School Law for Administrators

Special Education

Procedural violations did not deny child appropriate education

Citation: *Albright v. Mountain Home School District, 2018 WL 5794164 (W.D. Ark. 2018)*

A federal district court in Arkansas has denied a request for judgment on the record to a mother of a disabled child who alleged that her child was denied a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA). This lawsuit followed another lawsuit in which the mother alleged the same thing but pertaining to a different time period. In the first lawsuit, the mother had not prevailed (and was appealing the decision to the Eighth U.S. Circuit Court of Appeals). In this case, the court dismissed the mother's complaint with prejudice, finding that the procedural violations alleged by the mother did not result in the denial of a FAPE to her child.

Jacquie Albright had a child who attended school in the Mountain Home School District. Her child was disabled and therefore eligible for special education under the IDEA. Albright believed that the district was not living up to its obligations under the law and in an earlier lawsuit, alleged that the district had denied her child a FAPE from November 2013 through October 2014. A hearing officer found in favor of the school district in that case and the court affirmed that decision, granting summary judgment to the school district. Albright appealed that decision, and also filed another due process request, this time alleging that the district had denied her child a FAPE for the period between October 2014 and October 2017. The hearing officer again found in the district's favor and Albright again brought her lawsuit to federal court.

Under the IDEA, when a federal district court reviews a hearing officer's decision in a special education case, the review must consist of a review of the administrative record, there may be additional evidence considered if requested and appropriate, and the court must base its decision on the preponderance of the evidence, giving due weight to the hearing officer's decision in recognition of the hearing officer's expertise on the topic of education and in light of the hearing officer's opportunity to observe witnesses and make credibility determinations about those witnesses.

Under the IDEA, the mechanism through which disabled children are guaranteed a FAPE is the individualized education plan (IEP). This plan must be specially formulated to address the child's specific disability and resulting needs and must be the results of the procedures required under the IDEA and must be "reasonably calculated to enable a child to make progress in light of that child's circumstances" *(Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017)).* Procedural violations by a school district can result in denial of a FAPE but may not unless the "procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to par-

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Around the Nation ~ Virginia

Student sues district after suffering heat stroke at soccer practice

Monticello High School Athletic Director Matthew Pearman and soccer coach Stuart Pierson have both been named as defendants in a lawsuit brought by a student, Patrick Clancy, who suffered a heat stroke after an extreme soccer practice in July. In the suit, Clancy claims that the coaches put his health at risk. He alleges that he suffered from "exertional heat stroke" after taking part in a two-hour practice early on July 21, 2017.

According to the lawsuit, Clancy's mother noticed that her son's hands were turning blue and he was gasping for air after he returned from soccer practice in July. Emily Clancy said, "He couldn't walk, he couldn't talk. His head was hurting so much he was nauseous. He was in bad shape. All he wanted to do was lay on the cold, wood floor."

The lawsuit claims negligence and gross negligence by Pearman and Pierson. The suit asserts that school officials violated Virginia High School League guidelines for conducting practices in a number of ways including not having a trainer, cold water, shade, or any rest breaks. However, it is unclear how closely schools are required to follow these guidelines according to Billy Haun of the Virginia High School League. He said, "We put out the guidelines, and then those local schools can choose to be as stringent as they want. They can make them more stringent. They can make them less stringent."

—School Law Bulletin,
Vol. 45, No. 23, December 10, 2018, p. 6.

Around the Nation ~ Texas

Revised social studies standards teach students that slavery played a "central role" in causing the Civil War

A new set of standards will change the way history is taught in Texas, and many hope that it will help the state to move forward from an antiquated curriculum that left students in the dark about many important issues. In addition to changing the wording of the role that slavery played in causing the civil war, the revised standards also retained Hillary Clinton and Helen Keller as potential subjects of study, after it was reported this year that those names might be removed.

These changes are an attempt to streamline social studies curriculums in the state after some teachers said there was too much material to cover. The changes made to the standards were not meant as a total revision. Still, process still garnered national attention, in part because of Texas' large population and its outsize influence on the textbook publishing industry

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ticipate in the formulation process, or causes a deprivation of educational benefits."

In this, her second IDEA complaint, Albright outlined a number of procedural violations which she argued in aggregate resulted in the denial of FAPE to her child. In all, the procedural violations she alleged dealt with the topic of whether the district should have carried out a new functional behavior assessment (FBA) and provided her child with a new behavioral intervention plan (BIP) given maladaptive behaviors her child was exhibiting under the old BIP.

While the facts are a bit muddled, the general summary of the situation is that Albright's child had an IEP and a BIP. Prior to the 2015-2016 school year, the district requested Albright's consent to have a new FBA carried out for her child by a woman, Belk, who was a board-certified behavior analyst. Albright declined to provide her consent. During that school year, and the 2016-2017 school year, the IEP's for Albright's child stated that her behavior was not impending her educational progress. However, the district continued to use a BIP developed after an earlier FBA, under which the district sent Albright daily notes about her child's day, outlining any instances of misbehavior. At some point, despite that Albright had declined her consent, the district did have Belk evaluate Albright's child, i.e. the district conducted a new FBA.

Albright's claims are many, but include the following alleged procedural violations: 1) failure to conduct a new FBA or include a new BIP for her child at a time of Albright's choosing; 2) statements in IEPs indicating that the child was making educational and social progress which were incorrect based on the ongoing behavioral challenges her child was having; 3) carrying out an FBA without Albright's consent and without going through appropriate "consent override" procedures (namely a due process hearing); and 4) including an FBA and resulting BIP in her child's education plan without having gone through "consent override" procedures.

As a first matter, the court ruled that the IDEA does not require that a district carry out a new FBA or include a new BIP in a student's IEP unless the student was removed from school for more than 10 days for misbehavior that was a manifestation of her ability or placed in an alternative educational placement. Instead, the law required that the district consider using positive behavior interventions and supports among other strategies to address behavior challenges that may impede a child's learning or the learning of others.

As to the next several complaints, the court found them all to be connected. The court noted that Albright's allegation that her child was not making progress despite the fact that IEPs stated she was ignored the fact that the district had attempted to carry out an FBA in advance of the 2015-2016 school year, a request which Albright denied. The court rejected her argument that this request was just a ploy (Albright alleged that the district requested to carry out an FBA but secretly felt this was unnecessary and actually never intended to carry one out), finding that this argument ignored that the district actually did carry out an FBA even though Albright had not consented to one.

And although it was a procedural violation to evaluate a child without the parent's consent, the court found that "this procedural short-coming made no substantive difference in the end" because had the district gone through the motions of filing a due process hearing request to seek the right to reevaluate the child, "every court to consider the IDEA's reevaluation requirements has concluded that if a student's parents want [their child] to receive special education under the IDEA, they must allow the school itself to evaluate the student." Based on this reasoning, the court concluded that any procedural inadequacy related to the district's decision to reevaluate the child without having received consent did not compromise Albright's child a right to an appropriate education, seriously inhibit Albright from participating in the IEP formulation, or cause a deprivation of educational benefits.

Moreover the court concluded that, by a preponderance of the evidence, the IEPs for the child during the relevant period were reasonably calculated to enable the child to make progress in light of her circumstances. The evidence in the record showed that the child made progress in syntax, grammar, play and leisure, social interaction, group instruction, classroom routines, responsiveness, and reading and math. All of this was enabled, the court added, by the behavior management plan developed by Belk based on her assessment.

For these reasons, the court dismissed Albright's claims with prejudice.

—School Law Bulletin,
Vol. 45, No. 24, December 25, 2018, pp. 5-6.

First Amendment

Student argues he has First Amendment right to wear clothes depicting weapons

Citation: *Schoenecker v. Koopman, 2018 WL 5886011 (E.D. Wis. 2018)*

A federal district court in Wisconsin has granted a student's request for a preliminary injunction in a case in which the student alleged that the principal of his school had violated his First Amendment rights by forbidding him to wear shirts that depicted weapons or the word gun on them. The court ordered the principal to allow the student to wear the three shirts in question and also denied the principal and school district's request to dismiss the student's second amended complaint which alleged that a change to the school district's dress code policy similarly violated the student's First Amendment rights.

During his freshman year at Markesean High School, M.S. began wearing two t-shirts that depicted weapons. One used pictures of weapons to spell out the word LOVE and the other had the words "Celebrate Diversity" and showed a variety of weapons below. Teachers were uncomfortable with the shirts and asked M.S. to see the principal, John Koopman, who told M.S. the shirts violated the school's dress code and needed to be covered up. Though the dress code did not explicitly bar clothes with weapons on them, Koopman explained that it was within his discretion to interpret the dress code and that he believed the shirts violated the dress code. Koopman met with M.S. and his parents and told them that M.S. needed to stop wearing the shirts to school.

M.S. however continued to wear the shirts to school and when he did so, teachers required him to cover them up. When M.S. failed to comply, M.S. was sent to the "cubicle," a form of in-school suspension where he was segregated from others and did not receive instruction.

M.S. initiated a lawsuit under Section 1983 alleging that the prohibition on his shirts violated his right to free speech protected by the First Amendment. He sought only declaratory and injunctive relief, namely an order allowing him to continue wearing the shirts to school without facing discipline. In the meantime, the school district amended the dress code policy to include a prohibition on clothes depicting weapons. Further, M.S. added another shirt to his wardrobe, this one showed no pictures of guns but stated that if guns kill people, pencils misspell words, cars drive drunk, and spoons make people fat.

M.S. also amended his complaint to challenge the district's enforcement of the revised dress code to the extent that it prohibited students from wearing clothing depicting weapons in a non-violent, non-threatening manner. M.S. later filed a motion for preliminary injunction to prevent Koopman from discipling him for wearing the shirts. He also filed a request to amend his complaint for a second time to seek an order allowing him to wear clothing not only that depicted weapons but also clothing that used the word gun, so long as the clothing was non-violent and non-threatening.

Koopman responded to the motion for a preliminary injunction and filed a motion to dismiss the second amended complaint, arguing that he was not the proper defendant and that the school district was, but that M.S. had not sued the school dis-

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nationwide.

The current educational standards in Texas, which adopted in 2010, list slavery as one of several causes of the Civil War, after sectionalism and states' rights. The revised standards change this by saying that elementary school students should be able to identify "the central role of the expansion of slavery in causing the Civil War and other contributing factors, including sectionalism and states' rights."

A Democratic member of the board, Lawrence A. Allen Jr. made the motion to change the language. He said, "I think it's an excellent start." The new standards will take effect at the beginning of 2019. More than a year ago, volunteer teams of educators, academics, and other community members, overseen by the state, gathered to make revisions and deletions to the standards. In September, they submitted a first draft to the State Board of Education, which comprises of five Democrats and 10 Republicans.

After the board approved the draft to open it up for public comment, it quickly made national headlines because Mrs. Clinton's and Ms. Keller's names had been removed. Comments poured in, and not all of them from within state lines.

Marty Rowley, a Republican member of the education board, said he had not immediately noticed the deleted names when he voted to make the document public in September. Two months later, he approved the version that had restored Mrs. Clinton's and Ms. Keller's names. Debates over the curriculum have been going on for years, and critics of the revision process have criticized it for being too political, in part because the board members are elected officials.

Although the revised standards are an improvement over the previous standards, The Texas Freedom Network, an Austin-based advocacy group, believes that the state still has a long way to go. The group claims that the standards still do not paint a full picture of civil rights movements in the United States, and they exaggerate the extent to which Christianity influenced the founding fathers.

Source: *New York Times*

—School Law Bulletin,
Vol. 46, No. 1, January 10, 2019, p. 8.

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trict. Koopman argued that he could not be sued under Section 1983 for declaratory and injunctive relief in his individual capacity and could not be sued for any relief whatsoever in his official capacity.

The court rejected this argument. It wrote that it is "well-established that suing a municipal official in his or her official capacity is the same thing as suing the municipality of which he is an agent," and M.S. had sued Koopman in his official capacity. Thereby, M.S. had indeed sued the school district.

Koopman also argued that a plaintiff who seeks injunctive relief against a municipality must comply with *Monell*, which means that he must show that the harm for which he is suing is being caused by a municipal policy of custom. The court considered this and agreed, but found that M.S.'s second amended complaint clearly satisfied *Monell* given that the complaint alleged that the official policy of the school district (as stated in the student handbook) prohibited the wearing of clothing depicting firearms, even when such depiction was not done in a threatening or violent way. Thus, M.S. had alleged an injury that was caused by an official policy.

Therefore, the court turned to the request for a preliminary injunction. The court found that a preliminary injunction was in order. It explained that to issue a preliminary injunction, courts typically look to whether the plaintiff has established that he is likely to suffer irreparable harm in the absence of an injunction and that the balance of equities tips in his favor (i.e. that the government does not have a greater interest in the restriction). In a free speech case, the likelihood of success on the merits of the case is often a determinative factor in this consideration because "even short deprivations of First Amendment rights constitute irreparable harm." Further, the balance of equities usually tips in favor of the plaintiff if the government's conduct is likely unconstitutional.

Thus, the question this case looked to first was whether M.S. showed that wearing the shirts in question was a form of expression protected by the First Amendment. The court noted first that the shirt that used the word "gun" (If guns kill people …) was protected because it stated an opinion about guns, namely that counter to the popular saying that guns kill people, the facts are that people are responsible for any gun deaths. This could be "readily underst[ood] to mean that the plaintiff opposed laws restricting private ownership of firearms" and was therefore an expression of a personal belief on a matter of public concern protected by the First Amendment.

Turning to the other shirts, the court noted that the district argued that these shirts were not protected expression because they did not convey specific, unambiguous messages for although M.S. wore them to support gun ownership, this message is not clear. In support of this argument, the district cited cases in which certain forms of conduct (like flag burning) are protected only if the conduct is "inherently expressive" and communicates a message without additional speech.

The court rejected this argument however, noting that the shirts were not analogous to "conduct" but instead were examples of "pure speech" and a "narrow, succinctly articulable message is not a condition of constitutional protection," as the U.S. Supreme Court decided in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*. The court also rejected the district's comparison of the present case to one in which the Seventh Circuit found that an elementary school student's t-shirt (which depicted a childish drawing and the words Class of 2003) was not protected speech. The court noted that in contrast to that shirt, which did not convey any significant message, M.S.'s shirts conveyed clear messages of gun support, which made them examples of protected speech.

The court next determined that it would apply a softened *Tinker* standard (set by the Seventh Circuit in an earlier case) in considering the speech vs. the standard set by the Supreme Court in *Hazelwood School District v. Kuhlmeier* as the district argued should be applied. The Tinker standard requires that the school be able to forecast a substantial disruption from the conduct or speech.

The district cited several reasons for believing that the shirts in question would create a substantial disruption, including that the shirts made teachers uncomfortable and concerned about safety, students participated in a walkout at the school to protest school gun violence and to remember the victims of the Parkland shooting which had recently occurred, that classroom instruction was disrupted multiple times based on student arguments about M.S.'s shirts and that media outlets came to the school on numerous occasions to interview M.S. and other students, disrupting school operations.

But the court concluded that these reasons did not support the district's argument that it reasonably forecast substantial disruption. There was evidence that the school walkout was prompted not by M.S.'s shirts but by another school shooting. The mere reference to student discussion and arguments about the shirts was not enough to support the position of substantial disruption, nor was staff members' general discomfort, particularly given that the shirts did not advocate gun violence. And finally, the court found, the visits by the media were caused not by M.S.'s shirts but instead by the district's decision to prohibit him from wearing the shirts.

Based on this analysis, the court concluded that M.S. had a likelihood of success on the merits of his First Amendment claim. And balancing M.S.'s interest in his First Amendment right against the school district's interests against the issuance of the preliminary injunction, the court concluded that the balance weighed in M.S.'s favor. The district, according to the court, failed to show that allowing M.S. to wear the shirts would cause a substantial disruption and there was no showing that the public would be harmed by the injunction.

Therefore, the court granted M.S.'s request for a preliminary injunction to allow him to continue to wear the shirts. Further, the court denied the district's request to dismiss the second amended complaint.

—School Law Bulletin,
Vol. 46, No. 2, January 25, 2019, pp. 3-4.