports Law Year-In-Review

(Below please find the third part of a three-part installment by Lee Green, J.D. at Baker University in Baldwin City, Kansas discussing 2015 Sports Law Year-In-Review. A special thanks to Mr. Green for allowing us to provide this information to all school administrators in Maine.)

Constitutional Law: Invasion of Privacy

In June, in a unique case of first impression, Long v. State of Texas, a state Court of Appeals overturned the conviction for violating a state anti-wiretapping statute of a school board member who sent her daughter into the girls basketball team's locker room to surreptitiously record video and audio using an iPhone of the coach's halftime speech. The school board official's motive was to gather "evidence" incriminating the coach who admitted during the case that he had an intense style focusing on discipline and accountability. The board member's daughter had quit the team because of the coach and after the official distributed the recordings to other board members in an effort to get the coach fired, the district reported the incident to the police, leading to the criminal conviction for violating the wiretapping statute. In overturning the official's conviction, the court held that coaches do not have a reasonable expectation of privacy in their speeches to players, "regardless of where those speeches occur, because they are always subject to public dissemination and generally exposed to public view." The court drew support for its decision by citing multiple similar rulings that teachers do not have a reasonable expectation of privacy in statements made to students in class and that the same logic should be applied to coaches in athletics settings.

Constitutional Law: Equal Protection & Transgender Students

The development of fair, practical and legally sufficient policies regarding the inclusion of transgender athletes in sports activities is one of the latest civil rights challenges facing sport governing bodies and educational institutions.

In April 2014, the U.S. Department of Education's Office for Civil Rights issued an updated policy guidance clarifying that the civil rights guarantees in Title IX extend to all students, regardless of their sexual orientation or gender identity. The inclusion of transgender students in the new guidance reflects evolving legal standards nationwide, both through laws enacted by state legislatures and via policies implemented by state associations, regarding the protections against discrimination that must be accorded by schools to transgender students and student-athletes. The 53-page document, structured in a question-and-answer format, is available full-text at **www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.**

Hazing

Hazing continues to be a widespread problem in school athletics programs and one of the most highly litigated claims against districts and athletics personnel, with courts typically imposing liability either because of the failure to create an anti-hazing policy or for developing a policy that is substantively inadequate or ineffectively implemented.

In September, the Middlesex County (NJ) Prosecutor held a press conference to clarify the resolution of criminal charges against seven former football players at War Memorial High School in the Sayreville Public Schools related to an allegedly pervasive and long-standing tradition of hazing by upperclassmen against underclassmen, often involving acts constituting sexual assault and sexual battery, including sodomy. Originally charged with felony aggravated criminal sexual contact and criminal hazing pursuant to New Jersey's anti-hazing state law, the perpetrators were eventually tried as juveniles in Family Court, with six of the seven either pleading guilty to lesser charges or being found guilty of lesser charges. One still awaits trial. All of those whose cases have been resolved received probation and none will be required to register as sex offenders, an option the prosecutor could have chosen to pursue given the nature of the hazing behaviors.

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In April, the first "notice of intent" was filed to bring a civil suit against the district, claiming $2 million in damages suffered by one of the victims of sexual hazing against the school, and the athletics personnel involved in the situation, including the school's director of athletics and the members of the football coaching staff. The issue in that suit and others likely to be filed related to the situation will involve resolution of the questions whether school personnel had "actual knowledge" of the tradition of hazing against underclass football players and whether those school officials exhibited "deliberate indifference" to preventing the hazing.

Also to be determined is whether the district had a strong and effective anti-hazing policy in place for its athletics programs and, if so, whether all athletics personnel were in-serviced regarding the policy, whether student-athletes and parents were educated about the policy and informed as to how and to whom hazing should be reported, whether substantive, ongoing efforts were made by athletics personnel to enforce the policy, whether adequate supervision was in place over all environments and situations where hazing might take place, and whether any athletics personnel were aware of the hazing behaviors but allowed them to continue from year-to-year in the interests of maintaining "team traditions."

Despite the national media focus directed toward the Sayreville hazing scandal, it should be noted that similar hazing allegations surface numerous times each year at schools across the country. In 2015, hazing allegations were lodged involving the football team at Allendale-Fairfax High School (SC), the wrestling team at Provo High School (UT), the basketball team at Raton High School (NM), the football team at Juanita High School (WA), the cross country team at Shawnee Mission East High School (KS), the baseball team at Parkview High School (GA), the football team at Susan Wagner High School (NY), the soccer team at Walhalla High School (SC), the football team at Milton High School (VT), and the football team at Enterprise High School (CA) – just 10 examples of the more-than-75 incidents of hazing reported as having occurred in high school sports programs since the beginning of the year.

Sexual Harassment

On April 24, the OCR issued a new policy guidance clarifying the obligations of school districts to have systems and protocols in place to address sexual harassment in all programs – curricular and extracurricular – throughout K-12 schools, including athletics programs. Such procedures are mandated under Title IX. The OCR's pronouncement reflects the increased level of concern in recent years about sexual harassment and sexual assaults on college campuses and requires the application to schools of the same Title IX standards as are being applied to the 100+ colleges and universities currently under investigation for their handling of complaints by students. The April 24 guidance emphasizes the obligation of every school district to designate a Title IX Coordinator to in-service school personnel about their responsibilities under the law and to educate students about their rights. The guidance is available full text at **www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf**.