

The Good News, Bad News Case

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Which do you want first, the good news or the bad news? So as to not spoil your day, I'll give you the good news first, and you can stop reading thereafter if you'd like.

On March 17, 2008, Judge Webber in the U.S. District Court, Eastern District of Missouri handed down *K.F. et al v. Francis Howell R-III School District*. This case involved an eight year old autistic student, K.F. Pursuant to K.F.'s Individualized Education Program ("IEP"), the District placed her in the "Intensive Intervention Classroom" at a local elementary school. All of the students in this classroom were dismissed three hours earlier than their non-disabled peers on each Wednesday that school was in session during the two years in question. K.F.'s parents filed a complaint with the Office for Civil Rights ("OCR") in January of 2006. As a result, and shortly thereafter, the District entered into a Resolution Agreement with OCR. When the District allegedly failed to comply with the Resolution Agreement, K.F.'s parents filed this lawsuit.

Judge Webber decided that the OCR Resolution Agreement entered into by the District as a result of K.F.'s OCR complaint was not an enforceable contract and accordingly, K.F. could not sue to enforce the agreement as a third party beneficiary. To understand the importance of this decision, you must first have an understanding of OCR's broad reach.

OCR investigates complaints of discrimination with regard to race, color, national origin, gender and disability. This school year, our office has seen a drastic increase in the number of complaints filed against school district and accepted for investigation by OCR, specifically those alleging discrimination on the basis of disability. In stark contrast to filing a due process complaint, whereby parents (or their attorneys) must produce evidence and actively participate in a due process hearing, OCR complaints require relatively little involvement on the parents' part. In return, parents have the possibility of being rewarded with a finding (issued by a federal agency) that the district failed to comply with federal law. In addition, OCR may propose an "Individual Remedy" as part of a Resolution Agreement. Such Individual Remedies ask districts to take a specific action (i.e. conduct an evaluation, provide an accommodation, etc.) with regard to a particular student.

The process is this: Parents must simply file their complaint online or via letter, answer follow up questions from OCR staff, and possibly participate in an in-person interview. OCR will then usually conduct a full blown investigation of the district's policies, procedures and practices as they relate to the complaint. OCR often requests copious documents, interviews numerous district staff members and ultimately issues a finding. If OCR finds even a single issue of non-compliance it asks the district to sign and comply with a Resolution Agreement (or risk losing federal funding).

Judge Webber's decision that such Resolution Agreements do not constitute enforceable contracts is important in that it may encourage parents to resolve their complaints through appropriate due process channels, in lieu of involving a federal investigatory agency. After all, a decision by a judge or hearing officer is enforceable. For districts, resolving complaints through due process measures can be better a better option for several reasons. First, many school districts have liability insurance that covers due process cases, but not OCR complaints. Second, with your attorney's assistance, the issues in a due process hearing can be narrowed and limited. In contrast, OCR may investigate one matter and subsequently find non-compliance (if only by accident) on an altogether separate matter. Third, due process procedures allow for a district to require a resolution meeting, thereby opening the door for negotiation and possible settlement. While OCR has recently begun offering "Early Complaint Resolution" (the option for parents and the district to enter into a settlement agreement), if parents do not want to participate, they need not. Further, parties may not engage in Early Complaint Resolution absent OCR's approval.

While Judge Webber's decision does not allow for individuals to sue as third party beneficiaries to an agreement between OCR and a school district, his decision DOES NOT impact the necessity of district compliance with an OCR Resolution Agreement. If a district fails to comply with a Resolution Agreement it enters into as a result of an OCR complaint, it faces a serious risk of losing federal funding.

That wasn't the bad news. The bad news from the *K.F. v. St. Francois School District* case lies in the Judge's second holding. K.F.'s parents alleged that because they had to be at home those three hours every Wednesday that K.F. was dismissed early, they incurred financial losses and lost wages. Citing the *Winkelman* Supreme Court case that held that parents have independent and enforceable rights under the Individuals with Disabilities Education Act, Judge Weber expanded *Winkelman* to include claims under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (statutes that, unlike the IDEA, do allow for monetary damages). Accordingly, Judge Webber decided that K.F.'s parents had legal standing to "bring suit in their own right as an aggrieved party" for their financial losses and lost wages. Parents thus survived the District's Motion to Dismiss, and the case will proceed. If this aspect of decision remains unchallenged or is upheld in subsequent litigation, districts and/or IEP teams may need to rethink many current programming and placement decisions that could require parents to be at home during normal school hours. These include placements and/or programming such as homebound, shortened day alternative or other programs, and school days shortened as a result of special transportation issues.

This case does not mean that an IEP team can never place a student on a reduced day if the student's individual needs require it. However, Districts facing this issue are well advised to proceed with caution. If you have concerns or questions regarding a particular practice in your school district, please contact your District's school attorney.