No. 07-35115

In the United States Court of Appeals For the Ninth Circuit

WINDY PAYNE AND DYLAN PAYNE,
PLAINTIFFS-APPELLANTS,

v.

PENINSULA SCHOOL DISTRICT, ARTONDALE ELEMENTARY SCHOOL, JODI COY, JAMES COOLICAN, AND JANE AND JOHN DOES 1-10

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
For the Western District of Washington at Tacoma
District Court Case CV05-5780 RBL

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES, URGING AFFIRMANCE ON REHEARING EN BANC

FRANCISCO M. NEGRÓN, JR.
GENERAL COUNSEL
NATIONAL SCH. BDS. ASSOC.
1680 DUKE STREET
ALEXANDRIA, VA 22314
TELEPHONE:703-838-6722
FACSIMILE: 703-683-7590

FAGEN FRIEDMAN & FULFROST, LLP
LENORE SILVERMAN, SBN 146112
MAGGY M. ATHANASIOUS, SBN 252137
70 WASHINGTON STREET, SUITE 205
OAKLAND, CALIFORNIA 94607
TELEPHONE: 510-550-8200
FACSIMILE: 510-550-8211

Attorneys for National School Boards Association

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
October 13, 2010
Case Number 07-35115
Payne v. Peninsula School District, et al.

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6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors committee: N/A

/S/ Francisco M. Negrón, Jr. October 13, 2010

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Signature Date

TABLE OF CONTENTS

Page

CASES:

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS:

OTHER AUTHORITIES:

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit organization representing state associations of school boards and their over 14,500 member districts across the United States, which serves the nation's 50 million public school students.

NSBA is committed to supporting and advocating on behalf of school boards and local administrators to promote safe learning environments, maintain local control by schools and parents over the educational programs of students, and ensure the efficient and effective operation of school districts. NSBA strongly believes that schools must be afforded the opportunity to resolve disputes over a student's educational program informally and through administrative mechanisms to ensure speedy and efficient outcomes for students. School boards have a crucial interest in maintaining the ability to formulate and implement a student's educational program without the specter of costly litigation, knowing instead that the parties will take part in a predictable and expedient administrative dispute resolution process should disagreements arise.

This brief is filed with the consent of both parties.

STATEMENT OF THE CASE

The crux of this case is a school district's alleged failure to properly implement an educational strategy in a student's Individualized Education Program

(IEP), the use of a safe room, a behavior management strategy countenanced by state law and consented to by Plaintiffs-Appellants. Plaintiff D.P. is a student with moderate autism, resulting in delayed academic progress and behavior challenges, including inappropriate or aggressive behaviors. During the 2003-2004 school year, D.P. was placed in the Transition Program, a class designed for children with low cognitive skills and behavioral difficulties, at a school within the Peninsula School District (District).

D.P.'s operative IEP for the 2003-2004 school year identified behavior as an area of need. The IEP team met in September 2004 and found that D.P.'s behavior impedes his learning and the learning of others. The IEP team sought to address D.P.'s behavior issues through various interventions, including an Aversive Interaction Plan that provided for containment in a safe room. D.P.'s mother,

agreement that D.P. be transferred to another school within the District. "[T]he record suggests that the Paynes did not attempt to address D.P.'s emotional problems there and that they were unhappy with the District's provision of the services to which it had agreed. Despite the mediation agreement's failure to resolve all of Payne's issues with the District's provision of services, Payne never sought an impartial due process hearing." *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123, 1125 (9th Cir. 2010).

D.P. continued to attend school in the District during the 2004-2005 school year, until Mrs. Payne unilaterally removed D.P. from the District in favor of home-schooling. Plaintiffs-Appellants filed suit in December 2005. They claimed

guides the student's educational program and provision of special education services. *See* 20 U.S.C. § 1414(d)(1)(A). A student's parent is an indispensible decision-making member of the IEP team and generally must consent to the provision of special education services. 20 U.S.C. §§ 1414(a)(1)(D), (d)(1)(B).

The IDEA is not toothless; the rights bestowed are associated with specific enforcement mechanisms. *See* 20 U.S.C. § 1415(b). The IDEA provides that a party may present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). The

of IDEA or if the plaintiff seeks "relief for injuries that could be addressed *to any degree* by the IDEA's administrative procedures." *Kutasi v. Las Virgenes Unified Sch. Dist*., 494 F.3d 1162, 1168 (9th Cir. 2007) (emphasis added). Additionally, "where the IDEA's ability to remedy a particular injury is unclear, exhaustion should be required . . . ." *Robb v. Bethel Sch. Dist*., 308 F.3d 1047, 1051 (9th Cir. 2002). Parties wishing to avoid the administrative hearing requirement bear the burden of showing futility. *Id*. at 1050 n.2.

I. This Court Should Strictly Enforce the Exhaustion of Administrative Remedies Requirement Embedded in the IDEA

The purpose of the IDEA exhaustion requirement is to: (1) permit educational agencies to have "primary responsibility for the educational programs that Congress has charged them to administer," (2) ensure that federal courts "are given the benefit of expert fact-finding by a state agency devoted to this very purpose," and (3) promote "judicial efficiency by giving those agencies the first opportunity to correct shortcomings in their educations programs for disabled students." *Robb*, 308 F.3d at 1051.

Indeed, the IDEA reveals a strong legislative intent to require exhaustion; the school setting demands local

A. The IDEA's Legislative History and Statutory Scheme Support Stringent Adherence to Exhaustion in Favor of Local Resolution of Disputes

The history and statutory scheme of the IDEA evince a strong intent to require parents to exhaust administrative remedies before going to court. Congress included formal procedures for dispute resolution in the IDEA, as well as each of its predecessors.[1] Where the legislature has gone to the trouble of devising an administrative scheme for dispute resolution, courts have been reluctant to allow parties to circumvent exhaustion requirements. The courts reason that where Congress establishes administrative remedies, exhaustion is required, even when the complaining party's preferred remedy is unavailable under the administrative process. *See Booth v. Churner*, 532 U.S. 731, 735 (2001) (finding that the requirement that no civil action may be brought by a prisoner until "such administrative remedies as available are exhausted," required prisoner to exhaust administrative process even though he sought only unavailable monetary damages because he had already been transferred to another prison).

[1] Congress introduced legislation ensuring students with special needs access to a

In *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), the Supreme Court found

dispute resolution step, the "resolution session," prior to proceeding to a due process hearing. 20 U.S.C. § 1415(f)(1)(B). Perry Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. OF DISABILITY POL'Y STUD. 3, 3 (2010). Thus, Congress intended to make IDEA dispute resolution less formal, as opposed to other time-consuming and adversarial mechanisms like civil litigation.

On the whole, the legislative history evidences an intent to maintain the exhaustion requirement and to encourage informal dispute resolution.

B. There is a Special Need to Preserve the Exhaustion of Administrative Remedies Requirement in the School Context

The need for exhaustion is even more compelling in the context of resolving disputes over a student's educational program. The IDEA exhaustion requirement recognizes the traditionally strong state and local interest in education, allows for the exercise of discretion and educational expertise by state agencies, affords full exploration of technical issues, furthers development of the factual record and promotes judicial efficiency by giving state and local agencies the first opportunity to correct shortcomings. *Kutasi*, 494 F.3d at 1167. It is "intended to channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances." *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002).

The nation’s public schools serve appr

of Special Education reported that from 1991 to 2000, although the average number of requests for a due process hearing had risen from 4,655 in 1991 to 11,068 in 2000, from 1996 to 2000, the number of hearings held decreased. Eileen Ahearn, Nat'l Ass'n of State Dir. of Special Educ., Project Forum, Quick Turn Around, *Due Process Hearings: 2001 Update*, 4-5 (April 2002). This is presumably due in part to growth in alternative dispute resolution methods. *Id*.

As noted, Congress evidenced an intent to continue moving away from the judicialization of the IDEA's administrative dispute resolution mechanisms when it emphasized the mediation option in 1997 and added the requirement of a resolution session in 2004. Relaxing the IDEA's administrative exhaustion requirement does violence to Congress' intent to ensure expeditious, less adversarial dispute resolution with minimal emotional and finan(,)1.ifsts to the

In sum, IDEA exhaustion requirement

D. Public Policy Supports Requiring Plaintiffs-Appellants to Exhaust Their Administrative Remedies Under the IDEA

Plaintiffs-Appellants wish to circum

been permitted to seek relief from the courts if they so desired. It was D.P.'s parents' premature resort to the courts that created the needless delay that the legislature sought to avoid when it instituted the exhaustion of administrative remedies requirement.

II. Use of Restraints/Seclusion Is a Behavior Modification Tool Inextricably Intertwined with a Student's Educational Program

A. The Use of Seclusion as an Educational Tool is Open to Debate

The use of seclusion in schools for behavior modification is a subject that has been hotly debated by educational experts, advocacy groups and the legislature.[5] The House of Representatives Committee on Education and Labor recently requested that the United States Government Accountability Office (GAO) examine the issue. The GAO found no federal laws that restrict the use of seclusion and restraints in public and private schools, and widely divergent state

5

2010).[7] The district court found that the Education Department did not exceed its rulemaking authority and upheld the regulations.

The recent interest and debate highlights that, as of yet, there is no clear consensus regarding the use of seclusion as an educational tool. Nevertheless, whether one agrees or disagrees in principal with the utilization of these intervention techniques is beside the point; courts are not equipped to second-guess educational strategies recognized by state law and agreed to by parents. The IDEA leaves determinations of this sort to the administrative process.

B. Under Washington Law, Isolation is a Legitimate and Permissible

acceptable, effective, and efficient interventions to ensure safe, productive environments where norm-violating behavior is minimized and prosocial behavior is promoted." Sugai, *supra*, at 5-6. By definition, students with disabilities that need special education and related services have problems with learning and skill development. Kevin P. Dwyer, *Disciplining Students with Disabilities*, 26 NAT'L ASS'N OF SCH. PSYCHOL. COMMUNIQUE 2 (1997). As a result, "[u]nlike their nondisabled counterparts, they may, in some cases, have difficulty demonstrating socially appropriate behaviors." *Id*.

Failing to address the behavior of students with special needs can amount to the denial of a free appropriate public education. *Id*.; 20 U.S.C. § 1414(d)(3)(B)(i). For example, a student with Tourette's Syndrome may use obscene language, which violates the discipline code and impedes the student's learning and that of others. As such, the behavior should be addressed in the student's IEP. *Id*. For a student with autism, some manifestations of the disability may be purely be(A)Tj10.98 0 0 1l6 1 Ta frcation.

departure from accepted judgment, practice or standards and was not unreasonable in the constitutional sense." *Id*. at 633.

On its face, D.P.'s IEP indicates that

violence remains educational in nature. To find that a student's approved behavior plan, even a poorly implemented one, is "completely non-educational," is inconsistent with the plain meaning and the practical realities of the IDEA.

III. Alleged Imperfect Implementation of a Behavior Intervention Contained in an IEP Must First be

Robb

embarrassment, and psychological injury," without first seeking a due process hearing. *Id*. at 1048. The Court held that "when a plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required." *Id*. Whether exhaustion is required depends on the source and nature of the alleged injuries, not the remedy requested. In *Robb*, the injuries were "part and parcel of the educational process." *Id*. at 1054 n.4.

the IDEA. This Court correctly noted that "Payne's arguments…are unavailing. Even though monetary damages are not ordinarily available under the IDEA, she may not avoid the exhaustion requirements by requesting only monetary damages. Neither may she avoid those requirements by attempting on appeal to recast her damages as retrospective only when her complaint clearly alleges ongoing injuries." *Payne*, 598 F.3d 1123, 1128 (citations omitted). This is exactly what Plaintiffs-Appellants seek to do.

Although it is true that the facts must be viewed in the light most favorable to Plaintiffs-Appellants, the legal issue in this case weighs in favor of exhaustion; the decision regarding whether exhaustion is required is ultimately a question of law. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1993). The dissent in this case is concerned that the majority opinion places this case on the wrong side of the *Robb*/*Witte* dividing line. However, if the facts fall somewhere in between, this signals that the matter ought to be resolved by a hearing officer that will have the benefit of testimony of educational experts. Otherwise, courts are in the position of making judgments on educational issues to decide the initial question. Ambiguity is a red flag that exhaustion is required.

When the genesis and manifestations of the problem are debatable, the debate should be settled at the administrative level; the strong interests in favor of administrative exhaustion support this outcome. As the court in *Charlie F*. noted,

> Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm. But parents cannot know that without asking, any more than we can. Both the genesis and the manifestations of the problem are educational; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.

Charlie F., 98 F.3d at 993; *see also Robb*, 308 F.3d at 1052-54. At the least, an administrative proceeding will result in a clear record in which the technical issues are explored by educational experts, rather than the courts. Where allegations of psychological harm have an educational source and adverse educational consequences, educational agencies must first be given the opportunity to right the wrong. Extending *Witte* to cases involving alleged psychological injury

CONCLUSION

For the foregoing reasons, the National School Boards Association respectfully requests that the Court affirm the decision of the Ninth Circuit Court of Appeals in this matter.

Respectfully submitted,

/S/ Lenore Silverman
Lenore Silverman
Maggy Athanasious

Dated: October 13, 2010

CERTIFICATE OF COMPLIANCE

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/S/ Francisco M. Negrón, Jr.
Amici Curiae

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