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THE DBYD DIFFERENCE – EDUCATION LAW
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DON'T Show Me the Money!

- The Third Circuit Rejects Compensatory Damages in IDEA Claims -

We waited until the first week of December to bring you the November issue of the DBYD Education Law Newsletter. Why? Because a major special education case was decided on November 20, and it was important enough to stop the presses!

A cautionary note… This newsletter assumes that you've read DBYD's prior newsletters that describe the IDEA, the concept of FAPE and the basic structure of the federal judiciary. If you have not, please check our back issues or call (888) 362-DBYD for more information!

For this issue, it is also important to understand what compensatory damages are. Compensatory damages and compensatory education are not the same thing. Compensatory damages are paid to compensate victims for loss, injury, or harm suffered by another's breach of duty. Compensatory education is an "in-kind" remedy, meaning that the victim gets the thing he or she should have gotten all along. In-kind remedies are more often seen in some types of employment law cases. For instance, when an employee is denied overtime, the employee may receive what he would have earned if overtime had been properly allocated as an "in-kind" remedy. In contrast, compensatory damages would involve a more in-depth analysis of how the denial of overtime really hurt the employee and what it would take to make the employee whole.

The case is *Chambers v. School District of Philadelphia*, --- F.3d ---, 2009 WL 3948295 (3d Cir. 2009). The Student in this case has Dandy-Walker syndrome. In 2005, the Student's parents sued the School District of Philadelphia, alleging that it failed to provide FAPE to the Student.[1] The Parents initiated the hearing on their own behalf and on the Student's behalf. Taking into account prior lawsuits, due process hearings and agency complaints, this was the family's tenth (10th) action against the school district.

In the 2005 lawsuit, the Parents claimed that the District owed compensatory damages for violating the Student's right to FAPE. Notably, the Parents brought this claim on the

[1] The Parents also brought claims under the ADA and Section 504 of the Rehabilitation Act as well as constitutional claims. For our purposes, we are going to ignore these claims.

Student's behalf *and on their own behalf.* This means that they claimed the District owed the Student compensatory damages for not providing an appropriate education *and* they also claimed that the District owed the Parents compensatory damages for not providing an appropriate education.

The Parents' attempt to assert their own right was a major focus at the trial court level. For reasons that are not particularly relevant for this newsletter, the trial judge decided that the Parents were not allowed to bring claims on their own behalf under the IDEA. Therefore, the judge dismissed the Parents' IDEA claims without addressing the demand for compensatory damages.

It turns out that the trial judge's analysis, according to the U.S. Supreme Court, was wrong. This issue reached the U.S. Supreme Court in 2007 in a case called *Winkelman v. Parma City School District*, 550 U.S. 516 (2007). In *Winkelman*, the Court said, "parents enjoy enforceable rights at the administrative stage . . . it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court." *Id.* at 526. This means that the IDEA does give some substantive rights to parents. The extent of those rights is still being sorted out.

Winkleman was decided after the *Chambers* case was argued but before it was decided (yes, *Chambers* was initiated in 2005 and not decided until 2007). Therefore, when the Parents appealed to the Third Circuit, the appeals court decided that the trial judge should have found that the Parents *had* standing and then should have gone on to address Parents' claim for compensatory damages. Usually, the Third Circuit would bounce the case back to the trial court and let the trial judge work out the damages issue. In this case, however, the Third Circuit decided to do the work itself.

First, the Third Circuit looked to see what the Supreme Court has said about compensatory damages in IDEA cases. The answer, as usual, is "not much." The Supreme Court has held that reimbursement for out-of-pocket expenses that a school district should have been paying all along is permissible under the IDEA *because* such reimbursement is not – technically – a form of damages. *See School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 370-371 (1985). This is a far cry from saying that compensatory damages are or are not allowable.

Next, the Third Circuit looked to its sister circuits. The issue of compensatory damages has come up in the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh circuits. All of these courts have held that compensatory damages are not allowed under the IDEA. The Third Circuit indicated previously that it may be inclined to agree with its sisters, although it has never actually done so before. *See A.W. v. Jersey City Public Schools*, 486 F.3d 791 (3d Cir. 2007) (en banc). This time, the Third Circuit was blunt. It said:

> Given the Supreme Court's pronouncement in *Burlington* as well as the plain language and structure of the IDEA, we agree with our sister circuits, and now hold, that compensatory and punitive damages are not an

> available remedy under the IDEA. That language and structure make plain that Congress intended to ensure that disabled children receive a FAPE under appropriate circumstances, not to create a mechanism for compensating disabled children and their families for their pain and suffering where a FAPE is not provided. Accordingly, to the extent the Chambers seek such damages on their IDEA claim, that claim fails as a matter of law.

What does this mean for IDEA claims? After all, students are still entitled to compensatory education to remedy denials of FAPE. The change, we think, may be about money. When hearing officers award compensatory education, they typically award a bank of hours. Parents can then take those hours and obtain services for children at public expense. Sometimes, however, there is a good deal of additional litigation to assign a dollar value to the bank of hours. This is particularly important when parents want to use compensatory education to purchase physical products, not just educational services.

Currently, there are two competing theories about how to value compensatory education hours. Under one theory, hours are valued at the costs that the school district should have incurred if it had provided the necessary services all along. Under this analysis, the value remains constant regardless of the student's current needs. Under the other theory, hours are valued at the cost of services that are now required to bring the student to where she or he would be but for the denial of FAPE. This results in huge variability – sometimes favoring the student and sometimes favoring the school district (assigning dollars to hours is a "zero sum game").

If compensatory education is truly an in-kind remedy and compensatory damages are not allowed, it is possible that the dollar-to-hour analysis used by some courts may no longer be applicable. Those courts currently emphasize that the value of the services that it would take to make the student whole is an important factor. Based on the Third Circuit's holding in *Chambers*, it is clear that compensatory damages are not available under an IDEA claim. We at DBYD believe that the courts must now clarify the procedure for valuing an award of compensatory education. For that purpose, the issue that must be settled is whether the courts should ask "what should the school district have spent" or "what must the school district spend to make the student whole."

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