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FRY v. NAPOLEON COMM. SCHS.
Exhaustion of Remedies Under Disability Discrimination Cases

February 22, 2017

The Supreme Court of the United States issued a decision today in the case of *Fry, et vir, as Next Friends of Minor, E.F. v. Napoleon Comm. Schs.* The decision relates to a procedural argument made in many lawsuits involving children with disabilities. While the decision deals with procedural postures in judicial settings, there is significant language within the opinion of Justice Elena Kagen that is instructive to how school districts should approach complaints from parents/guardians relating to their child's educational access and program.

In *Fry*, the student-plaintiff, E.F., was a young child with severe cerebral palsy which limited her ability to physically care for herself. She had the assistance of a therapy dog, which provided E.F. with assistance with many self-care tasks, such as assisting her with balance when she used her walker, opening and closing doors, aiding her in taking off her coat, and transferring E.F. to and from the toiler. Upon entry to school in kindergarten, the parents requested that the service dog be allowed to assist E.F. in the manner for which it was trained. The Napoleon Community Schools (the "District"), instead, provided the student with a one-to-one adult aide. After discussions, a trial period, and an Office of Civil Rights complaint that resulted in the District being forced to allow the service dog to assist E.F., the family decided to place their daughter at another school that readily accepted her and her dog. The parents then sued the District under Section 504 of the Rehabilitation Act ("Section 504") and the Americans With Disabilities Act ("ADA") in federal court, claiming E.F. was denied equal access to her school and its programs, was denied a reasonable accommodation, and was discriminated against due to her disability. The parents sought a declaration of a violation

of the ADA and Section 504 and money damages for such violations.

The District argued that the Individuals with Disabilities in Education Act ("IDEA") has provisions that require parents/guardians to exhaust their administrative remedies (i.e., pursue a due process proceeding) prior to suing in federal court. Accordingly, the District sought to have the parent's complaint dismissed due to the fact that the parents did not first bring a request for due process under the IDEA. The District Court and the Sixth Circuit Court of Appeals both agreed with the District. However, the Supreme Court, in a unanimous decision, overturned the lower courts' determination that the parents were required to, and had not, exhausted their administrative remedies.

The Supreme Court's decision hinges on two very basic things – what is the parent/guardian complaining about and what is the parent/guardian seeking in their action. Under *Fry*, the answers to those questions are determinative of whether there is any obligation to bring a request for due process under the IDEA or whether parents can sue in federal court in the first instance, regardless of whether the child is classified or not.

The decision states clearly that, the "only relief that an IDEA officer can give – hence the thing a plaintiff must seek in order to trigger [the IDEA's] exhaustion rule – is a relief for the denial of FAPE." Therefore, if the parents/guardians argue that their child was denied services due to a decision of the district, even if the words "free and appropriate public education" are not used, the hearing officer is able to rule that the failure to provide the service ultimately resulted in the denial of FAPE. The Supreme Court left open the question as what will happen when a party alleges a denial of FAPE but requests a remedy that the hearing officer cannot grant, like money damages for emotional distress.

In terms of what the parents/guardians complains, the decision recognizes that the parents/guardians are "'master(s) of the claim.'" Often times, the words "FAPE" will not be mentioned in the complaint, but **it is** the lack of appropriate services or programs that is the gravamen of the complaint. Therefore, school districts will need to review complaints carefully to determine whether exhaustion is necessary. As was noted in the decision "the IDEA guarantees individually tailored educational

services, while Title II and §504 promise non-discriminatory access to public institutions." While there is a recognition by the Court that all three statutes may be violated at the same time, the opinion provides guidance in determining which statute is being implicated. The Court proposes two questions be asked: (1) could the plaintiff have brought essentially the same claim if the public facility being sued was not a school but another entity, like a public library or theater and (2) could an adult at a school have brought the same claim? If the answer to both those questions is "yes," it is likely the plaintiff is seeking redress under the ADA or Section 504 and not the IDEA, as there is likely no challenge to public educational programming at play. However, if the answer is no to either question, the answer is likely there is a FAPE denial alleged and therefore, and exhaustion requirement under the IDEA, involved.

Using the facts of *Fry* as an example of this test is instructive. The parents could have brought suit against a public theater under the ADA if, like the District, the theater had not allowed E.F. to bring her service dog in with her. Additionally, if a staff member of the District had sought review of a denial of an accommodation of a service dog, an ADA or Section 504 claim could be maintained. In neither instance would a claim under the IDEA stand. The Court used the example of a classified student being denied math tutoring in its decision, to demonstrate how the proposed questions would likely implicate a FAPE denial allegation. The parents of the student denied math tutoring could not bring a claim against a public library for such denial as that type of service is not one the library would have an obligation to provide to the public. Similarly, an adult staff member could not have alleged such a violation against a school district, again as there is no obligation to provide staff members such tutoring. Accordingly, a denial of FAPE under the IDEA is alleged and the parents/guardians would need to exhaust administrative remedies under the IDEA.

The implication of the *Fry* decision is that school district may now see claims brought against it that will be pled artfully to avoid the impartial hearing route, so as to be heard first in federal court. Districts should review parental requests for accommodations and relief carefully, to insure compliance not just with the IDEA, but with the disability discrimination statutes, such as the ADA and Section 504, to make sure that any accommodations requests, (such as a service dog) or claims

of disability discrimination (especially in bullying cases) occurs with consideration of all the statutes that may be implicated. We stand ready to assist you in determining the appropriate legal response to requests for accommodations, modifications and services.

Should you have any questions, please contact Stephanie Roebuck.

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