"Autism in the Courts!" A Legal Update

By

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SPECIAL ED LITIGATION IN 2021

The number of cases increased from 2020

Federal and state courts continue to be backlogged

Many administrative hearings continue to be held remotely

"Zoom" hearings have presented some logistical challenges

Virtual mediations continue to be efficient and successful

CURRENT LEGAL STANDARD IN IDEA CASES

"If grade-level advancement is not a reasonable prospect for the child, his IEP need not aim for it, but his educational program must be *appropriately ambitious in light of his circumstances*, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom."

The Supreme Court explicitly held that a school *does not* have 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".

OBSERVATIONS ABOUT THE CURRENT LEGAL STANDARD

- The Court in *Endrew F.* did not overturn its *Rowley* decision; rather, it explained that the standard announced in *Rowley* was based on facts related to a student that was fully integrated.
- If a student is "fully integrated" in the regular classroom, FAPE usually means the IEP is reasonably calculated to permit advancement through the general curriculum.
- The Court indicated that "every child should have the chance to meet challenging objectives".

OBSERVATIONS ABOUT THE CURRENT LEGAL STANDARD (CON'T)

- The standard articulated in *Endrew F.* was meant to be a more generally applicable standard, with the understanding that each student and case is factually specific and unique.
- The Court conceded that there can be "no bright-line rule" governing the appropriateness of IEPs.
- The Court reiterated that the IDEA does not "guarantee any particular level of education" nor does it "promise any particular educational outcome".

U.S. SUPREME COURT 2021-2022

- "Rule of 4" required before the S.Ct. takes a discretionary case, such as special education
- Currently, no sped cases pending on the S.Ct. Docket
- Education cases include:
  - Affirmative action
  - First Amendment
  - Religious school choice
  - Section 504 (damages for emotional distress; disparate impact)

THE STATUTE OF LIMITATIONS IN IDEA CASES MOVING FORWARD

- A SOL refers to a law that establishes the amount of time that conflicting parties have to commence litigation from the time of an alleged offense
- A SOL ensures that lawsuits and litigation are dealt with promptly
- People's memories tend to fade and become less reliable over time
- If too much time has passed, the evidence may be affected by memory loss, conflicting testimony, and inaccuracies
- A critical witness may forget the facts, become incapacitated or pass away
- A SOL also prevents long, drawn out litigation for harassment purposes
- The typical SOL is 2 years

STATUTE OF LIMITATIONS IN IDEA CASES

- Under IDEA, a parent or district must request an impartial due process hearing within *2 years* of the date the party *knew or should have known* about the alleged action that forms the complaint, or, if the state has an explicit time limitation for requesting a hearing, in such time as the state law allows.
- For years, Texas has had a one-year statute of limitations in IDEA cases.
- The impetus behind the one-year SOL is that it is critical for a student's success to have any disputes resolved expeditiously.

TEXAS EDUCATION CODE SECTION 29.0164

- The Commissioner or agency may not adopt or enforce a rule that establishes a shorter period for filing a due process complaint alleging a violation of state or federal special education laws and requesting an impartial due process hearing than the maximum timeline designated (under federal law).
- This section is *effective September 1, 2022*

FIFTH CIRCUIT COURT OF APPEALS
K.S. V. Riesel ISD
(November 22, 2021)

- The parents requested an evaluation when the student was in 11th grade due to math struggles and outbursts of anger
- The evaluation was conducted 8 weeks after the parent request and the student was found eligible for sped as LD
- The parents did not argue that the delay getting the evaluation was unreasonable, but that the school should have identified the student earlier based on his uneven academic performance and disciplinary history
- The parent had also presented the school with a private evaluation that was conducted in the 3rd grade

FIFTH CIRCUIT COURT OF APPEALS
K.S. V. Riesel ISD
(November 22, 2022) CON'T

- The parent also stated that the IEP was inappropriate because the student was mostly educated in the general education program
- The IEP required such accommodations as "change in pace of instruction", "check for understanding", and "reminders to stay on task"
- After the student turned 18, he engaged in assault on school property, warranting a DAEP removal
- The district did not invite the student to the MDR due to a trespass order
- A subsequent MDR was held where both the student and parents were present

THINGS TO CONSIDER
Riesel ISD case

- The Fifth Circuit ruled in favor of the district on all issues
- With respect to the evaluation, the parent had not previously requested testing nor did district personnel suspect a disability
- The prior private psychological report (from 3rd grade) was not presented to the school until the parent requested the evaluation
- The behaviors were not consistent with the traits of emotional disturbance
- On the IEP, the court stated *"[i]ndividualization does not mean that no two educational programs can be alike. It simply means that a student's program must account for his individual needs. And performing at grade level may well be an appropriate goal for a student like K.S."*
- The parties agreed that the MDR contained a procedural error, but it did not preclude the participation of the student in the process
- There was no evidence that the group present at the first meeting had predetermined the outcome of the second meeting

FIFTH CIRCUIT COURT OF APPEALS
B.F. v. Klein ISD
(April 7, 2021)

- The student received sped services based on multiple physical and cognitive disabilities, including communication issues, problems with walking and balance, and toileting issues
- The parents alleged that classroom videos showed staff members intentionally causing physical injury or contact
- The parents also alleged that the bus driver "yelled and screamed" at the student
- The allegations further stated that the student came home at least once a week with a soaked diaper and that the school was not working on toileting skills
- Additional allegations stated that the student received various scratches, bumps, and bruises over the years
- The parents sued for monetary damages under the ADA and Section 504

THINGS TO CONSIDER
Klein ISD case

- The Fifth Circuit affirmed the lower court's dismissal of the claims
- The Court noted that the family's experiences were "unquestionably heartbreaking"
- The standard for district liability under the ADA and 504 for monetary damages is whether the school staff had acted with "deliberate indifference"
- District administrators had promptly investigated and responded to the concerns
- The district terminated the teacher and aide, and notified CPS
- The bus driver was removed from the route
- Although the Court noted that it was "logically conceivable" that additional staffing could have helped, it declined to speculate
- THIS CASE DEMONSTRATES THE IMPORTANCE OF REMEDIAL MEASURES

FIFTH CIRCUIT COURT OF APPEALS
D.H.H v. Kirbyville Consol. ISD
(2021)

- D.H.H was a senior in high school where she received good grades and had consistent attendance
- In her 8th grade year, the parent has emailed the school to ask for an evaluation for accommodations under 504, special education under IDEA, or both
- The district evaluated for sped, but found her not eligible
- The parent filed for due process and the HO found for the district on eligibility, but awarded reimbursement for the costs of the private evaluations
- The parent filed in federal court challenging the HO's decision and seeking accommodations under Section 504
- The federal court ruled in favor of the district and the parents appealed

THINGS TO CONSIDER
Kirbyville Consol. ISD case

- The Fifth Circuit affirmed the dismissal of the parents' claims under 504
- The issue was whether the parent had alleged the proper standard under 504
- The parents alleged that the standard should be "disparate impact" rather than "intentional discrimination" since they were not seeking monetary damages
- The Court disagreed and stated that a showing of intentional discrimination (gross misjudgment or bad faith) was necessary
- The district had offered educational services and had conducted the evaluations demonstrating progress in school, thus no educational need

TEXAS HEARING OFFICER DECISION
Student v. Schertz-Cibolo-Universal City ISD
(April 12, 2021)

- The parent alleged that the district denied FAPE and sought reimbursement for a unilateral private placement at an autism day center, a residential placement out of state, a prospective residential placement, and transportation costs for transporting and visiting the child
- The student had been enrolled outside of the district for several years, so the data was limited for the school.
- The district made numerous efforts to obtain data from the private placements including attempting on site visits, but school personnel were afforded minimal opportunities
- The district made significant efforts to involve the parents
- The district developed IEPs and BIPs based on the information available

THINGS TO CONSIDER
SCUCISD case

- The HO determined that the district provided FAPE with its proposed IEPs
- The HO stated that the district did all that it could do in terms of designing an IEP that would provide the student with a program that is designed to provide education and related services so that the student would make progress
- The district crafted IEPs based on available information and knowledge, and, as such, they were reasonably calculated to provide an educational benefit
- The district continually sought information from the parents through ARDs and attempts to visit and confer with the residential facilities, but to no avail
- The district also offered parent training, but the parents declined any training
- Under the legal standards, there was no need to address the appropriateness of the private placements since the district could provide FAPE

TEXAS HEARING OFFICER DECISION
Student v. Hutto ISD
(March 18, 2021)

- The student's neurologist referred the child to a BCBA for evaluation and treatment for mild autism
- The BCBA observed the student for 6-8 hours outside of the school setting and conducted some testing
- The outside BCBA determined that the student exhibited behaviors that were consistent with autism and not necessarily attributable to the student's ADHD diagnosis. Thus, he recommended that the student be formally evaluated for autism
- The ARD reviewed the report and offered to evaluate for autism and provided a consent form to the parents
- The ARD adjourned with the intent to reconvene, but the parent did not return the consent form and withdrew the student before the meeting could be reconvened

THINGS TO CONSIDER
Hutto ISD case

- Under child find, the HO determined that the district did not violate the requirements because it had no reason to suspect autism or a related educational need beyond those already addressed
- The HO also determined that the district was ready and willing to conduct further evaluation upon receipt of the parent's written consent
- In a prior FIE, the district had found that the student's social-pragmatic skills had fallen within normal limits
- The student's strengths included eye contact, social greetings and manners, topic initiation, conversational turn-taking, positive affirmation of others, and use of facial expressions
- The student's behavior and sensory needs were typical of a student with ADHD, thus there was no reason to suspect autism

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