

WHO IS BEING UNREASONABLE? CASES WHERE THE SCHOOL LOST

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Please note that citations contained within Key Quotes have sometimes been omitted to enhance readability.

D.B. v. Bedford County School Board, 54 IDELR 190 (W.D.Va. 2010)

The court ruled in favor of the parent, overturning the decision of the hearing officer. The ruling was largely based on the failure of the school district to evaluate the student for a learning disability. The court concluded that the district and the hearing officer were fundamentally confused about the relationship between mental retardation and specific learning disabilities. The school district's written argument in the case stated that "The basis of a SLD [Specific Learning Disability] designation would have been mental retardation as a result of [the student's] low cognitive scores." Key Quote:

However, this is clearly erroneous, given that, pursuant to the pertinent regulations, SLD and MR are contraindicated, i.e., they are mutually exclusive, and thus MR would not have formed "the basis of a SLD designation."

Comment: The hearing officer conducted a three-day hearing and issued a 35-page report. It is rare for a court to overturn a detailed decision like this one, but here the court concluded that fundamental errors were made. The court pointed out that without a proper evaluation of the suspected disability the IEPs could not have satisfied the Rowley standard.

Draper v. Atlanta Independent School System, 49 IDELR 211; 518 F.3d 1275 (11th Cir. 2008)

The hearing officer ruled that the school district failed to provide FAPE to a student with dyslexia who had been misidentified as having a cognitive disability. The federal court upheld that ruling and the Circuit Court affirmed. J.D. tested at an IQ of 63 in third grade. Several years later, J.D. was enrolled by his mother in a private tutoring program where his reading level increased by two grades. This prompted the family to request that their son be further evaluated. The school complied, and though the student again tested at about an IQ level of 60, some discrepancies in the test scores caused the school psychologist to recommend further testing. That further testing showed that the student had an IQ 20 points higher than previously found, and as a result, he was reclassified as having a learning disability. The school district did not, however, provide the reading services promised in the IEP and a mediated agreement, and they did not change the student's reading program even though it produced no gains over three years. The hearing officer found that the district not only misdiagnosed the student as having mental retardation, it then made no effort to further evaluate him for five years in violation of clearly established law. Both the hearing officer and federal court held that the parent's claim was not barred by the two-year statute of limitations because the family did not have reason to know the student

had been injured by his placement until the later IQ testing. Key Quotes (from the *district court* decision, which is at 47 IDELR 260; 480 F.Supp.2d 1331):

As for the 2002-03 school year, J.D.'s IEPs were not based on accurate, up-to-date information as APS contends because they were based on the 1998 evaluation.

Despite the fact that his reading skills decreased, APS continued to use the Lexia reading program, and by the time of the hearing he was still reading at the 3rd grade level. Based on a preponderance of the evidence, the Court agrees with the ALJ's conclusion that APS failed to provide J.D. a FAPE by providing him essentially the same services that had failed him for three years in reading.

Finally, APS failed to design J.D.'s IEPs for the 2003-04 and 2004-05 school years to meet his individualized needs by failing to review and assess whether he had mastered his goals and objectives from the previous year and by failing to revise J.D.'s IEPs in certain areas from one year to the next.

School Board of Manatee County, Fla. V. L.H., 53 IDELR 149 (M.D.Fla. 2009)

The court upheld an ALJ order that required the school to permit a private psychologist retained by the parent to observe the child in the school setting. The court quotes from a 2004 OSEP Letter to Mamas:

There may be circumstances in which access may need to be provided. For example, if parents invoke their right to an [IEE] of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement. Letter to Mamas, 42 IDELR 10 (OSEP 2004).

N.S. v. District of Columbia, 54 IDELR 188 (D.C.D.C. 2010)

The court held that the IEP failed to meet IDEA standards, thus reversing the decision of the hearing officer. The district acknowledged several deficiencies in the IEP, such as the absence of a statement of present levels or a description of the supplementary aids and services, but argued that these were technical defects that did not deprive the student of a FAPE. The court did not agree. The court noted that the hearing officer's decision was largely based on the testimony from the teacher about what could be provided to the student—rather than what services the IEP actually called for. Key Quote:

Defendants contend that as long as [the school] was “willing and able” to provide N.S. with appropriate services to meet his educational needs, any errors or deficiencies in the IEP are harmless. However, the IDEA requires that a school district do more than simply provide services adequate to meet the needs of disabled students; it requires school districts to involve parents in the creation of individualized education programs tailored to address the specific needs of each disabled student.

H. Berry v. Las Virgenes USD, 54 IDELR 73 (9th Cir. 2010)

In a 2007 decision, the Ninth Circuit concluded that the district court correctly stated the standard for “predetermination” prior to the IEP meeting. However, the court remanded back to district court because that court failed to “make specific factual findings regarding the School District’s intent or state of mind prior to and during the IEP meeting.” In 2008, the district court made those findings, and concluded that the district had improperly “predetermined” placement. In a brief, unpublished opinion, the 9th Circuit affirmed that ruling. The district court’s analysis largely hinged on statements from the assistant superintendent at the start of the meeting: “Okay, so what we’ll be doing today is going through the assessment results and then we will talk about those goals and objectives. And we’ll talk about how we can meet those goals and objectives, program services—that discussion—*then we’ll talk about a transition plan.*” (Emphasis in the court’s opinion). The court concluded that this statement indicated a predetermined mind set by the district to transition the student back to the public school from the private school.

Drobnicki v. Poway USD, 53 IDELR 210 (9th Cir. 2009)

The District scheduled the IEP meeting without asking the parents about their availability. The parents informed the District that they were unavailable on the scheduled date and wanted to reschedule. The District did not contact the parents to arrange an alternative date; however, the District offered to let the parents participate by speakerphone. Whether the parents actually had a conflict does not matter, according to the Court. The Court found that the offer did not fulfill the district’s affirmative duty to schedule the IEP meeting at a mutually agreed upon time. Key Quote:

The use of [a phone conference] to ensure parent participation is available only “if neither parent can attend an IEP meeting.” The District’s procedural violation deprived the parents of the opportunity to participate in the IEP process and denied the student FAPE.

J.N. v. District of Columbia, 53 IDELR 326 (D.C. 2010)

The court held that the district denied the parent the opportunity to have meaningful participation at the IEP Team meeting by conducting the meeting without the parent and at a time the parent had objected to. The district sent three notices, proposing alternate dates, and received no response from the first two. So the third notice stated when the meeting would be held. The parent responded to the third notice with phone calls asking that the meeting be rescheduled, but the district did not do so. The federal district court pointed out that 1) the September 21 date was never agreed to; 2) there was no evidence that the parent could not be convinced to attend the meeting; and 3) the parent made "timely, diligent and reasonable efforts to reschedule" the meeting. The court thus concluded that the school had effectively eliminated the parent's ability to participate. The court noted that this was a procedural error that "undermine[s] the very essence of the IDEA."

B.P. v. Charlotte-Mecklenburg Board of Education, 54 IDELR 167 (W.D.N.C. 2009)

The court held that parents were entitled to tuition reimbursement for a school year due to the failure to come to closure on a definitive placement for the student. Despite the fact that there were seven IEP Team meetings during the school year, the district kept postponing a final decision about placement. Key Quotes:

The result of that meeting, the July 2004 IEP, called for B.P.'s placement in an Early Childhood Special Education setting five days per week with speech, physical, and occupational therapy services. This placement, however, was never implemented during the 2004-05 school year. In fact, no final placement decision was ever implemented during this school year, as the Team repeatedly agreed to defer making a final decision regarding placement while more data was gathered about B.P. and the types of services that he required. While CMS's efforts in this regard appear to be well-intentioned, the end result was that B.P. was never offered a definitive placement or program in a public school setting at any time during the school year. The Court agrees with the ALJ's assessment that CMS's failure to timely implement a specific public school placement for the 2004-05 school year denied B.P. a free appropriate public education in violation of the IDEA.

Comment: Some will classify this as an example of the maxim that "no good deed goes unpunished."

Jenkins v. Rock Hill Local School District, 49 IDELR 94; 513 F.3d 580 (6th Cir. 2008)

The Circuit Court reinstated a 1983 suit for retaliation against the superintendent. The parent alleged that the superintendent reported her to child welfare authorities,

excluded the child from school and refused to provide homebound tutoring, all in retaliation for the parent's letter to the local newspaper and complaints to school and other government officials. The court held that these activities were "protected speech" under the First Amendment and that the parent had alleged the elements of a legitimate claim of retaliation. The district was dismissed from the case as there was no evidence of a policy or custom of retaliation. Other claims asserted by the parent were rejected by the court. There was no invasion of privacy nor was there an infringement of the right to liberty in raising children.

Compton Unified School District v. Addison, 54 IDELR 71; 598 F.3d 1181 (9th Cir. 2010)

This case involved a 9th grader who scored below the first percentile in standardized testing. She failed every academic subject in the fall of 10th grade. Teachers described the girl as "like a stick of furniture" in the classroom. According to the court, the girl "sometimes refuses to enter the classroom, colored with crayons at her desk, played with dolls in class, and urinated on herself in class." But because the mother did not want the child "looked at" the district decided not to "push." However, the school did refer the child to a third-party mental health counselor, who recommended testing for special education. Still, the school did not conduct an evaluation, instead, promoting the student to the 11th grade. When the parent sought a due process hearing, alleging that the district failed to "find" the child in a timely fashion, the district argued that the hearing officer had no jurisdiction. The school focused on the statement in the law that schools must give notice of any "proposal" or "refusal" to do certain things, such as evaluating a child. Likewise, a parent can get a due process hearing over any such "proposal" or "refusal." So the school argued that it never "refused." When the parent asked the school to conduct an evaluation, it promptly did so. The 9th Circuit ruled for the parents, noting that it would "avoid statutory interpretations which would produce absurd results." The court quoted the dictionary and found that "refuse" means "to show or express an unwillingness to do..." and noted that the district's "willful inaction in the face of numerous 'red flags' is more than sufficient to demonstrate its unwillingness and refusal to evaluate Addison." One judge dissented, pointing out that this holding does not strengthen "the role and responsibility" of parents, as IDEA intends to do, but rather, it "weakens the parents' role by casting responsibility to monitor and identify children's development solely on to the shoulders of our school system."

Comment: This case presents an interesting public policy discussion about the roles and responsibilities of parents vis a vis school districts. But for practical purposes, there are two important points here. First, watch for those "red flags." Second, be prepared to "push" when necessary to meet the needs of the student.

**The information in this handout was created by Walsh, Anderson, Brown, Gallegos and Green, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.*