School Law for Administrators

In the News

State reps publicly urge Betsy DeVos to preserve Obama administration guidance on discipline

Secretary of Education Betsy DeVos received an AG letter for the attorney generals of California, Connecticut, District of Columbia, Illinois, Iowa, Maryland, Massachusetts, New Jersey, New York, Oregon, and Washington urging her not to rescind the school discipline guidance issued by the Department of Education in 2014 under Obama. The letter was also sent to U.S. Attorney General Jeff Sessions. The letters were sent in response to Devos' claims that she is seriously considering rescinding the guidance, which informed schools that they may be found in violation of federal civil rights law if they enforce intentionally discriminatory rules, or if their policies lead to disproportionately higher rates of discipline for students in one racial group. Many educators believe that this guidance has been instrumental in cutting down on discrimination in the schools.

Supporters of this guidance claim that it is extremely important. Schools across the nation struggle with inequality in their schools, and a Government Accountability Office (GAO) report found that black students are consistently disciplined at higher rates than students in other groups. Despite this fact, opponents of the guidance claim that it puts an onerous and unfair burden on school leaders. They claim that out-of-school factors impact black students, and this helps to explain why they're disciplined at disproportionate rates in school.

Still, many educators feel that the guidance is necessary and important. The attorney generals' letter stresses that the guidance has helped the U.S. Department of Education fulfill its broad obligation to protect students from discrimination based on race, color, sex, disability, national origin, and other factors. The letter states: "In short, exclusionary discipline harms students," the 11 attorneys general wrote. "Additionally, discrimination contributes to a racial gap in administration of this discipline. The guidance was issued to help schools address just these issues, and to rescind it now despite continuing disparities and other challenges would be counterproductive and harm our students, our schools, and our States."

Source: *Education Week*

—School Law Bulletin,
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IDEA

Father files lawsuit against state defendants alleging violations under the IDEA and Fourteenth Amendment

Citation: *Oskowis v. Arizona Department of Education, 2018 WL 3773937 (D. Ariz. 2018)*

A federal district court in Arizona has dismissed a lawsuit brought by the father of an autistic child against the Arizona Department of Education and other state defendants seeking an order enjoining them from exceeding federally-mandated deadlines with respect to actions under the Individuals with Disabilities Education Act (IDEA). The father sued after an administrative law judge (ALJ) took more than a year to issue a decision in an IDEA hearing. While the court dismissed the father's lawsuit, it ruled that the father could potentially amend his complaint to properly state a claim for review of the ALJ's decision.

E.O. was a 13-year-old student in 2013 who was diagnosed with autism and receiving services according to his IEP under the IDEA. E.O. attended the Sedona Oak Creek Unified School District Number 9. On May 3, 2016, E.O.'s father, Matthew Oskowis, filed a due process complaint with the Arizona Department of Education (ADE) claiming that the school district failed to deliver E.O. a FAPE because it was incorrectly implementing his IEP. Oskowis also added two other complaints, and the ADE consolidated them to be heard by an ALJ, Tammy L. Eigenheer. A preliminary prehearing was held on June 15, 2016, and Eigenheer issued a schedule, which was to conclude on August 1, 2016. However, Eigenheer extended the date for her final ruling to September 2, 2016. She had not issued any ruling by that date, and for over a year both Oskowis and the school district asked for a ruling and a status conference from Eigenheer, without a response. Over a year later, on Sepetmber 27, 2017, Eigenheer gave her final ruling.

Two days later, Oskowis filed a lawsuit on behalf of himself and E.O. against the ADE, Eigenheer, and the OAH (state defendants) claiming violations of the IDEA and of the Due Process clause of the Fourteenth Amendment. Oskowis asked for compensatory, injunctive, and declaratory relief. He also re-

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Guardian Ad Litem

District argues parent should not be appointed guardian ad litem, seeks dismissal of case

Citation: *J.T. v. Antioch Unified School District, 2018 WL 4334603 (N.D. Cal. 2018)*

A federal court in California has granted the motion of a parent of a student eligible for special education services to be appointed guardian ad litem for her child in a lawsuit in which the child alleged Fourteenth Amendment and Individual with Disabilities Education Act (IDEA) claims. While the school district had argued the mother was conflicted (in that she asserted certain of her own claims for monetary damages and therefore should not be the guardian ad litem), the court found that the monetary claims of the mother came from and were ancillary to her attempts to ensure the district would provide a free appropriate public education (FAPE) to her child.

J.T. was enrolled in the Antioch Unified School District in 2014. He was eligible to receive special education services under the IDEA. However, feeling that the district was not im-

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First Amendment . . . *(Continued from page 1)*

quested injunctions to: "(1) temporarily enjoin Eigenheer from acting as an ALJ in any future matter filed by [Oskowis] and (2) permanently enjoin the State Defendants from issuing decisions beyond those deadlines imposed by federal regulation." He also asked the court to order the state defendants to show why they exceeded the decision deadlines mandated by federal regulation. In addition, Oskowis sought a ruling that the state defendants violated his civil rights and asked for punitive and compensatory damages totaling $140,000. The state defendants asked the court to dismiss the complaint.

The court dismissed the complaint by Oskowis, but gave him permission to amend his complaint against the school district under the IDEA.

The court found that Oskowis improperly raised claims for violations of the IDEA under Section 1983 of the U.S. Code. "To state a claim under Section 1983, a plaintiff must allege that he was 'deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law'" *(Marsh v. Cty. Of San Diego)*. Since the essential point of Oskowis's claim was violations under the IDEA, he should have used the administrative remedies that were provided under the IDEA. The court found he was improperly seeking to re-litigate the decisions of Eigenheeer through Section 1983. Since it was inappropriate for Oskowis to state a claim for purported violations of the IDEA using Section 1983, that claim failed.

Oskowis also claimed his due process rights were violated under the Fourteenth Amendment by the state defendants. However, the court found this claim also failed because Oskowis named defendants that either were not able to be sued or were entitled to immunity.

Oskowis made claims against both the OAH and the ADE, but neither entity is amenable to lawsuit under state law. Each of the entities is a non-jural entity, and may be sued in Arizona only if the legislature specifically identifies it as a jural entity *(Payne v. Arpaio)*. Since the state did not identify either entity with the ability to sue or be sued, the court dismissed Oskowis's claims against both the OAH and the ADE.

The court went on to note that even it allowed Oskowis to substitute the State of Arizona as a defendant, the claims would still fail because the state is entitled to absolute sovereign immunity from claims against it brought under Section 1983. Unless a state waives its right to immunity by consenting to suit in federal court, which the state of Arizona has not done, it is entitled to sovereign immunity.

The state defendants also asked the court to dismiss Oskowis's claims against Eigenheer based on absolute judicial immunity. "Judical immunity 'protect[s] judicial independence by insulating judges from vexatious action prosecuted by disgruntled litigants'" *(Forrester v. White)*. Judicial immunity also covers administrative law judges. A judge only loses this protection if their actions are "nonjudicial" or taken "in the complete absence of all jurisdiction" *(Meek v. Cty. Of Riverside)*.

Oskowis argued that he and his son suffered harm because of the actions of Eigenheer during the due process complaint. Specifically, he alleged that Eigenheer "failed to render a decision within the federally mandated timeline" and "made numerous errors in her ruling." The court noted that the safeguards within the IDEA "reduce the need for private damages, actions, and allow for any error to be corrected by a district court on appeal." The court further noted that Eigenheer had to be able to perform her duties without fear of harassment or intimidation, and therefore her acts were judicial acts.

Regarding Oskowis's argument that Eigenheer should lose her judicial immunity for not meeting the decision deadline, the court found this argument lacking. The court found that nothing in the IDEA or applicable federal and state regulations supported the argument that the decision deadline was jurisdictional. The court emphasized that Eigenheer was entitled to absolute judicial immunity.

In conclusion, the court dismissed Oskowis's claims against the state defendants under Section 1983. However, the court found that Oskowis may be able to amend his complaint to properly state a claim for review of the ALJ's decision concerning his due process complaint against the school district under the IDEA. However, he could not seek review of that decision under Section 1983. The court also found that Oskowis could not plausibly amend his complaint to correct the defects in his claims against the state defendants. Therefore, these claims were all dismissed with prejudice.

—School Law Bulletin,
Vol. 45, No. 19, October 10, 2018, pp. 3-4.

Special Education ~ Parents seek stay put order, which court grants, but finds its in the high school rather than middle school

Citation: *Scordato v. Kinnikinnick School District, 2018 WL 4005210 (N.D. Ill. 2018)*

A federal district court in Illinois has granted the request of parents of a student eligible for special education services under the Individuals with Disabilities Education Act (IDEA) the right to "stay put" at his then current placement. However, the court concluded that the "then current" placement was actually at the high school rather than the middle school as the parents argued. Therefore, the court concluded that the student should attend the high school under the last agreed upon individualized education plan (IEP) during the pendency of any proceedings.

P.S. was a student with intellectual disabilities who also communicated in sign language with his teacher. He had attended middle school at Roscoe Middle School in the Kinnikinnick School District. He was turning 15 years old during the 2018-2019 school year which would begin in August 2018. This meant that the high school had the obligation to take over the financial obligations of educating him. Therefore, an IEP

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Guardian Ad Litem . . . *(Continued from page 2)*

plementing services identified in J.T.'s individualized education plan (IEP), J.T. filed a due process complaint with the Office of Administrative Hearings (OAH) in 2017. The OAH issued a decision in February 2018 largely denying J.T.'s claims.

Therefore, J.T. filed an appeal of the OAH decision. His mother, N.M. identified herself as guardian ad litem in the caption of the complaint. The district sought to have the court dismiss the complaint, arguing that although N.M. was identified in the caption as guardian ad litem, there was no petition for guardianship ad litem filed or approved by the court. In response, J.T. petitioned the court to appoint N.M. as his guardian ad litem, noting that she was his parent who had legal guardianship and custody of him.

The question at issue here was whether the court should approve the guardian ad litem petition for N.M. The school district argued that N.M. should not be appointed guardian ad litem because she had interests that conflicted with J.T.'s interests. More specifically, the district pointed out that although the case docket showed J.T. as the sole plaintiff, the complaint characterized N.M. as an additional plaintiff and asserted claims arising from violations of her rights. The district did not further elaborate why N.M.'s claims were potentially in conflict with J.T.'s interests.

The court determined that while there are times when a parent's interests may conflict with those of their child and that an independent guardian ad litem can be appropriate in those cases, here, N.M.'s primary interest seemed to be in ensuring that her son received the services that were his right. Thus, the court granted J.T.'s petition to add N.M. as his guardian ad litem.

The court explained that Federal Rule of Civil Procedure 17 (c)(2) requires that a court appoint guardian ad litem "to protect a minor or incompetent person who is unrepresented in an action." While a minor (under 18) may bring suit, their guardian must conduct the proceedings, and the guardian ad litem must be able to represent the minor's interest in the litigation. The decision to appoint guardian ad litem is typically a decision made by the trial court and the primary consideration is whether the minor and guardian have divergent interests. For example, if a parent has an actual or potential conflict of interest with their child, the parent cannot be allowed to control or influence the child's litigation.

As an example, the court cited a case in which a minor who had been sexually assaulted while at a juvenile detention facility was appointed guardian ad litem who was not her mother because the child's mother was attempting to receive a significant monetary award in the way of damages. This monetary award would not have been recoverable by the child and therefore the court found that the parent and child's interests were in conflict.

The court however did not find the same potential for conflict in this case, despite the district's argument that N.M.'s interests were in conflict with J.T.'s interests. The court noted that while the complaint did seek monetary damages, it did not appear that N.M. asked for damages on her own behalf. Instead, the court found: "to the extent that N.M. seeks monetary claims here, they arise from and are ancillary to her attempts to ensure the District provides a [FAPE] to J.T. in accordance with his rights under the IDEA and other statutes." The court found that the relief requested supported this in that the lawsuit was focused on J.T.'s educational experience. In the lawsuit, J.T. requested compensatory education funds, an order that the district train its staff to identify and refer students with disabilities, and a finding that the district denied J.T. a FAPE.

The court reserved the right to appoint guardian ad litem at a future date if it became apparent that N.M.'s and J.T.'s interests began to diverge, saying for example that the court may appoint an independent guardian if N.M. attempted to obtain damages for herself.

The court also rejected the district's argument that N.M. was not a suitable guardian ad litem based on her absence from the nine days of hearings during the administrative hearing proceedings. The court found no precedent for such a finding, and pointed out that N.M. had participated in the hearings by telephone (while she was on bed rest) and that J.T. had been represented by counsel, a parent's advocate from the law firm, and a paralegal during the proceedings. Moreover, the court noted that the factual findings made by the hearing officer showed that N.M. has been consistently involved in J.T.'s schooling and has acted "repeatedly to assert what she believes to J.T.'s educational rights." The record, the court concluded, indicated that N.M. was acting in good faith to protect J.T.'s interests and the petition to appoint her guardian ad litem was approved.

—School Law Bulletin,
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team meeting was scheduled in February 2018 to prepare for the upcoming school year. P.S.' parents were in attendance, along with his middle school teachers and teachers from the high school. The high school in this case was in another school district—Hononegah Community High School District 207.

Although P.S.' parents stated their preference that P.S. remain at Roscoe Middle School, the IEP team determined that P.S. should transition to high school for the 2018-2019 school year. There were a variety of reasons, including that the high school had offerings (e.g. vocational programs) that would suit P.S., certain of his friends and peers had already transitioned to high school or would be, and the teachers felt he was ready to move on to high school. Additionally, the high school agreed that teachers there would be given basic sign language training. P.S.' parents worried that P.S. was not ready to transition to the high school for a variety of reasons. However, they did not initiate a due process hearing following the issuance of the IEP for P.S. at the end of February following this meeting.

Instead, P.S.' parents requested another IEP meeting in March. The parents again expressed their concerns about transitioning P.S. to the high school and asked the team of educators to change their decision. No changes were made and the IEP team continued to believe P.S. should attend high school the following school year. The IEP team did offer P.S. extended year services in the summer leading into the next school year at the high school so that he could become accustomed to the building and teachers, enabling an easier transition. They also assured the parents that they had experience helping students through difficult transitions. The parents received a copy of the IEP at the meeting and that same day filed a request for a due process hearing.

The hearing officer rejected the parents' argument that placing P.S. at the high school violated his rights under the IDEA, and the parents then initiated a lawsuit alleging that the proposed IEP violated P.S.' right to a free appropriate public education (FAPE). In addition, the parents asked for a "stay put" order to keep P.S. at the middle school during the pendency of any proceedings. The "stay put" order is what is at issue here.

Reviewing the facts in relation to the "stay put" request, the court concluded that the parents' request for a stay put order would be granted but found that the "then current" placement for P.S. was the high school and not the middle school as they argued.

Under the IDEA, the "stay put" provision provides that "during the pendency of any proceedings . . . unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." While "then-current educational placement" is not defined under the law, the Seventh Circuit has held that this means "more than the actual school attended by the child and something less than the child's ultimate educational goals." For a child not being moved to another school because of a disciplinary action (i.e. an expulsion), the Seventh Circuit has held that the change of placement inquiry was limited to "certain fundamental decisions regarding . . . the most appropriate type of educational program for assisting a child . . .with a handicap."

Here, the court noted that P.S.' parents did not seek a due process within 10 days of the issuance of the February 2018 IEP. Thus, according to the IEP's own terms (which specifically detailed the 10-day period to contest the IEP), the school would begin providing the programs and services outlined in the IEP following that 10-day period. Had the parents initiated a due process hearing following issuance of this IEP, P.S.' "stay put" placement would presumably have been the middle school because the court would have looked to the last agreed IEP, which while not provided was likely the IEP that outlined the services provided to P.S. at the middle school. Instead, the parents sought a due process hearing after their March meeting, after the February IEP had already gone into effect, calling for the transition of P.S. from the middle to the high school.

The court did not stop its analysis here though, nothing that the determination of a student's then-current educational placement does not look solely to the current IEP but also must involve a fact-driven inquiry that considers the student's educational goals. The goals stated in the February 2018 IEP include preparing P.S. for eventual employment after graduation or for post-secondary education or training. These services were available at the high school as detailed in the IEP, including such things as a vocational internship program. Moreover, educators from both the middle and high school believed that P.S. was ready to transition to high school based not only on his age, but also other factors such as his friends and peer group having already transitioned or preparing to transition in the next school year. The middle school educators also expressed concern that P.S.' student peers in the middle school who were not transitioning were mostly non-verbal and they believed being placed with students with a greater variety of abilities would be beneficial.

Additionally, the high school had indicated that it would provide all of the same programs and services to P.S. that the middle school had provided, including the same sign interpreter. The IEP also included a curriculum better suited to begin preparing P.S. for life after high school, and maintained some continuity of student peers and staff.

The court while not unmoved by P.S.' parents' concerns about his transition to high school, found that the high school was prepared to handle a difficult transition. The court also noted that the parents had rejected certain options that might have made transitioning easier for P.S. including the high school's offer to provide extended year services in the summer before the 2018-2019 school year to enable P.S. to grow accustomed to the school and certain of the staff and routines. The court also found that a note from P.S.' doctor dated in 2016 stating that P.S. should remain in middle school based on his difficulty with transitions and the fairly recent development that the school intended to transfer him to the high school was not on point. The court noted that the decision to transition P.S. to high school was made in February 2018, nearly two years after the date of the doctor's note.

Thus, the court found that not only did the last agreed IEP call for P.S. placement at the high school but this placement was also in line with his educational goals. Therefore, the court granted the stay put motion but found that the placement was at the high school rather than the middle school.

—School Law Bulletin,
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