NJSBA 2018 Special Education Case Law and Legislative Update

Cherie L. Adams, Esq.
Adams Gutierrez & Lattiboudere, LLC
1037 Raymond Boulevard, Suite 900
Newark, New Jersey 07102
cadams@asgllaw.com

Approved Legislation

1. **P.L.2017, c.6** (Feb 6, 2017): Requires teacher preparation program for instructional certificate to include certain amount of instruction or clinical experience in special education and for students with disabilities endorsement to include credit hours in autism spectrum disorder.

2. **P.L.2017, c.62** (May 08, 2017): Requires school districts to adopt a allowing students in grades 9 through 12 who participate in certain interscholastic extracurricular activities to earn varsity letter.

3. **P.L.2017, c.70** (May 11, 2017): Requires State Board of Education regulations regarding school nurse certification to include certain minimum eligibility requirements.

4. **P.L.2017, c.76** (May 11, 2017): Authorizes students in Marie H Katzenbach school for the deaf to operate State vehicle for driver education and provides protection for such activity under tort claims act.

5. **P.L.2017, c. 83** (May 11, 2017): Requires State to pay educational costs of students who reside in homeless shelter outside district of residence for more than one year.

6. **P.L.2017, c.103** (July 11, 2017): Directs BOE to make database of special education decisions available on website.

7. **P.L.2017, c.105** (July 13, 2017): Includes students who participate in school intramural sports programs in the student-athlete head injury safety program.

8. **P.L.2017, c.137** (July 21, 2017): Requires Commissioner of Education to develop guidelines for school districts regarding transgender students.

9. **P.L.2017, c.169** (July 21, 2017): “Charlie’s Law”, Establishes civil penalties for persons who interfere with or deny persons with disabilities accompanied by service or guide dogs access to places of public accommodation.

10. **P.L.2017, c.176** (July 21, 2017): Prohibits health insurers, SHBP, SEHBP, certain health care providers, and Medicaid from discriminating in providing coverage and services based on gender identity.

11. **AR-113**: Designates February 2018 as "Career and Technical Education Month" in New Jersey.

12. **P.L.2017, c.263 (**January 8, 2018) expands certain civil rights protections under the "Law Against Discrimination" to include breastfeeding and expressing milk or related medical conditions. Under the law, it would be a civil rights violation for a working woman to be fired or otherwise discriminated against because of breastfeeding or expressing her milk during breaks. The law also requires an employer to provide reasonable break time each day and a suitable location for an employee who is breastfeeding to express her milk in private.

13. **P.L.2017, c.274 (**January 8, 2018**)** provides immunity to board of director members and employees of private schools for students with disabilities (PSSDs) if they report incidents of bullying in compliance with school policy. This law will provide PSSDs same immunity that is currently given to members of a school board and school district employees under the "Anti-Bullying Bill of Rights Act."

14. **P.L.2017, c.387 (**January 16, 2018**) Requires** public and nonpublic schools to notify students and parents of availability of summer meals programs and locations where meals are served.

15. **N.J.A.C. 6A:16-7.7(a)2ix(1):** permits a school district to include in its HIB policy a process by which the principal, or his or her designee, in conjunction with the anti-bullying specialist (ABS), makes a preliminary determination as to whether a reported incident or complaint is a report of an act of HIB before the principal refers the incident to the ABS for investigation.

16. **N.J.A.C. 6A:16-7.8:** Requires approved PSSDs to develop, adopt, and implement policies prohibiting harassment, intimidation, and bullying on school grounds, including its school buses and school-sponsored functions.

17. **P.L.2017, c.291** (January 16, 2018) Establishes certain requirements for use of restraint and seclusion on students with disabilities in school districts, educational services commissions and approved private schools for students with disabilities,

18. **P.L.2018, c.5** (April 11, 2018) Requires school districts to review the employment history of job applicants to ascertain if they have any past allegations or instances of child abuse or sexual misconduct against students. It explicitly prohibits such employers from hiring a person serving in a position involving regular contact with students unless the employer conducts a review of the employment history of the applicant by contacting former and current employers and requesting information regarding child abuse and sexual misconduct allegations.missions, and approved private schools for students with disabilities.

School Law Case Update

Constitutional Law

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. (June 26, 2017)

The Church, which operated religious preschool and daycare program, brought action asserting free exercise claims against the Director of Missouri Department of Natural Resources, seeking declaratory and injunctive relief, and challenging denial of church's application for competitively-awarded grant for purchase of rubber playground surfaces, which denial was based on Department's policy of denying grants to religiously affiliated applicants. The Supreme Court reversed the District Court decision to dismiss the action and remanded the case. The Supreme Court held that the church's challenge was subject to the strictest scrutiny and denial of church's application for grant to purchase rubber playground surfaces was denial of church's free exercise rights.

D.V. by and through B.V. v. Pennsauken School District, 247 F.Supp.3d 464 (March 29, 2017)

A student, his guardian, and his uncle brought § 1983 action against school district, asserting retaliation claims under the Rehabilitation Act and the Americans with Disabilities Act, student-on-student sexual orientation bullying under New Jersey's Law Against Discrimination, and sex discrimination under Title IX. School district moved for summary judgment. The Court granted summary judgment in favor of the school district because there was no causal connection between protected activity and alleged retaliatory actions as required to support retaliation claims. Moreover, the student-on-student sexual orientation bullying claims were not actionable under New Jersey's Law Against Discrimination and the school district was not liable for sex discrimination under Title IX absent evidence that it was deliberately indifferent to student's complaints of bullying.

Discrimination

Title IX

Remphrey v. Cherry Hill Twp. Bd. of Educ., 2017 WL 253951 (January 20, 2017)

Plaintiffs Susan and William R. Remphrey bring claims on behalf of their minor daughter, S.R., under Title IX and the New Jersey Law Against Discrimination against the Cherry Hill Township Board of Education and Francis Madison. Plaintiffs allege that Mr. Madison, a teacher at Cherry Hill West High School, sexually harassed S.R. during the 2014-2015 school year. Defendants made a motion to dismiss the complaint. The court found that plaintiffs sufficiently plead under Title IX against the district, but granted the motion to dismiss against the individual teacher. The NJLAD claims survived the motion to dismiss.

Fry v. Napoleon Cmty. Sch., 137 S.Ct. 743 (2017)

Parents sued local and regional school districts and principal, alleging that they violated Title II of Americans with Disabilities Act (ADA) and Rehabilitation Act when they refused to allow child, who had cerebral palsy, to bring service dog to school. The Supreme Court held that if, in a suit brought under a statute other than the Individuals with Disabilities Education Act (IDEA), the remedy sought is not for the denial of a free appropriate public education (FAPE), then exhaustion of the IDEA's procedures is not required. It also held that to determine whether a plaintiff in such a suit seeks relief for the denial of a FAPE, a court should look to the gravamen of the plaintiff's complaint.

Hamilton v. Hite, 70 IDELR 175 (E.D. Pa. 2017)

Evidence showing that the school district repeatedly offered educational services to the grandmother of a child with severe behavioral problems negated the grandmother's claim that the district retaliated against her for her advocacy by refusing to provide services, repeatedly suspending the student, and filing a complaint with child protective services.

OPRA

L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56 (App. Div. 2017)

In each case, plaintiffs in multiple different school districts requested copies of settlement agreements and records reflecting the provision of special services to other qualified students. The respective school districts resisted disclosure, citing statutory and regulatory provisions that generally safeguard the privacy of students in their records, subject to certain specified exceptions and conditions. The lawsuits generated conflicting results in the trial courts. The Appellate Division Court held that the respective plaintiffs are entitled to appropriately-redacted copies of the requested records, provided that on remand those plaintiffs either: (1) establish they have the status of "[b]ona fide researcher[s]" within the intended scope of N.J.A.C. 6A:32-7.5(e)(16); or (2) obtain from the Law Division a court order authorizing such access pursuant to N.J.A.C. 6A:32-7.5(e)(15). In either event, the school districts shall not turn over the redacted records until they first provide reasonable advance notice to each affected student's parents or guardians."

Paff v. Galloway Twnshp., *N.J. Sup. Ct. (Albin, J.)*

The Appellate Division's overly constrictive reading of OPRA cannot be squared with the OPRA's objectives or statutory language. OPRA recognizes that government records will constitute not only paper documents, but also information electronically stored. The fields of information covering "sender," "recipient," "date," and "subject" in the emails sent by the Galloway Township Chief of Police and Clerk over a two-week period are government records under OPRA.

FAPE

***Endrew F. v. Douglas County School Dist. RE–1*, 137 S.Ct. 988 (2017)**

In a unanimous decision, the Court held that, to meet its substantive obligation under IDEA, a school district must offer an IEP that is reasonably calculated to enable a child to make progress "appropriate in light of the child's circumstances." When a child is "fully integrated" into a regular classroom, providing FAPE that meet the unique needs of a child with a disability typically means providing a level of instruction reasonably calculated to permit advancement through the general curriculum(Rowley Standard). However, if progressing smoothly through the general curriculum is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement but must be "appropriately ambitious in light of his circumstances." The Court states "this standard is markedly more demanding that a 'merely more than de minimis' test for educational benefit.

E.D. by T.D. and C.D. v. Colonial Sch. Dist., 69 IDELR 245 (E.D. Pa. 2017)

An administrative decision rendered prior to Endrew F is still valid if the judge applied a sufficiently rigorous test and considered the child's circumstances. The court held that the academic progress was "appropriate in light of her age and disability-related needs, "even though she was not proficient in all academic areas by the end of the school year.

G.L v. Saucon Valley Sch. Dist., 69 IDELR 249 (E.D. Pa. 2017)

The positive outcomes documented in witness statements and progress reports for an 11-year-old boy with a n emotional disturbance proved that the school district had adequately addressed the boy's behavior needs. The records showed that he child had a reduced elopement, increased classroom participation, and improved his reading skills.

Brandywine Heights Area Sch. Dist. v. B.M., 69 IDELR 212 (E.D. Pa. 2017)

A school district's failure to address the behaviors of a preschool student with autism led to an award of compensatory education services. The district waited six months into the child's kindergarten year to develop an appropriate IEP, despite evidence that the child had been exhibiting the inappropriate behaviors since entering preschool.

G.D. West Chester Area Sch Dist., 70 IDELR 180 (E.D. Pa. 2017)

The parents of a gifted third grade student with an anxiety disorder disagreed with the results of a school psychologist' eligibility determination finding that their child was not in need of special education and related services. However there was no evidence that the school psychologist's evaluation was "legally deficient" simply because she diagnosed with the recommendation of the child's treatment therapies The court held that the school district had appropriately considering the child's anxiety issues by developing 504 plan offering the designation of a trusted adult for a child.

D.B by M.B and A.B.v. Fairview Sch Dist., 117 LRP 45742 (W.D. PA. 10/31/17)

The proactive measures taken by the school district to address a preschool student's behavior and language deficits were appropriate and sufficient to survive a challenge to its child find implementation. The parents filed a lawsuit alleging that the district had taken too long to identify the child as eligible for an IEP pursuant to the IDEA

Sean C. and Helen C. v. Oxford Area Sch. Dist., 70 IDELR 146 (E.D. Pa. 2017)

This court held that the substantive appropriateness of IEP's must be judged based on the information available at the time of the IEP's formation and not be second-guessed by information.

Bejamin A. by Michael and Karen A. v. Unionville-Chadds Ford Sch. Dist.., 70 IDELR 150 (E.D. Pa. 2017)

The court held that the fact that the IEP's developed for an elementary school boy with ADHD did not specifically refer to the development of "executive functioning skills" as an annual measurable IEP goal did not render the IEP's deficient.

T.M. by T.M. and C.M. v. Quakertown Cmty Sch. Dist., 69 IDELR 276 (E.D. Pa. 2017)

The parents of an 11-year old student with autism, global apraxia, and an intellectual disability alleged that their child should be provided one-to-one academic instruction rather than opportunities for socialization with peers. The court found that the student made increasing gains in socialization.

A.C. v. Scranton Sch. Dist., 69 IDELR 211 (M.D. PA. 2017)

The school district was not responsible for the actions of private school staff using inappropriate physical restraints at least 23 times over a three year period on a 10-year old boy with a mixed developmental disorder, autism, an intellectual disability, ADHD, and a mixed receptive/expressive disorder. The court refused to hold the public school district responsible for the actions of the private school employees.

Methacton Sch. Dist. v. D.W., 70 IDELR 247 (E.D. Pa. 2017)

A court held that the school district denied FAPE to a high school student with SLD by failing to obtain baseline evaluative data prior to developing goals. As a result, the IEP goals did not align with the student's evaluative data. The court awarded funding for a private school placement to the parents of the student.

K.N. and J.N. on behalf of J.N. v. Gloucester City Board of Education, OAL DKT. NO. EDS 2690 -15 3 AGENCY REF. NO. 2015 22262 (Sept. 8, 2017)

District was found not to have violated the IDEA with respect to student's participation in After-care program; program was never part of the IEP and District had provided accommodations to facilitate student's participation when it existed; not required to create one for him when it ceased to operate.

Attorneys' Fees

A.S. v. Harrison Township Bd. Of Educ., No.17-1963, (D.N.J. April 6, 2017)

Disabled student and his parents brought action against local school board, New Jersey Department of Education, and its commissioner, alleging violations of the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act, and the New Jersey Law Against Discrimination (NJLAD), and seeking declaratory and injunctive relief. The District Court approved a settlement despite disapproving of attorney billing practices. The court did not want to force unconsenting parties to continue litigating.

C.C. v. Eastern Camden County Regional School District, 2017 WL 1170832 (March 29, 2017)

In a special education matter, the District Court rejected a settlement as not being fair or reasonable to the minor child. In particular the Court looked to the attorneys' fees and determined that they were grossly disproportionate to the amount the child was to recover under the circumstances. It noted that the school district provided no discovery and did not provide any defense of its actions. The Court concluded that the amount of time logged and resulting fees were disproportionate to the activity reflected on the docket.

M.R. and R.R. v. Ridley Sch Dist., 70 IDELR 141(3d Cir 2017)

The Third Circuit ruled in a case of first impression that parents who prove that a school district violated the IDEA' stay put provision and win compensatory services qualify as "prevailing party" under IDEA, making them eligible for an award of attorney's fees

C.G.; R.G., o/b/o C.B.G. v. Winslow Township Board of Education (No. 15-3929) (July 14, 2017)

The Court of Appeals for the Third Circuit, affirmed the District Court's order barring plaintiff's attorney from personally videotaping depositions and the District Court's order reducing a fee award from the requested $160,731 to $47,212.50. The Court of Appeals noted that under the Federal Rules of Civil Procedure, Rule 30(b)(3(A)-(B) permits the videotaping of a deposition with proper notice, however, Rule 30(b)(5)(A)-(B) precludes an attorney from performing the videotaping. Specifically, depositions must be conducted by "officer" which is either a "person appointed by the court" or a person "designated by the parties" under Rule 29(a). The Court of Appeals also found the reduction of the fee award to be reasonable and relied upon the District Court's discussion which highlighted red flags such as the disparity between Plaintiff's counsel's expertise and the lengthy amount of time billed for routine matters.

A.P. by P.T v. Shamokin Area Sch. Dist., 70 IDELR 248 (M.D. Pa. 2017)

A parent who prevailed I in a due process hearing on one of five issues was only entitled to proportional share of her attorney's fees. The court reduced the fees awarded from the requested $28,468 to $4,000 based on the relief obtained.

Illegal Acts

C.O. v. Pine Hill School District Board of Education, Not Reported in A.3d, 2017 WL 4819141

Plaintiffs allege that Defendant school district was negligent in placing both the Plaintiff and the child of a man who had convicted of the prior sexual assault of the Plaintiff. As a result, Plaintiffs argued that as a result of not being separated from this Plaintiff was subjected to bullying and a physical altercation occurred involving both students occurred. Plaintiffs further allege in their complaint in this civil action that, despite these recognized concerns, Carolyn and Arlene were placed in the same homeroom. Plaintiffs asserted that the school-district defendants were negligent, grossly negligent, careless and reckless in failing to, among other things, "promulgate a safe educational environment meant to prevent and cope with harassment, bullying or intimidation." Plaintiffs appeal the October 9, 2015 order denying their motion to amend to include an LAD claim and the February 5, 2016 order granting summary judgment in favor of the school-district defendants. The Appellate Division held that the pain and suffering threshold at N.J.S.A. 59:9-2(d) did not require Plaintiff to delineate between the injuries caused by her sexual assault and those aggravated by the School's failure to protect her from bullying as a result of her sexual assault, and that the issue was for a jury to determine. It also held that the late amendment of these claims was permissible after two years of discovery since the new claim would not require further discovery or joinder of additional defendants.

Discipline of Students

T.P. on behalf of A.P.,v Northern Valley Regional Board of Ed -- OAL Final Decision OAL DKT. No. EDS 18095-17 Agency Dkt. No. 2018-27268 (Feb 6, 2018)
District failed to properly complete manifestation determination and reversed long term suspension as a result. Board failed to distinguish which conduct subject to discipline was the subject of the manifestation determination and failed to take into account all of the relevant information.

L.S. o/b/o J.S. v. Board of Education of Piscataway (Comm. Decision #67-17) – Petitioner filed an appeal seeking a reduction in his daughter's four-day out-of-school suspension by the Board. The ALJ found that *N.J.S.A.* 18A:37-2 gives school boards the authority to impose

discipline on students and that it has been established that the Commissioner will not substitute her judgement for that of a school board unless it can be proved that the board's decision was arbitrary, capricious, or unreasonable. The ALJ found that petitioner failed to show that the Board's finding that J.S. cheated was arbitrary, capricious or unreasonable. Additionally, the ALJ found the penalty to be reasonable. The Commissioner concurred with the ALJ's findings.

S.O. o/b/o L.O. v. Board of Education of the City of Orange (Comm. Decision #45-17) (February 2017) – A parent appealed the Board's decision to expel his daughter after an incident involving a dress code violation turned into angry words, threats, and aggressive physical behavior towards the vice principal. The Commissioner explained that the penalty was improperly characterized as "expulsion" but agreed with the findings of the ALJ and thus dismissed the petition with prejudice.

Student Residency & Eligibility to Attend Public School

K.H. o/b/o A.H. and V.H. v. Board of Education of Butler (Comm. Decision #70-17) – Petitioner appealed the respondent Board's determination that his children were ineligible to attend school in the respondent's school district. The Commissioner found that pursuant to *N.J.A.C.* 6A:22-3.1(a) when there is a consent order or a written agreement between divorced parents that designates the school district of attendance, the amount of time spent with either parent does not dictate where the children must attend school. Consequently, the Commissioner found that A.H. and V.H. who resided in the Butler with their father 48% of the time were eligible to attend Butler public schools because the Consent Order agreed upon by the divorced parents designated that the children would continue to attend Butler schools. Lastly, the Commissioner remanded the case back to OAL for determination of whether the Board is owed tuition for the time period prior to the signing of the consent order where the children were splitting their residency between the parents.

Harassment, Intimidation and Bullying (HIB)

C.J. o/b/o minor children v. Board of Education of Willingboro (Comm. Decision #94-17) – Petitioner alleged that her children were being abused and bullied, were afraid to go to school, and received therapy as a result of the anxiety they experienced from attending the Board's school. Thus, petitioner sought to have her children removed from the respondent Board's school district. Petitioner did not request an HIB investigation, did not indicate where she wanted her children to attend school, and did not specify the legal grounds for out-of-district placement. The ALJ found that petitioner appeared to be making claims of HIB but did not follow the procedural requirements and that petitioner did not allege any factual or legal basis for out of district placement of her children. Consequently, the ALJ found the Board was entitled to summary decision. The Commissioner concurred with the ALJ.

Independent Evaluations

S.S. and M.S. on behalf of H.S. v. Hillsborough Township Public School District 2018-26883 EDS 14675-17 (Jan. 19, 2018) IEE ordered on summary basis because board did not file for due process within 20 days of request for evaluation; district not entitled to do its own additional evaluations first even when none had been done because re-evaluation meeting had occurred and requested evaluation was denied.