

VCASE 2006 SPECIAL EDUCATION LAW UPDATE

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I. SPECIAL EDUCATION DECISIONS

A. BURDEN OF PROOF

Schaffer v. Weast, 126 S. Ct. 528 (2005).

The parents challenged the substance of their child's individualized education program ("IEP"), believing it denied him a free appropriate public education ("FAPE"). The parents contended that the student required smaller classes and more intensive services. They enrolled the student in a private school and challenged the IEP in an administrative due process hearing. At the hearing, they sought reimbursement for the private school tuition. The administrative law judge ruled in favor of the school district and held that the parents bore the burden of proving that the IEP was inadequate. On appeal, a federal district court judge ruled that the burden was on the school district and awarded the parents reimbursement. The school district appealed. The U.S. Court of Appeals for the Fourth Circuit reversed the lower court and determined that the burden belonged to the parents. The parents appealed to the U.S. Supreme Court.

The U.S. Supreme Court held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." The Court noted that the IDEA is silent on the allocation of the burden of persuasion. Thus, "[a]bsent some reason to believe that Congress intended otherwise . . . , we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." The Court, however, refused to decide whether states can override this default rule through state legislation.

B. PRIVATE PLACEMENT AND REIMBURSEMENT

Emery v. Roanoke City School Board, 432 F.3d 294 (4th Cir. 2005).

David Emery suffered injury as a result of a car accident in 1991. He was subsequently identified as having a learning disability and emotional disturbance. David began school in the 1991-92 school year in a public school program but was later sent to a private school pursuant to his IEP due to significant behavioral issues. Ultimately, in the late Spring of 1992, David was expelled from the private day school because of his threats made toward staff which caused him to be viewed as too aggressive and dangerous for the program. David's parents used their private medical insurance to place David at Cumberland Hospital for the 1992-93 school year. The insurance company paid over \$200,000 for the Cumberland placement for a six month period of time. David paid no money for the placement. Roanoke City offered no IEP for David during the 1992-93 school year. Following his discharge, David was provided FAPE in private residential programs at the expense of Roanoke City until such time as David was too old to qualify for services under the IDEA. David sued the School Board for reimbursement for the over \$200,000 in expenses for the Cumberland placement. The due process hearing was not initiated until September 7, 2001.

The local hearing officer dismissed the case on the basis of the statute of limitations. This decision was affirmed by the federal district court on October 7, 2004. On December 8, 2005, the U.S. Court of Appeals for the Fourth Circuit affirmed the decision but on other grounds. The Fourth Circuit held that David had no standing to sue for reimbursement because he had "suffered no cognizable injury." The failure to provide FAPE in 1992-93 would be an injury but it could not give rise to a claim for money damages under the IDEA. Additionally, David was past the age of entitlement to FAPE. There was no dispute regarding the appropriateness of services provided to David after the school year in question. The Court held that reimbursement has to flow to those who actually expend resources. Because David had no out-of-pocket expenses, he did not have standing to sue for reimbursement. It was also significant that there was no diminution of lifetime benefits under the insurance policy as David was now covered under a different policy. Reimbursement was denied.

M.S. v. Fairfax County School Board, et al., 2006 WL 721372 (E.D. Va.)

M.S. is a student with cognitive and communication impairments including mental retardation, oral motor apraxia, and mild to moderate autism. After Fairfax County Public Schools ("FCPS") proposed an IEP for the 2002-2003 school year, the parents rejected the IEP, unilaterally enrolled M.S. in a private program, and requested reimbursement from FCPS. FCPS denied this request and took the position that the private program was not appropriate. In December of 2002, the student's mother was

charged with violating Virginia's compulsory school attendance statute. The parent was found not guilty of the charge in March of 2003.

On June 1, 2004, the parents requested a due process hearing and sought reimbursement for their unilateral placement of M.S. in the private program and to have M.S.'s future educational placement determined. The parents also asserted a retaliation claim under Section 504 of the Rehabilitation Act because of the charges filed against the child's mother under the compulsory attendance statute.

In January of 2005, a hearing officer found that the school system's IEP did not provide sufficient one-on-one instruction to M.S. However, the hearing officer denied the parents' claim for reimbursement for the private program, finding that the private program was not reasonably calculated to give M.S. educational benefits. The hearing officer ordered FCPS to provide M.S. with a program that included private sign-language instruction, private speech and language instruction, and compensatory education. The hearing officer also concluded that the parent's section 504 claim was time-barred and unsupported by the evidence.

After the hearing officer's decision, the parents disputed FCPS' implementation of the hearing officer's decision. The parents filed this lawsuit against FCPS, Fairfax County School Board, several administrators of FCPS in their individual capacity, the Virginia Board of Education, the Virginia Department of Education, and two state officials. There were seven legal counts filed against this variety of defendants, and the claims were brought under multiple provisions of the Americans with Disabilities Act, § 504, § 1983, and the IDEA. This present decision discussed the defendants' motions to dismiss. The highlights of the decision include the following findings:

All claims against the "Fairfax County Public Schools" were dismissed on the basis that "Fairfax County Public Schools" is a non-entity that does not have the capacity to sue or be sued. In Virginia, the governance of each school division is vested in that division's school board. Therefore, "the Fairfax County School Board is the only local entity empowered to govern the Fairfax County public school system and is the only entity that has the authority to sue and be sued in connection with such governance."

The court also dismissed all the claims against FCPS administrators in their individual and official capacity. The court held that the defendants may not be subject to individual liability under the ADA or Section 504 of the Rehabilitation Act. Further to the extent that the FCPS administrators were sued in their official capacities, the court noted that the lawsuits represented only another way of pleading a suit against the entity of which the officer is an agent. Because the agency, Fairfax County School Board, was named as a defendant, the court dismissed the claims against the individual FCPS administrators.

The parents' claims under Section 504 and the ADA were determined to be time-barred. The court reiterated the position that such claims are subject to the one-year statute of limitations described in the Virginia Rights of Persons with Disabilities Act. However, the student's claims under Section 504 and the ADA were not time-barred because M.S. was a legal minor (under age eighteen), and therefore the statute is "tolled" until he reaches the age of majority.

The claims that were brought under Section 1983, a civil rights statute, were dismissed. The court ruled that a party may not sue under Section 1983 for an IDEA violation. Although the court has taken this position before, it is important to emphasize because Section 1983 claims can result in monetary damages. Money damages are not available for an IDEA violation in the Fourth Circuit.

A.K. v. Alexandria City School Board, 409 F. Supp. 2d 689 (E.D. Va, 2005)

A.K. attended Alexandria City Public Schools ("ACPS") from Kindergarten through seventh grade. He was found eligible for special education services as a pre-school student and he has received special education services since the time he was found eligible. The IEP developed by ACPS in June of 2003 described services for the 2003-2004 school year and proposed a placement in a therapeutic private day school. The parents rejected this placement and instead unilaterally enrolled A.K. in a private residential school on Cape Cod, Massachusetts. A year later, the IEP team from ACPS met with the staff of the residential school, and during three three-hour long meetings, an IEP was developed for the 2004-2005 school year. ACPS again offered a private therapeutic day school placement.

The parents did not agree to the placement, but ACPS sent applications on behalf of the student to two local private therapeutic day schools. Each school indicated that they had an appropriate program for the student and invited the student and parents to visit and for interviews. The parents did not have the student interview at either school and reenrolled the student in the residential school on Cape Cod. The parents then filed a due process hearing seeking reimbursement for the residential placement.

In denying the parents' claim, the hearing officer concluded that ACPS did offer A.K. a FAPE since the school system had offered the student an appropriate and educationally-beneficial special education program in a private day school in his local community. The hearing officer also held that A.K.'s IEP included a proposed placement by proposing a therapeutic day placement and therefore ACPS did not need to identify by name a specific school facility for A.K. to attend. The parents appealed the hearing officer's decision.

The court considered the parents' allegations that ACPS committed three procedural violations that denied the parents meaningful participation in the IEP process

and denied A.K. FAPE. The parents alleged (1) they had never been notified that private day placements in the local area would be considered, (2) specific private day programs were not disclosed by ACPS at the IEP meeting, and (3) ACPS did not clearly present what services were available and how the services would be provided to A.K.

In rejecting the parents' first allegation, the court noted that the parents clearly knew of, or should have known, that ACPS was considering private placements in the local area. The record indicated that ACPS had proposed two IEPs, one for the 2003-2004 school year and one for the 2004-2005 school year, which proposed a private day school placement. The record also indicated that the parties discussed private day school placements during one of the three three-hour long IEP meetings.

With respect to the second claim, the court held that ACPS "was not required to identify in writing any *specific* private school for the student's placement in order to satisfy the requirements of the IDEA." In reaching this holding, the court relied upon prior case law which stated that, "a recommendation for a child's educational placement means a recommendation to the actual educational program and not the particular institution where the program is implemented." Citing Jennings v. Fairfax Co. Sch. Bd., 35 IDELR 158 (E.D.Va. 2001), aff'd 39 Fed.Appx. 921 (4th Cir. 2002).

Finally, the court affirmed the hearing officer's decision that the IEP did specifically set forth services to be provided to A.K. The court held that the private day placement was reasonably calculated to offer A.K. educational benefits and the court affirmed the hearing officer's conclusion that either of the two private day schools proposed by ACPS could implement the proposed IEP.

County School Board of Henrico v. Z.P., et al., CA 3:03CV396 (E.D. Va. Oct., 2005).

Defendant, Z.P., was born in 1998 and diagnosed with autism at the age of two. In August 2002 and September 2002, the parents and the school board met to prepare an IEP for the 2002-2003 school year. The proposed placement was the preschool autism class at a public elementary school. The parents refused to consent to the placement and unilaterally placed Z.P. into a private program. When the school board refused to reimburse the parents for the private program, the parents then initiated a due process hearing alleging that the school board's 2002 IEP failed to provide Z.P. with FAPE. In addition, the parents asserted that the school board committed three procedural violations in the 2002 IEP, including: 1) failure to include Extended School Year Services ("ESY") services for the summer of 2003; 2) failure to include a Behavioral Intervention Plan ("BIP"); and 3) failure to include evaluation methods that would be used to evaluate Z.P.'s progress toward four of the five IEP goals. The hearing officer found for the parents on all accounts. The school board appealed to the District Court. The District Court overturned the hearing officer's decision. The parents then appealed to the Fourth Circuit. The Fourth Circuit remanded the case back to the District Court to make an

independent finding as to the IEP's appropriateness, while giving appropriate deference to the hearing officer's decision.

On remand, the District Court again overruled the hearing officer's decision. The court concluded the hearing officer's findings were not entitled to due weight because he did not give proper deference to the professional educators' view that the proposed IEP was appropriate, and he did not acknowledge that the parents had the burden of proof. Further, the court held that the hearing officer erred when he determined that the school board's failure to include ESY services, a BIP, and evaluation criteria were fatal procedural violations under the IDEA. The court also determined that the hearing officer's decision did not properly consider the least restrictive environment requirements.

According to the court, schools are entitled to have a reasonable time to implement ESY services. ESY services do not have to be established before the commencement of the school year. Likewise, a school is not required to have a BIP established at any particular date. The IDEA regulations do not require the inclusion of a BIP until a student's behavior impedes his own learning or the learning of others. The court also held that the school's failure to check the assessment methods on four of the annual goals would not have prevented Z.P. from receiving a FAPE from the public school program.

With respect to the IEP, the court determined that the IEP was reasonably calculated to provide educational benefit to Z.P. The court noted that the TEACCH methodology used by the school board has been found by a number of courts to be an appropriate educational method for teaching autistic children, and that there is no consensus that one-on-one ABA therapy is the only effective method for teaching children with autism.

C. PROCEDURAL ERROR

Stafford County School Board v. Cheryl Howard, et al., Stafford County Circuit Court, Case No. CH04-138 (June 10, 2005)

The School Board appealed to State circuit court a decision of a hearing officer which ordered compensatory education services for a student with autism even though there had been no evidence which demonstrated that the student had been denied a free appropriate public education. The evidence at the lengthy hearing, which was initiated by the parents, established that the student had received FAPE including adequate ESY services. The experts testified that the student had even received more services than were needed for FAPE. The hearing officer did not address the issue of whether the services were appropriate, which was the basis for which the hearing was initiated. Rather, the hearing officer ordered compensatory education services because of the assertion by the parents that they had not received a listing of low-cost legal assistance in connection with

their due process hearing. The parents acknowledged that they knew of attorneys who had specialized in education law and had received the listing in connection with a due process hearing previously. They recited that they had not received the listing in connection with the current hearing. The hearing officer found that this procedural problem that arose in connection with the hearing denied FAPE and would give rise to a claim for compensatory education. The court's decision on appeal reversed and held that the student had been provided FAPE and that any procedural problem did not result in a denial of FAPE. The claim for compensatory education services was denied and judgment was entered in favor of the School Board.

D. RIGHT OF APPEAL

Fairfax County School Board v. Commonwealth of Virginia Department of Education, et al., Fairfax County Circuit Court, CL 2005-5556 (March 28, 2006).

The School Board filed a motion for judgment under Va. Code § 22.1-214D seeking to have reviewed and reversed the decision of the Virginia Department of Education made under the complaint procedures (CRP) of 8 VAC 20-80-28. The State argued that the case should be dismissed because there is no appeal permitted in court to challenge findings made in the state complaint system. Citing Loudoun County School Board v. Board of Education, 612 S.E.2d 210 (2005), the Circuit Court held that appeals to court of findings made in the state complaint process are clearly permitted. "Whether dicta or not, the Court of Appeals in Loudoun could not have been clearer in stating that an appeal to a circuit court may follow a CRP hearing." VDOE is pursuing an interlocutory appeal.

E. SECTION 504 OF THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

Bacon, et al. v. City of Richmond, et al., 386 F.Supp.2d 700 (E.D. Va. 2005).

An advocacy group and two of its members (the "Plaintiffs") filed a lawsuit against the City of Richmond ("City") and the Richmond City School Board ("School Board") alleging that they had been adversely affected by deficient handicap accommodations at four different schools located in the Richmond City Public Schools. They alleged that the City and the School Board violated Section 504 of the Rehabilitation Act ("Section 504"), the Americans with Disabilities Act ("ADA"), and the Virginians with Disabilities Act ("VDA"). The Plaintiffs sought prospective remedial action rather than monetary damages for past injuries. The City and School Board claimed that the Plaintiffs did not have legal standing to bring this action, the City and the School Board collectively were not proper parties for this type of action, and the Plaintiffs did not adequately state a cause of action under the VDA. Thus, the City and the School Board moved to have the case dismissed.

The court held that the advocacy group had legal standing in its representational capacity under Section 504 but not under the VDA. “Under Virginia law, persons or entities only acquire standing to sue in representational capacity by asserting the rights of another when specifically authorized by statute.” The VDA does not specifically provide for associational representation. The two individual members, however, did have standing under both statutes. Further, the court held that the Plaintiffs had city-wide standing--their cause of action would reach all Richmond City public schools because they should not be precluded from attending programs, events, and activities held at other schools open to the entire student population; thus, their cause of action would not be limited to the four schools that had directly impacted the Plaintiffs.

Although the City and the School Board blamed one another for the lack of compliance and, thus, claimed that they were not proper parties to this action, the court held that both parties were responsible and necessary parties to the action: the City is responsible for appropriating funds for the remedial project, and the School Board is responsible for implementing the remedial project. The court also held that the City was a proper party under the ADA because it accepted federal funding, and the Plaintiffs had adequately stated their claims under the ADA and Section 504. The court, however, dismissed the Plaintiffs’ VDA claim because their pleadings lacked a required element. The VDA prohibits discrimination under any program or activity receiving state financial assistance or conducted by or on behalf of any state agency. The plaintiffs’ complaint did not specifically allege that the City had received any state funding for its educational programs; thus, the VDA claim was dismissed as deficient with leave to amend.

F. ALTERNATIVE EDUCATIONAL SETTING

Reiser v. Fairfax County Board of Education, CA 05-114 (E.D. Va. June 17, 2005)

A high school student with ADD was expelled for misconduct. The student was placed in an alternative setting while on discipline. The parents challenged the appropriateness of the alternative setting. The parents argued that the alternative setting was not an appropriate placement because it did not offer all of the various programs of the student’s prior placement. Specifically, they argued that the alternative setting did not offer advanced placement courses, a Japanese language program, or extensive extra-curricular activities. A due process hearing officer disagreed and determined that the student’s placement in the alternative setting was appropriate. The parents appealed the hearing officer’s decision to U.S. district court.

According to the court, the school board was not required to duplicate at the alternative setting every single special club, athletics, arts, and Japanese language program. The court noted that the school board had gone beyond what was required by allowing the student to participate in advanced placement classes online. Further, the

court noted that the classes at the alternative setting were in a small group setting thus offering the student an opportunity for social interaction. The court determined that the alternative placement was appropriate as it provided the student with a free appropriate public education. Therefore, the court upheld the hearing officer's decision and granted the school board's motion for summary judgment.