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IDEA Does Not Require Baseline Data in IEP's

Lathrop R-II School District v. Gray, 09-3428 (8th Cir. 2010)

The Eighth Circuit held this month that the IDEA does not require Districts to include baseline data in IEP's. A statement of the child's present abilities is sufficient.

The facts state when D.G., who is autistic, transferred to the District in 2000, employees were specially trained. Occupational and speech language therapy, and a full-time paraprofessional were provided. Later, Lathrop consulted an autism specialist and independent psychologist to evaluate him. D.G. did not have a BIP, but his behavior was addressed and the District implemented strategies from the specialists' assessment.

D.G.'s father challenged the IEP claiming Lathrop did not provide a FAPE since baseline data was not included in the IEP. He also contended that the District did not provide adequate prior written notice and excluded or limited the Gray's participation in D.G.'s education.

A three member administrative panel held that the District had not provided FAPE since baseline data was not included and it did not address his behaviors and social skills adequately. The panel ruled that the District did provide adequate notice and participation.

The District then appealed to Federal District Court, which reversed the panel's decision. The case was then appealed to the Eighth Circuit.

The Eighth Circuit first noted that IDEA's requirements are met when an IEP is created pursuant to correct procedure and is reasonably calculated to provide educational benefit. The IDEA does not require baseline data; an IEP must only include a statement of current performance, how the child's disability affects his involvement and progress in the general curriculum, and a statement of measurable goals.

The descriptions of D.G.'s present level was 12 pages long and very descriptive. Each of 27 goals included benchmarks and present ability. Many of the goals did include baseline data from which subsequent goals were based. Behavior goals were sufficiently included.

The Eighth Circuit agreed that the administrative panel applied incorrect legal analysis. It confirmed that the Gray's had adequate notice and participated in creating the IEP.

How This Effects Your District:

When creating an IEP Districts must include a statement on how the child performs at the time it is created, but specific baseline data is not required.

Although this case is out of the Eighth Circuit, Ohio law mirrors federal law in only specifically requiring present levels of performance in the IEP. Additional information may be included in the IEP, though it is not necessary, on a case by case basis.

Finally, for children with significant behavior needs who have not exceeded 10 days of disciplinary removals in a year it is not necessary to provide a BIP as long as the IEP addresses behavior goals. However, a BIP may be advisable even if not required by the law if a child has persistent behavior issues.

New Jersey Court Upholds First Amendment Over School Policy

C.H. v. Bridgeton Board of Education, 09-5815 (D.N.J. 2010)

The U.S. District Court for the District of New Jersey recently held that a school could not stop a student from participating in a pro-life day of silence. The student must be allowed to wear an arm-band, stay silent during the school day, and distribute fliers as part of her First Amendment rights. This order was declared despite the fact that the speech violated preexisting dress code and literature distribution policies.

Student C.H., a freshman at Bridgetown High School, asked administrators if she could participate in the Pro-Life Day of Silent Solidarity (DOSS) in order to express both her religious and her political beliefs. She wanted to take a stand against abortion by remaining silent during class and during the school day, handing out fliers explaining to other students why she chose to stay silent, and wearing a red duct tape armband with "LIFE" written on it in black marker. She would wear the band over her arm and/or her mouth. All this was to take place on a specific prearranged day.

The superintendent decided C.H. could not put tape over her mouth. She could not wear an armband or distribute handouts because it would violate school dress code and literature distribution policy. This message was relayed by the principal to C.H. and her father. On a previous occasion, however, members of Students Against Drunk Driving (SADD) were allowed to wear T-shirts over their uniforms, paint their faces white, stay silent, and wear signs telling how they had "died" in a drunk driving accident. C.H. then sued the school alleging a violation of her right to free speech under the First Amendment and that the dress code, literature distribution, harassment/anti-bullying, and equal education policies were unconstitutional as applied to her and generally. She requested an injunction to force the school to allow her to participate in DOSS.

In deciding whether to grant the injunction, the Court first determined what standard to apply. Defendants argued the issue was how they regulated the speech. Plaintiffs argued the issue was that the speech was regulated at all. Although the school argued that *Tinker* only applies in cases where the school discriminates against a student because of his or her viewpoint, the Court agreed with C.H. and applied the *Tinker* standard. It noted that the line of student speech cases that analyze the time, place, and manner of the restrictions do not apply to their own Third Circuit. The Third Circuit does not require viewpoint discrimination. In addition, the Court indicated viewpoint discrimination likely was present here since other groups were allowed to participate in similar expression where C.H. was not.

The Court then applied the *Tinker* standard to the armband and literature distribution. The school had to prove that C.H.'s "speech would substantially disrupt or interfere with the work of the school or the rights of other students." The school could not show that the speech would cause a substantial disruption.

Bridgetown High School had previously instituted a strict dress code to stop students from dressing provocatively and to discourage gangs. It feared that making an exception here would undermine that and open the floodgates. The court determined this was not enough. The school had to show a good reason why significant disruption would occur. Simply fearing disruption was not enough.

In regard to the literature distribution policy, the Court determined that the fact that students may be 'upset' by C.H.'s speech was insufficient. Again, the school needed to show indications of substantial disruption. As a result, the injunction was granted and the school had to allow C.H. to participate in DOSS.

How this Effects Your District:

Though it was wise for Bridgeton School District to have clear policies in place, these policies cannot serve as a basis to infringe on a student's First Amendment right to freedom of speech. When an act that violates school policy is truly protected speech, it will serve as an exception to regular enforcement of the policy.

While school districts should have clear policies in place, they should also educate themselves about when First Amendment rights are triggered or consult an attorney when a question arises. Student speech is protected unless it disrupts the school, is drug or violence related, is lewd or obscene, or could be perceived as the school's speech.

Speech can also be regulated if administration believes the speech will significantly disrupt the school. However, officials must be able to specifically point out why the speech is likely to do so. Simply fearing disruption is not enough.

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Additionally, hurt feelings or discomfort are not disruption.

It is also important to note that the Sixth Circuit may not have applied the same standard in this case. The District of New Jersey applied *Tinker* since their Third Circuit Court of Appeals does not require viewpoint discrimination in *Tinker* cases. Contrarily, the Sixth Circuit has categorized a case with a similar fact pattern as consisting of a neutral policy with restrictions on time, place, and manner of student speech. In *M.A.L. ex rel. M.L. v. Kinsland*, the Sixth Circuit held they were not obligated to apply the *Tinker* standard since that case addressed viewpoint discrimination. The facts of the case must suggest viewpoint discrimination for *Tinker* to apply.

District Court Upholds Prayer at Board Meetings

Doe v. Indian River School District, 05-120-JJF (D.Del. 2010)

The U.S. District Court for the District of Delaware recently held that a School Board's policy to open meeting with prayer is constitutional. The Court concluded that board meetings were similar to legislative sessions rather than the school setting. It followed precedent allowing prayer to begin legislative sessions.

The Board's own policy became an issue after Plaintiffs, who are Jewish, objected to prayer at a District high school graduation. However, several board members stated that their constituents preferred board meeting to start with prayer. The board then consulted an attorney on the issue. It developed a new policy on prayer by board members at regular board meetings.

The Policy stated that the board may open meetings with a prayer or moment of silence if the individual member chooses. The board rotates the opportunity for one member per meeting to offer a prayer or moment of silence. If the member chooses not to, the next member in the rotation may. The opportunity may not be used to proselytize, advance or convert, or disparage any belief. The policy also noted that prayer is voluntary and no one would be forced to participate either in prayer or a moment of silence. Finally, any prayers may be sectarian, denominational, or not and in accord with the particular board member's religious heritage. A disclaimer noted that the prayer is voluntary for each board member and no one is required to participate.

Plaintiffs Dobrich and Doe then filed suit claiming the prayer violated the Establishment Clause of the First Amendment which calls for a separation of church and state.

To decide whether prayer at Board meetings was unconstitutional, the Court first had to determine which previous case to apply. The court concluded that *Marsh v. Chambers*, a 1983 United States Supreme Court case, was appropriate. *Marsh* held that prayer at the beginning of each session of the Nebraska state Legislature was constitutional. The District of Delaware used *Marsh* since it believed a board meeting is similar to legislative session.

Marsh explicitly applies to "other deliberative public bodies," such as school boards, the Court said. It did not matter that school boards pass laws or levy taxes without public approval. The Court also disagreed with Plaintiffs' contention that *Marsh* did not apply since school districts were not around at the time the Constitution was adopted as legislatures were.

The fact that children often attended school board meetings also did not persuade the Court that the meetings were similar to a classroom setting. Attendance was not involuntary and school personnel do not have control over the students. Extending this, the Court also determined that board meetings were not similar to extracurricular activities as in some other cases that had struck down prayer.

The Court also would not consider the content of the prayer. Though many Board members had referenced "Jesus Christ" in prayer, this did not make the prayer unconstitutional pursuant to *Marsh*. If content were considered, all prayer would be excluded from public functions which is inconsistent with precedent.

The Court also considered that the prayer policy did not attempt to push others towards a specific religion or advance any religion. The type of prayers did not advance religion since the opportunity to pray is rotated among Board Members without consideration of their beliefs. Also, some Board Members chose to give a moment of silence or declined to include sectarian reference in their prayer.

The Doe's then alleged that the policy impermissibly entangled the public school board with religion. The Court rejected that claim since

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Marsh would then contradict itself. That the Board Members gave the prayer themselves, rather than clergy, as in *Marsh*, also did not persuade the Court that the policy was unconstitutional. Prayer rotated between members regardless of their faith which is more inclusive than the situation in *Marsh*.

Finally, the Court rejected all Plaintiff's contentions that the policy was actually adopted with an impermissible motive. It did not matter that the policy only applied to public board meetings, not special private ones. Legislatures do not need to also have prayer at committee meetings to make the act legitimate. There was no evidence that the prayer was actually intended to persuade the public to participate. The manner in which the policy was adopted also did not show any impermissible motive.

How this Effects Your District:

Prayer in schools is an extremely tricky matter and the Federal Courts have not yet been able to agree on whether prayer should be permitted at school board meetings. Although this case suggests prayer at school board meetings may be constitutional, some cases diverge from *Marsh* and apply a different standard which likely would lead to a different result.

Indeed, in *Cole ex rel. Cole v. Cleveland Board of Education* (1999) the Sixth Circuit held that Cleveland Board of Education violated the Establishment Clause by praying before School Board Meetings. It based its decision on the Supreme Court's *Lee v. Weisman*, rather than *Marsh*. The Sixth Circuit also focused more than the District of Delaware on the fact that the prayer is in a school atmosphere where impressionable children are involved.

Districts should be very careful that prayer in school does not advance any one religion. Any opportunity to pray should be available to people regardless of their religion or whether or not they have a religion at all.

It is also important that prayer does not discourage any other religion or lack thereof. It should be very clear that others are not required to participate in any prayer or moment of silence.

Because of the Sixth Circuit's holding in *Coles*, however, Ohio Districts should avoid prayer at Board Meetings or discuss the matter further with legal counsel before implementing any prayer policy. The constitutionality may very much depend on the facts of the situation. Until the Supreme Court addresses this specific issue and resolves the disagreement between the courts, *Cole,* not *Doe,* binds Ohio's Federal Courts.

Wisconsin Teachers' Personal Emails not Subject to Public Records Law

***Schill v. Wisconsin Rapids School District*, No. 08-AP967 (Wis. Jul. 16, 2010)**

The Wisconsin Supreme Court has decided that teachers' personal emails sent or received on district computers should not be subject to disclosure under the Wisconsin Public Records Law. Four justices, however, would have held that personal emails are public records.

After an individual requested emails between a group of teachers, those teachers objected to the release of personal emails, but not work-related ones. The Wisconsin Supreme Court reversed the trial court and determined the records could not be turned over.

The Court based it's decision on legislative history, caselaw, and previous interpretations by other states, local attorneys, and the Wisconsin Attorney General. The Court concluded that the emails were not public records simply because they were kept by a public entity. To be public records, the emails must serve a public function. The Court allowed one caveat, noting that emails could be records in a disciplinary investigation.

Although the plurality opinion concluded that the emails were not public records, four other justices disagreed. Two dissented, and the two concurring judges believed the emails were public records, but should not be released out of public policy concerns.

How This Effects your District:

Now that personal notes communicated at work are in email form and held in electronic databases, this issue has been a predominant one in courts. In Ohio, this issue was decided, and cited by the Wisconsin Court, though not in the same context.

In *State v. Lake City Sherriff's Dept.*, (Ohio 1998), Ohio's Supreme Court held emails containing racial slurs were not public records since they were not related to public business. However, although this suggests Ohio teachers' personal emails cannot be turned over even when requested, district staff should be careful to make sure any emails are within district policy.

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at West Clermont Local School District on August 18, 2010
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