2016-2017 Year in Review

Cases Before the Supreme Court

Endrew F. v. Douglas Cnty. School Dist., 137 S.Ct. 988 (March 22, 2017)

Issue: 35 year ago, the Supreme Court held that the IDEA contained minimum substantive protections for students with disabilities. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). Under the IDEA, the Court held schools must provide "individual services sufficient to provide every eligible child with *some* educational benefit." *Id.* The Tenth Circuit Court of Appeals interpreted the Supreme Court's use of "some benefit" in *Rowley* as meaning "more than *de minimis*."

Holding: On March 22, 2017, the Supreme Court determined the IDEA required a more demanding standard than the merely "more than de minimis" standard the Tenth Circuit Court was using. It held: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." "The instruction and services must likewise be provided with an eye toward 'progress in the general education curriculum.'" 1414(d)(1)(A)(i)(IV)(bb). "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." Emphasis is being placed on considering the student's potential for growth in developing goals of an IEP.

Fry v. Napoleon Cmty. Schools, 137 S.Ct. 743 (Feb. 22, 2017)

Issue: Plaintiffs cannot recover damages as a remedy under the Individuals with Disabilities Education Act ("IDEA"), but plaintiffs can recover damages as a remedy under the Rehabilitation Act ("Section 504") and the Americans with Disabilities Act ("ADA"). The Supreme Court will decide whether a plaintiff must exhaust the IDEA procedural requirements when he or she brings a suit for damages under Section 504 and/or the ADA.

Holding: A plaintiff does not need to exhaust the IDEA's administrative requirements where "the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a FAPE." In other words, IDEA's exhaustion requirements only apply to cases where a plaintiff alleges a denial of a FAPE.

8th Circuit Decisions

Koester v. Young Men's Christian Association of Greater St. Louis, 855 F.3d 908 (May 2, 2017)

Issue: Whether under the ADA, the YMCA discriminated against a child with a disability by requiring a copy of the student's IEP or similar information from an outside source (ie a physician) to identify program accommodations for the child.

Holding: The YMCA did not unreasonably fail to accommodate the child for three reasons. First, it offered an alternative to requiring a copy of the student's IEP. Next, the YMCA demonstrated a pattern of accommodating children with disabilities. Finally, the Plaintiff was unable to demonstrate that the YMCA failed to participate in an interactive process because the Plaintiff filed suit before the YMCA had a chance to do so.

J.M. v. Francis Howell School District, 850 F.3d 944 (March 7, 2017)

Issue: Parent filed suit claiming unlawful use of isolation and physical restraints which then denied the student from participation in and the benefits of a public education. The original complaint included violations under the IDEA. Her second amended complaint asserted violations of: (1) the Equal Protection Clause of the Fourteenth Amendment; (2) 42 U.S.C. §§ 1983 and 1988; (3) the Americans with Disabilities Act (ADA); (4) Section 504 of the Rehabilitation Act of 1973; and (5) the Missouri Human Rights Act (MHRA). The District moved to dismiss the case based on a failure to exhaust administrative remedies under the IDEA.

Holding: The Eighth Circuit Court of Appeals applied the *Fry* test in concluding the complaint was properly dismissed by the district court for failure to exhaust administrative remedies even though the Plaintiff did not list a violation under the IDEA in the final complaint. First, a court may consider the history of the proceedings in determining whether the gravamen of the suit is the denial of a FAPE which invokes the IDEA's formal procedures. Initially, the Parent included violations under the IDEA. Secondly, the court may consider the "substance, not just surface" of the complaint which infers a violation of a FAPE rather than a discrimination claim that is protected under the ADA and Section 504. The allegations that the Student was spending too much time away from his class led to issues of not providing a FAPE.

***R.M.M.*, A Case in the District of Minnesota and 8th Circuit**

R.M.M. by and through Morales v. Minneapolis Public Schools, No. 15-CV-1627, 2016 WL 475171 (Feb. 2016)

Issue: A Student attending a nonpublic school was evaluated in January 2014 and determined to have disability. An Individual Service Plan (ISP) was implemented, and services started at the resident School District in mid-March until mid-April when the Parent informed School District that the Student would no longer attend the special education class. The Administrative Law Judge (ALJ) made several findings that are currently on appeal. First, the ALJ found that the Student's "child find" claim was moot "because Student had ultimately been publicly evaluated and determined eligible under IDEA [Individuals with Disabilities Education Act]." Second, the ALJ found that he had jurisdiction over the issue despite rendering the "child find" claim moot. Third, the ALJ found that a student attending a nonpublic school was denied Free Appropriate Public Education (FAPE) when an ISP was not reasonably calculated to provide educational benefit, and awarded compensatory education. Both parties appealed this decision.

Holding: The district court held that the child-find violation was not moot because the violation was based on the District's failure to act, and the Parent had the right to a due process hearing on that failure. The District may be obligated to provide compensatory education for such a failure. Additionally, the court found that under the IDEA and Minnesota Statutes, Minnesota school districts are required to provide a FAPE to a Student placed in a private school by his or her parents. The Public School District appealed this decision. Currently, the issue before the 8th Circuit is whether private school students are entitled to a FAPE. The issue before the district court is whether the student was entitled to a due process hearing.

*Booth Law Group represented the school in this matter.

Minnesota Court of Appeals Decisions

In the Matter of J.J.E. v. ISD 279, No. A16-0828 (Minn. App. January 17, 2017)

Issue: In 2014-2015, J.J.E. attended Columbia Heights, and he received homebound, one-on-one instruction. J.J.E. and his mother moved to Osseo, and he began attending school at Osseo. The District believed homebound instruction was inappropriate for J.J.E., and the District proposed a full-day schedule for J.J.E. The Parent disagreed. The court held in favor of the District.

Holding: In finding in favor of the District, the court noted that the Parent signed the District's proposed IEP, which did not mandate homebound instruction. Second, the court found that the District's IEP was reasonably calculated to provide educational benefit, and that J.J.E. improved academically and behaviorally when he attended school more often.

Decisions in Other Jurisdictions

Kulm Public Schools and James River Special Education Cooperative v. J.K., OAH File No. 20160351, (October 6, 2016)

This was the first due process hearing in the state of North Dakota in ten years.

Issue: The school district along with the special education cooperative filed for a due process hearing after denying a Parent's request for an Assistive Technology Independent Educational Evaluation ("IEE") and requested the last proposed individualized education program ("IEP") to be determined appropriate and be implemented.

Holding: The Administrative Law Judge ("ALJ") found in favor of the school district. First, the ALJ determined the school district's assistive technology evaluation and the proposed IEP were both procedurally and substantively appropriate. Therefore, the school district was relieved of any duty to pay for an Independent Educational Evaluation. Second, the ALJ ordered the proposed IEP to be implemented unless the parent revoked consent for special education services. At that time, the school district would no longer be responsible to provide a free appropriate public education.

*Booth Law Group represented the school district and the special education cooperative in this matter.

Office for Civil Rights Decisions

Academy for Sciences and Agriculture High School, OCR No. 05-16-1377, (December 30, 2016)

Issue: Student A began attending the Academy in January of 2016. Student A's previous school implemented an Individual Education Plan (IEP) and a Behavior Intervention Plan (BIP) in order to address Student's anxiety. Student A was eligible for special education and related services under the criteria for Emotional or Behavioral Disorder and Other Health Impairment.

On March 24, Student A was agitated. The Dean, Case Manager, and Educational Assistant (EA) tried to calm Student A down in a conference room, but Student A became angrier. Eventually, Student A physical attacked the EA and threw school property. The School suspended Student A for five days. At a re-entry meeting, the IEP team made changes to Student A's IEP and BIP.

On April 12, Student A went to the behavior room even though he was not exhibiting any signs of anxiety, and the student had not tried any of the previous steps on the BIP before entering the behavior room. The Dean told

Student A that he had to go back to class because the Dean knew that students sometimes used the behavior room as a way to miss classes that students do not like. Student A returned to class and began throwing pencils. The Case Manager asked Student A if he need a break, in accordance with his IEP and BIP. Student A refused to leave the room or take any further de-escalation steps, so the Dean cleared the classroom. When the bell rang, Student A left the classroom by pushing a staff member who was standing in front of the door. Subsequently, Student A punched another student in the arm and ripped a drinking fountain off of the wall. In accordance with the IEP and BIP, the school called the police.

After the April 12 incident, Student A was suspended for 10 days. At a manifestation determination meeting, the team decided that Student A's conduct was related to his disability. As a result, Student A would receive educational services in-home during his suspension. Also, Student A's parents decided to enroll him in a private psychiatric hospitalization program. While Student A was in the hospital program, Student A's parents requested homebound services. The District denied on the basis that home was not the least restrictive environment.

Holding: OCR concluded that the District did not: (1) fail to implement Student A's IEP, (2) fail to convene an IEP team meeting after the Parent requested additional accommodations after hospitalization, (3) discriminate against Student A on the basis of his disability or deny Student a FAPE, or (4) harass Student A on the basis of his disability. OCR reasoned that the school district was not liable for any of the allegations because it convened IEP team meetings appropriately, followed the IEP and BIP when Student A exhibited signs of anxiety, disciplined Student A in accordance with its policies and in accordance with similarly situated students, and that there was no evidence of harassment on the basis of Student A's disability.

*Booth Law Group represented the school in this matter.

ISD No. 279, OCR No. 05-16-1365, (December 12, 2016)

Issue: The District received a complaint alleging two things. First, complainant alleged that the District discriminated against Complainant's daughter on the basis of ADHD, in violation of Section 504 and the ADA. Second, Complainant alleged that the District retaliated against Complainant for rejecting services proposed by the District and pressuring Complainant to accept, in violation of Section 504 and the ADA.

Student A, who attended a District Middle School, received special education services for ADHD and anxiety. Student A was on a transfer IEP. Upon the District's first IEP team meeting for Student A, the District offered social work

minutes and/or mental health case management services. Complainant declined the proposed services because she did not believe Student A needed mental health services. Complainant subsequently declined the District's offers for mental health case management services through the 2015-2016 school year.

Student A's performance and attendance at school declined. The school held a conciliation meeting to address Complainant's concerns. As required by district policy for conciliation meetings, the special education coordinator and school principal attended the meeting. Complainant stated that she believed this was an attempt to pressure her to accept mental health case management services. After this meeting, Student A's behavior at home declined as well as at school. Complainant stated she was considering hospitalization for Student A.

Complainant became increasingly concerned with Student A's behavior at home, and told the District she was afraid of what would happen if she had to call the police. After getting parental consent, the Chief of Police attended Student A's IEP team meeting to discuss police response to distressed persons. Complainant believed this was another attempt to pressure her into accepting mental health services. Sometime after this meeting, the school asked the Chief of Police to conduct a welfare check on Student A because the student had been absent for five days, and the District could not get in contact with Complainant.

Holding: OCR found in favor of the District on both the harassment and retaliation charges. First, regarding harassment, OCR found that the alleged "harassing" behaviors, such as preferential seating, calling Student A out of the room for work, breaking up assignments, and questions from the social worker were actually required by Student A's IEP. Second, OCR concluded that the District did not retaliate when it offered mental health case management services or requested welfare check on Student A. Offering services is not an adverse act, something required to show retaliation, and the school had a legitimate concern for Student A so its requested welfare check was not retaliatory.

Caution: The District in this case was very careful about involving the police in a student's special education issues. Be cautious. The well-intentioned intervention may be seen as "criminalizing" a student's behavior.

*Booth Law Group represented the school in this matter.

ISD No. 11, OCR No. 05-16-1363, (December 6, 2016)

Issue: Complainant alleged that the District discriminated against Student A in violation of federal law because it failed to offer Student A access to specialized

courses equal to those offered to non-disabled peers and because the district failed to educate Student A with non-disabled peers to the maximum extent appropriate.

Student A attended the District's High School, and she had an IEP for services related to E/BD, visual impairments, and SLD. Student A struggled in school, and her behavior and attendance deteriorated until she quit attending school altogether. The parent requested homebound services, but the District determined that homebound was not the least restrictive setting, and would only isolate Student A further. The District suggested its REACH program, a federal setting IV program in another district for students with E/BD, and the Parent agreed. Months later, the Parent removed Student A from Reach and declined the District's offer for other Setting 3 and 4 placements.

Holding: OCR found in favor of the District on both allegations of discrimination. First, OCR concluded that the District provided appropriate special education and services to Student A, and increased supports and services to meet the needs of Student A. All decisions were made by professionals using appropriate evaluation materials. Second, OCR concluded that the District did not deny Student A access to extracurricular programming or specialized courses because the school allows all students to participate in these activities, with or without modifications. However, Student A never requested to participate.

*Booth Law Group represented the school in this matter.

Dear Colleague Letter on Students with ADHD, July 26, 2016. U.S. Department of Education, Office for Civil Rights, Students with ADHD and Section 504: A Resource Guide (July 2016)

The United States Department of Education wrote this Dear Colleague Letter to clarify school district's obligations with respect to students with Attention Deficit Hyperactivity Disorder (ADHD) and Section 504. The Resource Guide provides tips on evaluating students with ADHD who may need special education and also on placement determinations for students with ADHD.

Evaluations: The letter emphasizes that schools should consider "all the potential major life activities that may be impacted by the student's impairment, *not just learning*" when conducting an evaluation. Additionally, the letter states that schools should refrain from acting on stereotypes about students with ADHD, especially stereotypes about race, gender and ADHD. In addition, the letter states that the district cannot take mitigating measures into account when evaluating a student for a disability, and the district should interpret the term disability broadly. Finally, the letter states that when a district thinks a medical assessment is necessary to decide whether a student

has ADHD and is qualified for special education, the district cannot require the parent's to pay for the evaluation.

Placement: The letter stresses that students with ADHD can "often meet the challenge of school, including advanced course placement and honors classes," if the student is properly evaluated and given appropriate supports. Additionally, the letter states that districts "must tailor services to the individual needs of the student, and must not limit placement options under Section 504 … to a predetermined universe of options." Specifically, students eligible for a FAPE under Section 504 due to ADHD are entitled to services the team decides, regardless of cost or administrative burden. Finally, the letter explains that special education, related aids, and services included in a 504 Plan or other document need to be clear and detailed to ensure that the parents understand what the plan requires.

Minnesota Department of Human Rights Decisions

Jones v. Athlos Leadership Academy, REF: 65740, (December 29, 2016)

Issue: In this case, a Parent filed a charge with the Minnesota Department of Human ("MDHR") rights, alleging discrimination on the basis of race and disability.

The Student in this situation was a first-grader at the School. Neither the Parent nor the School knew about the student's disability. Throughout the school year, the student progressively struggled with behavior, and he was suspended a handful of times for aggressive behavior. The Parent requested an evaluation. The School proposed an IEP and a BIP, and the Parent consented, but requested that only in-school suspension be used. The Student had another violent outburst, and the School suspended him for five days.

The Parent requested an independent evaluation. The School proposed an IEP with a Federal Setting III placement. The Parent refused, and wanted the child to be educated in the general classroom. The School proposed an interim IEP, and the Parent did not consent. The Parent refused to consent to a Setting III placement, even though the Parent's own mental health expert recommended a Setting III placement.

Holding: MDHR concluded that no probable cause existed, and dismissed the charge. MDHR concluded that the School did not deny the Student benefits based on his race or disability, but instead attempted to accommodate the child's disability as much as the school could.

*Booth Law Group represented the school in this matter.

Minnesota Department of Education Complaint Decisions

*In the Matter of *** and His Parent, *** v. *** School district, Independent School Dist. No. ****, 2017 WL 1135933, MDE 17-009-H, (March 6, 2017)

Issue: Whether a Public School District is required to pay for the evaluator of an IEE to attend an IEP team meeting following the completion of the IEE.

Holding: The District is not required to pay for an independent evaluator to attend an IEP team meeting for the Student after completion of the IEE. Either the District or the Parent may request an independent evaluator attend the IEP team meeting, but the party requesting the attendance of the evaluator is responsible for the cost.

ISD #829, Complaint No. 16-131C, (August 2, 2016)

Issue: In this complaint, Parent alleged that the Student did not receive reading and writing skills instruction required by the IEP and other violations of the IEP.

Holding: MDE found that the District did not violate the IEP because the services the Student received were "sufficient to enable the Student to benefit educationally from instruction." To support the conclusion, MDE relied on the fact that the District modified materials as appropriate and gave the Student specialized skills instruction during a resource period. MDE also noted that the Student was absent from the resource period 28 times.

ISD #720, Complaint No. 16-127C, (August 2, 2016)

Issue: In this complaint, Parents allege that the District failed to review and revise a Student's IEP and that the District failed to consider parental concerns in the IEP process. The Parents allege that the IEP contained a provision for special transportation, but the District alleges that the IEP does not contain a provision for special transportation. After a series of District proposal and parental rejections, a conciliation conference was held to discuss the issue of specialized transportation. Eventually, the Parent signed off on the District's proposal because she was sick of fighting on the issue of transportation. However, the parties continued to dispute the issue. The Parent requested an IEP team meeting facilitated by MDE on several occasions, and the District refused to participate.

Holding: Although the Parent refused to participate in a meeting that was not facilitated, MDE found the District in violation of law for two reasons. First, the District had an obligation to review and revise the IEP annually, with or without the Parent, which it failed to do. Second, the District had an obligation

to keep records of its attempt to convince the Parent to attend an IEP team meeting at an agreed upon time and place, which the District failed to do. Finally, MDE found that the District was not in violation of law when it considered Parent's request for specialized transportation, but ultimately refused to provide specialized transportation services.

Legislative Updates

Third-party reimbursement

Pursuant to Minn. Stat. §125A.21, subd. 2(b), evaluations required as part of a student's individualized education program process or individualized family service plan process along with health-related services provided by the district according to the IEP or IFSP can now be submitted to a third-party for reimbursement from medical assistance or Minnesota Care. The district's intent to seek reimbursement must be given to the parent annually.