



## *Seminar Outline*

### **Civil Rights Litigation Dennis C. McAndrews, Esquire**

#### **I. The Legal Pendulum Swings Under IDEA**

- A. Between 1986 and 1995, the legal pendulum swung in favor of children with disabilities and their families.
1. In 1986, the Handicapped Children's Protection Act amended Section 1415 of IDEA to explicitly permit attorneys' fees, abrogating a Supreme Court decision in Smith v. Robinson which held that attorneys' fees under Section 504 were not permitted with respect to claims that mirrored IDEA claims. Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed.2<sup>nd</sup> 746 (1984).
  2. In 1990, the Pennsylvania Department of Education issued extensive regulations under IDEA which went well beyond the federal mandate, especially in areas such as discipline, class size, frequency of evaluations, and content of school district special education documentations.
  3. In 1995, the Third Circuit Court of Appeals decided W.B. v. Matula, 67 F.3d 484 (3<sup>rd</sup> Cir. 1995) which held that claims for monetary damages under IDEA and Section 504 may be pursued under 42 U.S.C. §1983, as well as directly under Section 504. Andrew M. v. Delaware County MH/MR Administration, \_\_\_ F.3d\_\_\_, 2007 U.S. App. LEXIS 14027 n.10 (3d. Cir. 2007).
  4. Existing United States Supreme Court authority permitted claims for attorneys' fees under IDEA and Section 504 to

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be litigated under the “catalyst theory” which held that fees may be obtained where a request for due process served as a “catalyst” to produce the relief desired; no hearing officer decision or judicial finding was necessary to be a “prevailing party” under this theory. Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566 (1992).

- B. The pendulum has swung toward school districts in the new millennium.
1. The right to compel attorneys’ fees has become more restricted, and the “catalyst theory” rejected. Buckhannon Board of Care Home v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 121 S. Ct. 1835 (2001). Amendments to IDEA in 1997 and 2004 also restricted the right to obtain counsel fees for IEP meetings and resolution sessions, and now explicitly permit school districts to seek counsel fees for frivolous claims.
  2. Expert witness costs may not be ordered by the court under IDEA as a “cost of litigation”. Arlington Central School District v. Murphy, 126 S. Ct. 2455 (2006). Query? May such expert witness costs be obtained as part of an Independent Educational Evaluation under Schaffer, below?
  3. The burden of proof in IDEA cases has been transferred from school districts to parents and the child with disabilities. Schaffer v. Weast, 126 S. Ct. 528.
  4. A statute of limitations was recognized for IDEA claims in Montour School District v. S.T. and His Parents, 805 A.2d 29 (Pa. Cmwlth. 2002) but rejected uniformly by the federal courts. Amanda A., et al. v. The Coatesville Area School District, 2005 WL 426090 (E.D. Pa. 2004); Jonathan T. v. the Lackawanna Trail School District, 2004 WL 384906 (M.D. Pa. 2004); Jonathan H. v. Elizabeth

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Forward School District, \_\_\_ F. Supp. 3d \_\_\_ (W.D. Pa. 2004); William S. v. Upper St. Claire School District, \_\_\_ F. Supp.2d \_\_\_ (W.D. Pa. 2004); Kristi H. v. Tri-Valley School District, 107 F. Supp.2d 628 (M.D. Pa. 2000). However, amendments to IDEA in 2004 then created a presumptive limitation period at 20 U.S.C. Section 1415(b)(6)(B) and 1415(F)(3)(D).

5. The remedy of damages under Section 1983 has been restricted by A.W. v. Jersey City Public Schools, 486 F.3d 791 (3rd Cir. 2007), which held that damage claims under IDEA and Section 504 may not be brought under Section 1983. A.W. abrogated W.B. v. Matula concerning Section 1983, but not with respect to claims under Section 504 and IDEA directly.
6. Courts have questioned whether damage claims under IDEA are viable without resort to Section 1983. Compare, Brandon V. v. Delaware County Intermediate Unit, 2007 U.S. Dist. LEXIS 53852 (E.D. Pa. 2007) with Irene and Gary B. v. Philadelphia Academy Charter School, No. Civ. A. 02-1716, 2003 WL 24052009 (E.D. Pa. Jan. 29, 2003); Susavage v. Bucks County Intermediate Unit, et al., 2002 W.L. 109615 (E.D. Pa. 2002); J.F. v. School District of Philadelphia, No. Civ. A. 98-1793, 2000 WL 361866 (E.D. Pa. April 7, 2000) (holding that IDEA creates a private cause of action and that a school district and individual district defendants may be liable for violations of IDEA); Scott C. v. Bethlehem Area School District, No. Civ. A. 00-642, 2002 WL 31955998 (E.D. Pa. Sept. 13, 2000) (permitting IDEA claim against district to proceed to trial).
7. Some observers believe that hearing officers and the Appeals Panels have become more aligned with interests of school districts.

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8. Discipline of special education students has become easier with changes to IDEA-2004, as well as under decisions limiting the necessity to use Functional Assessments of Behaviors (FBAs) and explicit Behavior Management Plans (BMPs).
9. Despite IDEA-2004's presumptive 60 calendar day period for evaluations, Pennsylvania retains a 60 school day time period for such evaluations, and has increased Pennsylvania's reevaluation period to every three years to be consistent with federal law. Note: IDEA-2004 requires reevaluations up to annually upon parental or teacher request. 34 C.F.R. § 300.303.
10. In 2001, Pennsylvania repealed Chapter 342 and dramatically revised Chapter 14 to eliminate class size limits and a number of other protections for children with disabilities.

## II. Claims for Which Damages May Be Sought in Special Educational Contexts

### A. Section 1983

1. IDEA – Abrogated in A.W.
2. Section 504 – Abrogated in A.W.
3. Constitutional Violations
  - (i) Due Process – Susavage
    - a) state-created danger
    - b) special relationship
    - c) failure to train
    - d) liberty/bodily restraint
    - e) is a policy, practice, custom for violation of a statute?
  - (ii) Equal Protection
  - (iii) First Amendment, Fourth Amendment
4. State Law Entitlements?

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- B. IDEA
  - 1. Statute of limitations - Memorandum attached
  - 2. Exhaustion – When is it required? Brandon V.
  
- C. Section 504 – Memorandum attached and Brandon V.
  - 1. Statute of limitations – borrows state statute
  - 2. Exhaustion – When is it required?
  - 3. What is “discrimination”?
    - disparate treatment (facial discrimination)
    - disparate effect – a practice which precludes equal access to educational benefits
    - failure to reasonably accommodate to allow meaningful benefit, i.e., equal access to educational benefits
  
- D. Americans with Disabilities Act – Susavage
  
- E. Title IX – for gender-related claims Davis v. Monroe County Board of Education, 526 U.S. 629, 119 S.Ct. 1661 (1999) (private action may be brought against school district for student-on-student harassment where the district was deliberately indifferent to severe harassment which denied access to education).

### III. Practice Strategies for Parents

- A. Focus on compensatory education as much as possible
  - 1. Don't blindly accept a two-year limitations period--there are many arguments and exceptions to the contrary. Memorandum attached.
  - 2. Pursue a trust fund. Heather D. v. Northampton Area School District, 2007 WL 1775467 (E.D. Pa. 2007) (ordering fund of \$182,000.00).
  - 3. Pursue full days of compensatory education, Keystone Central School District v. E.E., 438 F.Supp. 2d 519 (M.D. Pa. 2006) (awarding full days of compensatory education for limited district failures).

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- B. Save damage claims for egregious cases involving physical injuries/restraint/ serious educational harm
- C. For genuine damage claims, obtain forensic experts at the earliest possible date
- D. Know your federal judge - will you get a truly independent review with due deference, or a much more deferential approach to the administrative process?

If you would like to receive an electronic copy or more information regarding this topic, please visit our website at <http://www.mcandrewslaw.com/> or call (610) 648-9300.

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