

Special Education Case Update: *Perez v. Sturgis Public Schools et al.*

by Danielle Guarascio, Esq.



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In a unanimous ruling issued on March 21, 2023, the United States Supreme Court decided *Perez v. Sturgis Public Schools et al* and held that the Individuals with Disabilities Education Act's (IDEA) exhaustion requirement, 20 U.S.C. § 1415(I), did not preclude an Americans with Disabilities Act (ADA) lawsuit where the relief sought is not something the IDEA can provide.

The case was based on the experiences of, now 27-year-old, Miguel Luna Perez (Perez), who was a deaf student that enrolled in Michigan's Sturgis Public Schools (SPS) after moving to the United States from Mexico. The Perez family filed an administrative due process complaint claiming that Perez was denied a Free Appropriate Public Education (FAPE), as required by the IDEA, 20 U.S.C. § 1415, from ages 9 through 20 while attending SPS. Perez and his family alleged that the school district failed to provide him with appropriate educational services and supports, such as a proper classroom aide for instruction in sign language. The Perez family also alleged that SPS inflated his grades and misrepresented his academic progress to his parents by placing him on the honor roll every semester and passing him from grade to grade. Accordingly, Perez and his parents believed that he was on track to graduate; however, as graduation approached, SPS informed Perez and his family that he would only be eligible for a certificate of completion and would not be awarded a diploma. The parties ultimately settled the due process complaint outside of court. SPS agreed to provide Mr. Perez all the equitable relief he sought, including additional schooling at the Michigan School for the Deaf. The Perez family accepted this immediate relief.

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After settling his administrative due process complaint, Perez filed a lawsuit in federal district court under the ADA seeking backward-looking relief in the form of compensatory damages. SPS argued that a provision in

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Informal Removals: New Guidance from OSEP

by Kelly B. Perkovich, Esq.

In July 2022, the Office of Special Education Programs ("OSEP") released a comprehensive guidance document titled "Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions (July 19, 2022)," which replaced the previous guidance issued in June 2009.

Most notably, this guidance defines "informal removals," a previously unnamed practice wherein children are removed from school for a partial day. Because the removal was below the one-day suspension threshold which triggered a district requirement to report the incident, these removals previously went uncounted. Now, OSEP defines an informal removal as an "action taken by school personnel in response to a child's behavior that excludes the child for part or all of the school day, or even an indefinite period of time. These exclusions are considered informal because the school removes the child with a disability from class or school without invoking IDEA's disciplinary procedures. Informal removals are subject to IDEA's requirements to the same extent as disciplinary removals by school personnel using the school's disciplinary procedures. Informal removals include administratively shortened school days when a child's school day is reduced by school personnel, outside of the IEP Team and placement process, in response to the child's behavior" ensuring that the Individuals with Disabilities Education Act's (IDEA) discipline protections are implemented.

Districts should be aware that frequent use of informal removals may indicate that a child's Individual Education Plan ("IEP") does not appropriately address their behavioral needs, which may result in a denial of a Free Appropriate Public Education ("FAPE"). IEP teams should consider that repeated informal removals, i.e. approaching ten (10) school days, may trigger the need for the IEP team to meet. Under 34 C.F.R. § 300.324(b), IEP reviews and revisions are appropriate to address the behaviors that led to the short-term repeated disciplinary removals including the impact on the child's learning.

Districts should also be mindful that informal removals count as a school day when calculating a disciplinary change in placement. The



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the IDEA, 20 U. S. C. § 1415(l), barred Perez from bringing an ADA claim without first exhausting the IDEA's administrative dispute resolution procedures. The district court dismissed the lawsuit. The Sixth Circuit Court of Appeals affirmed the district's court decision finding that the settlement of a FAPE claim did not satisfy the IDEA's exhaustion requirement under 20 U.S.C. § 1415(l).

The case was appealed to the United States Supreme Court. The Supreme Court reversed the decision of the Sixth Circuit Court of Appeals and found that because the IDEA does not provide compensatory damages (i.e. monetary damages) as a form of relief, the administrative exhaustion requirements under 20 U.S.C. § 1415(l) did not foreclose Perez's ADA disability discrimination claim. The Court explained that 20 U.S.C. § 1415(l) has two features: 1) there is a general rule that allows individuals to make claims under other federal laws, and 2) there is an exception preventing civil actions under other federal laws when the relief is available under the IDEA. The Supreme Court ruled that the exception requiring the use of all administrative remedies under 20 U.S.C. § 1415(l) of the IDEA did not apply to claims for relief that were unavailable under the IDEA but available under other federal laws like the ADA, such as Perez's claim for compensatory damages. Alternatively, if Perez's ADA claim included a type of relief available under the IDEA, then he would have had to exhaust the IDEA's administrative procedures first.

The Supreme Court's decision underscores the extent to which a student must exhaust the administrative requirements under IDEA before seeking relief under another federal statute, such as the ADA. The impact of the decision in *Perez* is not yet clear, though it could lead to a rise in federal special education litigation, since the decision opens the door for parents to bypass the need to exhaust administrative remedies under the IDEA when they are seeking monetary damages under the ADA.

*Our office will continue to monitor the impact of the Supreme Court's decision in *Perez* and how it is impacting special education litigation. If you have questions on how this case may impact your district, please reach out to WBK. ♦*

We're Speaking

- On March 23, 2023, Attorney Megan Turnbull presented a Continuing Legal Education seminar on "What You Need to Know About Allegheny County Property Tax Appeals" for the School and Municipal Law Section of the Allegheny County Bar Association.
- Attorney Megan Turnbull will be presenting on the topic of Solicitor Ethics at the PBI Municipal Law Colloquium on June 16, 2023.
- Attorney Lee Dellecker presented on the impact of the Common Level Ratio on real estate assessment litigation at a PASBO event held on May 5, 2023.
- Several WBK attorneys will be presenting at the annual Dr. Samuel Francis School Law Symposium & Special Education Workshop being held in June. More information can be found by visiting Tri-State's website. ♦

Partial Removals: New Guidance from OSEP, *continued*

IDEA defines a school day as a day that children attend school for instructional purposes, including partial days. Therefore, the use of informal removals as a method of discipline throughout the school year could trigger the discipline procedure in 34 C.F.R. §§ 300.530 through 300.536, unless the following factors are met: 1) the child is afforded the opportunity to continue to appropriately participate in the general curriculum; 2) the child continues to receive the services specified on the child's IEP; and 3) the child continues to participate with nondisabled children to the extent they would have in their current placement. 71 Fed. Reg. 46715 (Aug. 14, 2006).

The OSEP guidance formalizes the procedures that many districts had already been following with respect to partial day removals and reinforces that districts have been correct in their approach. The guidance document provides proactive and preventative strategies that may be used to prevent the use of disciplinary removals, including informal removals. Such strategies include but are not limited to utilizing universal and academic behavioral supports, offering targeted supports, and offering individualized intensive supports. To learn more about these options, please visit <https://sites.ed.gov/idea/idea-files/guide-positive-proactive-approaches-to-supporting-children-with-disabilities/>.

If you have questions regarding the guidance or how to ensure that your district is appropriately handling partial day removals, we encourage you to contact your solicitor or the special education team of attorneys at WBK. ♦

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This issue of In Brief: School Law Update is meant to be informational and does not constitute legal advice. Should districts wish legal advice on any matter, they should contact their legal counsel or request a legal opinion from Weiss Burkardt Kramer LLC.

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