



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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Students Must Try: IDEA, FAPE and Student Motivation

"Poor motivation and poor performance do not always and invariably lie at the feet of teachers and schools. Students themselves also have to try" -- the closing salvo from a panel of the United States Court of Appeals for the Fourth Circuit in its *T.B., Jr. v. Prince George's County Public Schools* July 26, 2018 decision. The Court rejected a claim that a Maryland school division failed to provide T.B. a free appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA) when it failed to properly identify him as a student with a disability. The majority opinion held that while the division committed a procedural violation of the IDEA, the violation did not deprive T.B. a FAPE. A strongly worded concurring opinion agreed that the student failed to prove denial of FAPE, but challenged the majority opinion's conclusions regarding the role and responsibility of the family.

T.B. began attending Prince George's County Public Schools (PGCPS) in elementary school and initially met with academic success. His grades took a turn for the worse during his middle school years; his teachers noted he did not follow instructions or participate in class, often had missing/incomplete assignments and received poor quiz/test grades. The pattern continued into high school, culminating in his failing and having to repeat the tenth grade. Commensurate with his deteriorating academic performance was his attendance: in his first two years of high school he missed 68.5 days, 90% of which were unexcused. When he was in class, he was disruptive, would ignore

instruction, use his cell phone, and talk to other students during class time. By the end of his first tenth grade year he stopped attending entirely.

T.B.'s father requested that he be evaluated for special education eligibility early in his ninth grade year. A student team met and determined T.B.'s difficulties were not the result of a disability and no further assessment was necessary. T.B.'s performance issues did not improve. His parents renewed their request for evaluation; the division declined the testing. The parents acquired an independent educational evaluation (IEE), which resulted in a diagnosis of moderate ADHD, a specific learning disability, and an unspecified depressive disorder. T.B. transferred to

another PGCPS high school for his second tenth grade year, but stopped attending after the first few days of the fall semester – citing anxiety. The family initiated a due process hearing for compensatory education and reimbursement for the IEE. During its pendency, a PGCPS psychologist conducted testing on T.B. His IEP team concluded T.B. was eligible for special education services for an emotional disability, namely anxiety. The team offered five fee-waived credit recovery courses as compensatory services.

The due process hearing lasted six days and included 21 witnesses. The hearing officer concluded that PGCPS committed a procedural violation for failing to conduct testing, but the violation "did not actually interfere with the provision of a free appropriate public

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education." The hearing officer wrote that T.B. "simply did not want to go to school. This is the case regardless of the school, the teachers, the courses, the programs, the placement, the accommodations, the class size, or the compensatory services offered." On appeal, the federal district court agreed that the division's failure to respond to the parents' request for an evaluation did not deny T.B. FAPE; however, the court granted T.B. reimbursement for the IEE.

The Court of Appeals majority opinion recited the long-recognized principle that a procedural violation does not necessarily entitle a student to relief: a violation must result in the loss of an educational opportunity. "The premise of the IDEA is that struggling students sometimes owe their difficulties to a disability that special education services could remedy. But not always. Not every student who falters academically owes his difficulty to a disability. Academic challenges may reflect 'personal losses,' 'family stressors,' or 'unwillingness to accept responsibility' on the part of the student." Further, "schools are not required 'to designate every child who is having any academic difficulties as a special education student'."

Giving deference to the hearing officer's observations and findings, the Court of Appeals majority determined that "no type or amount of special education services would have helped T.B. achieve a FAPE." Evidence presented by both the division and the family affirmed that "T.B.'s problems were rooted in his refusal to go to class or attend school," including a transition program recommended by his IEP team. The record revealed that his parents never advised PGCPs why.

Further, educators called by both the division and the family almost universally testified that there was no reason to suspect that T.B. suffered from a learning disability or any other condition mandating special education services. They concluded that "he was simply unwilling to take his education seriously." T.B.'s teachers testified

that routinely his disinterest manifested itself in outright contempt. He was disruptive and would sleep in class. The Court of Appeals cited extensively to the hearing officer's opinion, who concluded that "the overwhelming evidence . . . establishes that the Student was capable of doing satisfactory work when he wanted to and that his poor performance was due to the fact that he failed to attend an almost preposterous number of classes and rarely did either homework or classwork."

The Court reaffirmed that in IDEA challenges plaintiffs have the burden of showing not just that there was a violation by a school division, but that if the violation had not occurred, the student's outcomes would have improved. In this case, plaintiffs failed to present evidence that timely compliance by school officials would have resulted in the student's better attendance at school. "It is unfortunate that T.B. did not do better in PGCPs. But the fault does not lie with the school district. Teachers tried repeatedly to get T.B. to take even a modest interest in his education, and their efforts just as repeatedly came up short. Holding the school district liable for regrettable results in every case would simply deplete its resources without improving outcomes for anyone, a result Congress could not have intended."

The concurring opinion took exception with some of the majority opinion, writing: "while I am constrained to conclude that the plaintiffs have failed to demonstrate that the school division's egregious child find violations actually interfered with the provision of FAPE, I cannot agree that the blame lies with T.B. and his parents, and that PGCPs should bear little or no responsibility for a student in its care or for the unfortunate outcome in this case."

School administrators must promptly respond to requests for evaluations, and timely and thoughtfully comply with IDEA's myriad of substantive and procedural obligations. Nonetheless, the Court of Appeals emphasizes a student's proper role in his own education.

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