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Civil Rights Litigation Update
Appendix of Recent Title IX and Rehabilitation Act Cases

by Laura O'Leary and John Husted

Supreme Court

Fry v. Napoleon Cmty. Sch., ___ U.S. ___, 137 S. Ct. 743 (Feb. 22, 2017)

Parents of a student who has cerebral palsy sued the School District after it refused to permit the student's service dog to attend school and assist the student during her classes. The School District argued that the service dog was superfluous because the School District provided a one-on-one aide to provide all support services for the student during the school day. The district court granted the School District's motion to dismiss, holding that the parents were required to exhaust their administrative remedies under IDEA before pursing claims for injunctive relief and money damages under the Americans with Disabilities Act ("ADA") or under Section 504 of the Rehabilitation Act ("Section 504"). A divided panel of the Sixth Circuit Court of Appeals affirmed, holding that administrative exhaustion is necessary when the injuries relate to the specific substantive protections of the IDEA and whenever the genesis and manifestations of the claimed injuries were educational in nature. The Supreme Court vacated the Sixth Circuit's opinion and remanded the case.

The Court explained that although some overlap exists between the protections of the IDEA and those of the ADA or Section 504, the Sixth Circuit applied too broad a reading of the IDEA's exhaustion provision. The IDEA requires a plaintiff to exhaust the IDEA's administrative procedures before filing an action under the ADA or Section 504 only when the suit seeks relief that is also available under the IDEA. To meet this standard, "a suit must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available.'" *Id*. at 752. However, "in determining whether a suit indeed 'seeks' relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint." *Id*. The Court noted that the IDEA "asks whether a lawsuit in fact 'seeks' relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit 'could have sought' relief available under the IDEA." *Id*. at 755. Thus, a court must look to the substance of a plaintiff's complaint to determine whether, regardless of the labels and terms it uses, it seeks relief for the denial of an appropriate education. *Id*.

In making this determination, the Court suggests consideration of two hypothetical questions: (1) "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school" and (2) "could an adult at the school…have pressed essentially the same grievance?" *Id*. at 756 (emphasis in original). If the answer is yes, and the complaint does not expressly allege a denial of a FAPE, it is also unlikely to require IDEA administrative exhaustion. If the answer is no, the complaint probably does concern denial of a FAPE, and IDEA administrative exhaustion is likely required.

The Court also explained that a review of the history of the proceedings may also shed light on whether a denial of FAPE is the gravamen of the complaint, explaining that a plaintiff's initial

choice to pursue IDEA's formal administrative procedures may indicate that the plaintiff is seeking relief for the denial of a FAPE, though this is a fact-based analysis, as a plaintiff may have legitimate reasons for abandoning the IDEA process. Justice Alito, joined by Justice Thomas, filed a concurrence, expressing disagreement with the Court's suggestions concerning the two hypothetical questions and the consideration of whether the plaintiff initially pursued IDEA's administrative procedures.

Fifth Circuit Court of Appeals

***Salazar v. South San Antonio Independent School District*, 690 Fed. Appx. 853 (5th Cir. June 15, 2017)**

Title IX does not impose liability on a school district when the only employee or representative of the school district with actual knowledge of the violation was the perpetrator himself, even if the perpetrator had authority to institute corrective measures on behalf of the district to end discrimination by individuals or in the school's programs.

Salazar, an elementary school student, brought a Title IX claim for monetary damages against the school district after Michael Alcoser, the school's vice principal, sexually abused Salazar for several years. Alcoser, the perpetrator, was the only school district employee who had actual knowledge of the abuse at the time it occurred. Given his position as vice principal, Alcoser had authority to address gender discrimination and sexual harassment at the school. When Salazar's parents discovered Alcoser's abuse and reported it to the police, the school district cooperated fully in the ensuing investigation and terminated Alcoser's employment. Alcoser pleaded guilty to aggravated sexual assault and was sentenced to eighteen years in prison.

At trial, the jury awarded $4,500,000 in damages against the school district, finding that an official of the school district, Alcoser, had actual knowledge of the sexual harassment and reacted with deliberate indifference. The district court denied the school district's motion for judgment as a matter of law in which the school district argued that the implied private right of action for damages under Title IX did not extend to cases in which only the wrongdoer had actual knowledge of the discrimination.

The Fifth Circuit, relying on *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), in which the Supreme Court stated: "[w]here a school district's liability rests on actual notice principles, however, the knowledge of the wrongdoer himself is not pertinent to the analysis," held that "requiring a recipient of Title IX funds to respond in damages when its employee sexually abuses a student and the only employee or representative of the recipient who has actual knowledge of the abuse is the offender does not comport with Title IX's express provisions or implied remedies." The Court reversed and rendered judgment for the school district.

***Doe v. Columbia-Brazoria Independent School District*, 855 F.3d 681 (5th Cir. May 3, 2017)**

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