THE YEAR IN REVIEW

2017-2018

CARYL ANDREA OBERMAN AND ANDREW E. FAUST

IN THE THIRD CIRCUIT

- *Berardelli v. Allied Services Institute of Rehabilitation Medicine*, No. 17-1469 (3d Cir. Aug. 14, 2018): The Rehabilitation Act's mandate of "reasonable accommodation" is consistent with the ADA's mandate of "reasonable modifications", and therefore the use of a service animal (in this case Buddy the dog) is *per se* a reasonable accommodation under Section 504, subject only to the limited explicit exceptions in the ADA. Excellent statutory analysis, with the proper amount of righteous indignation. For more on service dogs, s*ee* *A.R. v. School Administration Unit #23*, 117 LRP 43536, No 15-cv-152 (D. NH Oct. 12, 2017): (complaint that sought remedy requiring district to hire, train, and pay for handler for service dog was a claim for denial of FAPE, not Section 504 or ADA accommodation, and therefore required exhaustion).

- *Rena C. v. Colonial School District*, 890 F. 3d 404 (3d Cir. 2018): Parents were justified in rejecting a settlement offer that did not include attorneys' fees. District Court decision denying fees incurred after the offer reversed and remanded. Cert. denied.

- *Wellman v. Butler Area School District*, 877 F. 3d 125 (3d Cir. 2017): Case dismissed for failure to exhaust 504 and ADA claims, even though previous settlement agreement for denial of FAPE released the District from all federal claims and made further exhaustion impossible.
- *H.E. v. Walter D. Palmer Leadership Learning Partners Charter School*, 873 F. 3d 406 (3d Cir. 2017): District court's affirmance of parents' procedural right to a due process hearing and vacation of HO's order and remand entitled parents to prevailing party status and attorneys' fees and costs.

- *S.P. v. Pennsylvania Department of Education*, No. 17-2461 (3d Cir. May 1, 2018) (not precedential); 72 IDELR 56: Because the Department of Education was not a party to the underlying due process complaint that resulted in an award of independent evaluation reimbursement to parents against defunct charter school, it was not responsible for the parents' attorneys' fees and costs.

- *Luo v. Owen J. Roberts School Dist*rict, No. 16-4412 (3d Cir. June 11, 2018) (unpublished); 72 IDELR 86: Parent has no constitutional right to pre-approve methodologies to be used by a psychologist in evaluation. Districts need only seek consent for the evaluation itself. Challenges to methodologies can be addressed in subsequent due process proceedings after the evaluation is performed.

- *J.L. v. Wyoming Valley West School District, No. 16-3727 (*3d Cir. Feb. 9, 2018*) (*not precedential*);* 71 IDELR 142: Parents must exhaust administrative remedies before suing under 504 and Section 1983 for alleged use of mechanical restraints on van, because linked to the student's educational progress.
- *School District of Philadelphia v. Kirsch*, No. 16-3022 (3d Cir. Feb. 5, 2018) (not precedential); 71 IDELR 123: District Court erred in excluding reimbursement for 1:1 aide services in private school where the District's own proposed IEPs required them. Remanded.

- *S.D. v. Haddon Heights Board of Education*, No. 15-1804 (3d Cir. Jan. 31, 2018) (not precedential); 71 IDELR 143): Even though student had no IEP and was receiving services under Section 504 only, and parents alleged a denial of FAPE under Section 504 only, exhaustion was required because the parents' request for "supplemental instruction" could indicate a possible need for special education.

- *K.D. v. Downingtown Area School District*, No. 17-3065 (3d Cir. Sept. 18, 2018): In the Third Circuit, we have apparently been operating under the *Endrew F.* standard all along. The Supreme Court "simply confirmed the standard that has been used in the Third Circuit for years" and did not overrule it. It's comforting to know that the *Endrew F.* requirement of challenging and ambitious goals has been with us all this time.

AND ITS DISTRICT COURTS

FAPE

- *Pocono Mountain School District v. T.D.* No. 3:15cv764 (M.D. Pa. July 20, 2018): Academics alone do not determine IDEA eligibility. Student with solid grades and academic performance but difficulties with relationships, frequent nurse visits, and incomplete assignments was entitled to an IEP. HO partially reversed, and Student awarded tuition reimbursement under IDEA instead of 504.

- *Colonial School District v. G.K.*, No. 17-3377 (E.D. Pa. Apr. 30, 2018): Reversal of decision in favor of *pro se* parent. The Hearing Officer held that the School District unilaterally changed goals after the parents filed for due process, that the reading goal was defective for failure to specify grade level of instruction, thus depriving parents of information necessary for their meaningful IEP participation although there was not enough evidence on the record to establish the substantive inappropriateness of the goal itself, and that speech and language goal progress monitoring was subjective and unclear as to generalization to more than one conversational partner. The court held that HO used wrong standard (lack of progress under IEP), espoused limited view of parents' right to participate, decided that the speech and language violation was not "serious enough to constitute denial of FAPE, and that the HO "exaggerated" the importance of lack of a defined reading level and adequate progress monitoring. The court also discounted the HO's reliance on the parents' independent reading evaluation because it was performed by a "for-profit concern" and therefore less reliable than "school testing". So much for credibility determinations belonging to the trier of fact.

- *Methacton School District v. D.W.*, No. 16-2582 (E.D. Pa. Oct. 6, 2017); 70 IDELR 247: Goals without appropriate baselines deny FAPE and entitle student to tuition reimbursement for private school.
- *Shane T. v. Carbondale Area School District,* No. 3:16-0969 (M.D. Pa. Sept. 28, 2017); 70 IDELR 259: HO reversed and remanded in part. Reenrollment of private school student in District triggers obligation to offer FAPE, regardless of the district's subjective determination that parent intends to keep student in private school. Parent stated no more than her desire to keep her options open.

EVALUATIONS

- *Brady P. v. Central York School District*, No. 1:16-cv-2395 (M.D. Pa. Mar. 16, 2018); 71 IDELR 215: the date on which the private psychologist stated at an IEP meeting that the District's delay in addressing student's SLD would likely prevent him from ever being a competent reader and that the IEP had defects was the "knew or should have known" (KOSHK) date.

- *A.H. v. Colonial School District*, No. 1:16-cv-00726 CA #1:16 (D. Del. July 5, 2018): IEE claim. Formulaic application of IDEA specific language and lack of inquiry into whether the student was actually evaluated in all areas of suspected disability. The court discounted expert opinion as to the adequacy of the evaluation by a highly qualified psychologist who had not evaluated the student finding her "less credible" than District witnesses who had evaluated. The court rejected the argument that the tests done were insufficient, relying on the conclusion that the tests actually performed were not inappropriate. The court held that FBAs are not required under the IDEA, and that documentation of classroom observations is not required either. Extreme deference to SD evaluators who allegedly knew student well enough to decide not to evaluate him fully.

- *C.F. v. Delaware County Intermediate Unit*, No. 17-cv-1599 (E.D. Pa. Apr. 23, 2018); 70 IDELR 250: Child find obligation extends to parentally placed private school students, even if those students have no individual right to specific services. Parents alleged student would have received "equitable services" if the IU had identified all of his disabilities.

SEA RESPONSIBILITY

- *Commonwealth of Pennsylvania Department of Education v. D.E.*, No. 17-4433 (E.D. Pa. Apr. 23, 2018): Motion to dismiss of private school denied. The SEA can pursue unjust enrichment claim against a private special education school that accepted tuition payments from parents after defunct charter school failed to make those payments as ordered and SEA was ordered by Hearing Officer to repay parents.
- *Angelique D. v. Pennsylvania Department of Education*, No. 16-1179 (E.D. Pa. Jan. 29, 2018); 71 IDELR 152: Grandmother successfully added SEA as party to due process hearing involving compensatory education due from defunct charter school. The Hearing Officer held that the SEA was responsible for compensatory education, and the court held that this made grandmother the prevailing party for her fee suit, which survived the SEA's motion to dismiss.

- *Lejeune, G. v. Khepera Charter School*, No. 17-4965 (E.D. Pa. Aug. 29, 2018): The SEA is not required to step in when a charter school is unwilling to comply with its settlement obligations. When a charter is not defunct but unable to comply, the SEA has "significant discretion" in deciding how to fill the charter's shoes, even where that discretion changes the terms of an existing settlement agreement. The SEA was not held responsible for fees required by a settlement agreement where it was not a party to the underlying dispute that resulted in the settlement..

ACCESSIBILITY

- *S.F. v. School District of Upper Dublin,* No. 17-04328 (E.D Pa. Apr. 18, 2018); 72 IDELR 36: Parents can sue their school district to comply with federal accessibility requirements at its middle school even though the student will not be attending there until the 2019-20 school year. Parents began discussing accessibility needs with the district in January 2016, and the district had made no decisions and taken no action as of September 2017, suggesting it would not be ready in time for student's arrival.

FEES

- *J.M v. Montgomery County Intermediate Unit*, No. 17-1583 (E.D. Pa. Mar. 26, 2018); 72 IDELR 23: District Court reduced parents' compensatory education award, but not attorneys' fees, allowing full amount to be recovered.
- *Price v. Commonwealth Charter Academy-Cyber*, No. 17-1922 (E.D. Pa. May 17, 2018); 72 IDELR 60: Pro-se parent who filed untimely appeal does not have to pay charter's attorneys' fees where there is no evidence that the claim was frivolous or filed for an improper purpose.
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RESIDENCY

- *A.P. v. Lower Merion School District,* No. 16-5925 (E.D. Pa. Mar. 1, 2018); 71 IDELR 188: IDEA Hearing Officer has authority to determine a student's residency because residency is intertwined with the right to receive services from an LEA.

EXHAUSTION AND OTHER PROCEDURAL MATTERS

- *Weiser v. Elizabethtown Area School District,* No. 17-625 (E.D.Pa. Feb. 27, 2018); 71 IDELR 191: No need to exhaust claim that district discriminated against a student with autism by denying transportation where student died after being struck by car while walking home from school. Due process hearing procedure can offer no meaningful remedy.
- *H.L. v. Marlboro Township Board of Education*, No. 16-9324 (D. N.J. Nov. 14, 2017) (unpublished); 71 IDELR 42: Parents' failure to provide ten day notice prior to placing student unilaterally in private school does not necessarily bar tuition reimbursement claim. Case remanded to Hearing Officer for determination of how, if at all, the delay in notification the District harmed the district.

- *I.K.v. Montclair Board of Education*, No. 16-9152 (D. N.J. May 31, 2018) (unpublished); 72 IDELR 101: Parties entered into a mediation agreement. Parent alleged that the IEP as modified by the agreement failed to offer FAPE in the least restrictive environment. The court held that the ALJ erred in dismissing the complaint on the grounds that the agreement was binding.

REMEDIES

- *Stapleton v. Penns Valley Area School District*, No. 4:15-cv-2323 (M.D. Pa. Dec. 12, 2017); 71 IDELR 87: Compensatory education fund is not required to pay for college tuition where student does not connect college courses to educational deficits resulting from the district's original violations, although there is no absolute prohibition on using compensatory education for college tuition.

- *School District of Philadelphia v. Post*, 262 F. Supp. 3d 178 (E.D. Pa. 2017): District failed to give serious consideration to educating student with autism in regular education classroom and unilaterally removed him from his pendent (per his early intervention IEP) regular education placement for 45 to 90 minutes per school day. Both procedural violations (flouting stay put and excluding parents from decision making) amounted to a substantive violation of FAPE because student lost the opportunity to participate with and learn from typical peers, and parents' loss of opportunity to participate is a substantive harm in itself. Compensatory education is an appropriate remedy even if no proof of academic detriment.
- *Rayna P. v. Campus Community School*, No. 16-63 (D.Del. Aug. 10, 2018): Inadequate compensatory education award reversed and hours awarded both for days the student with debilitating illness attended school and days she was absent.

AND IN STATE COURT

- *J.W. v. School District of Philadelphia*, No. 1504-03169 (Phila. Common Pleas Ct. May 30, 2018) substantial judgment for student in bullying case based on Pennsylvania Human Relations Act

DISCRIMINATION

- *United States v. Nobel Learning Communities*, No. 1:17-cv-366 (D. N.J. May 9, 2018); 71 IDELR 5: Relational discrimination claim under the ADA. Expulsion of child with Downs Syndrome from private school's daycare program because of difficulties with toileting harmed her parents directly. Motion to dismiss the ADA Title III claim filed by the federal government on parents' behalf denied.

LEAST RESTRICTIVE ENVIRONMENT

- *Geniviva v. Hampton Township School District*, No. 17-351 (W.D. Pa. 2018); 72 IDELR 57: It was not a violation of LRE for a district to place 18-21 year-olds in high school with younger teens. Reimbursement for postsecondary transition program on a university campus denied.

CASES OF NOTE ELSEWHERE

- *K.M. v. Tehachapi Unified School District*, No. 1:17-cv 01431 (E.D. Cal. June 4, 2018); 72 IDELR 63: District's refusal to allow student's insurance-funded therapist to follow her throughout school day as a reasonable accommodation presented sufficient fact to defeat motion to dismiss Title II and Section 504 claims. Extension of *Fry's* substantive ruling beyond service animals.

- *Lawton v. Success Academy. Charter Schools, Inc.*, No. 1:15-cv-07058 (E.D. N.Y. Aug. 10, 2018); 72 IDELR 176: Case challenging rigid application of code of conduct that has the effect of excluding students with disabilities survives a motion to dismiss Section 504 claims. Scathing opinion by the court.
- *The Center for Discovery, Inc. v. D.P.*, No. 16-cv-3936 (E.D. N.Y. Mar. 31, 2018); 72 IDELR 3: Court refuses to impose sanctions on private school seeking to compel removal under a *Honig v. Doe* theory despite it not being an LEA. Leaves open the question of whether private schools can avail themselves of *Honig* procedures.
- *E.S. v. Conejo Valley Unified School District*, No. 17-2629 (C.D. Cal. July 30, 2018); 72 IDELR 180: District delay in performing FBA deprives parents of information parents need to be meaningful participants in kindergarten student's IEP development, yielding compensatory education and reimbursement for private evaluation.

- *S.H. v. Mount Diablo Unified School District*, No. 16-cv-04308 (N.D. Cal. Jan. 23, 2018); 71 IDELR 126: Proposed prehearing settlement offer of $10k in attorneys' fees not "sincere and responsible" and parents justified in rejecting it.
- *Lincoln- Sudbury Regional School District v. Mr. and Mrs. W.*, No. 16-10724 (D. Mass. Jan. 25, 2018); 72 IDELR 28: Rare decision awarding substantial attorneys' fees and costs against parents who lost their IDEA case.
- *Endrew F. v, Douglas County School District RE1*, No. 1:12-cv-02620 (D. Col. Feb 2, 2018); 71 IDELR 144: On remand, and using the correct standard, the court held that district had failed to provide FAPE because it failed to provide appropriate behavioral supports.

And, in the creative lawyering division:

- *A.A. v. Walled Lake Consolidated Schools*, No. 16-14214 (E.D. Mich. Oct. 31, 2017); 71 IDELR 37: Parents appealed decision removing student from general education classroom. District sought to represent student's interests claiming that the parents and the SEA had conspired to deny the student FAPE by the parent opposing the removal. The court wasn't having any and denied motion to realign the parties.