

3/27/2024

No 23-0874

In the
Supreme Court of the United States

O.P., A MINOR, BY AND THROUGH HIS
PARENT DAVID PLOTKIN,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When is a school district's material failure to provide special education services included in a child's Individual Education Program also a failure to provide a free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant

- David Howard Plotkin

Respondent and Defendant-Appellee

- Montgomery County Public Schools

LIST OF PROCEEDINGS

United State Court of Appeals for the Fourth Circuit
No. 22-2073

David Howard Plotkin, *Plaintiff-Appellant* v.
Montgomery County Public Schools, *Defendant-
Appellee*.

Date of Final Opinion: November 3, 2023
Rehearing Denial: December 28, 2023

United States District Court District of Maryland
No. TDC-17-0571

David Howard Plotkin, *Plaintiff* v. Montgomery County
Public Schools, *Defendant*.

Date of Final Opinion: September 15, 2022

Maryland Office of Administrative Hearings
OAH No.: MSDE-MONT-OT-16-29351
Oliver Elliot Plotkin, *Student*, v. Montgomery County
Public Schools
Date of Final Order: September 26, 2016

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Howard Plotkin requests that this court issue a writ of certiorari to review, reverse, and remand the decision below.



OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, dated November 3, 2023, is included at App.1a. The Memorandum Opinion of the United States District Court for the District of Maryland, dated September 15, 2022, is included at App.5a. These opinions were not designated by the courts below for publication



JURISDICTION

The Fourth Circuit denied a timely filed petition for rehearing on December 28, 2023. (App.32a). This court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition and suit is filed under the Individual with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-82 (2018). The definition of a Free Appropriate public education is found at 20 U.S.C. § 1401(9).

20 U.S.C. § 1401(9)

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.



STATEMENT OF THE CASE

A. Introduction

O.P., a student with autism, who attended Wood Acres Elementary School in Bethesda, Maryland during the second and third grades, did not receive special education mathematics instruction from May 5th 2015 to May 5th, 2016 as required by his Individualized Education Program (“IEP”) as outlined in the Individuals with Disabilities Education Act (“IDEA”).

B. Statement of the Facts

During the one-year period spanning the spring of O.P.’s second grade and the spring of O.P.’s third grade he failed to receive approximately two hundred seventy (270) hours of special education mathematics instruction.

An investigation by the Maryland State Department of Education “MSDE” found O.P. did not receive special education math during the complaint period which is limited to one year by the IDEA. Montgomery County Public Schools (“MCPS”) failed to provide supplemental compensatory special education mathematics instruction within one year as required by the MSDE. J.R. 358-359.

C. Procedural History

Subsequently, a due process complaint was initiated by O.P.’s parents on September 26, 2016. These issues were not resolved due to a failure to apply the appropriate legal standards pursuant to the IDEA by The Maryland Office Of Administrative Hearings, The United States District Court District of Maryland, and

The United States Fourth Circuit of Appeals. The Petitioner requests a review by the United States Supreme Court to resolve these issues consistent with legal standards pursuant to the IDEA. This petition is not without merit as The United States Supreme Court has previously addressed similar but distinct aspects of the IDEA to help ensure students with disabilities can receive a free appropriate public education (“FAPE”). *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).



REASONS FOR GRANTING THE PETITION

I. LOWER COURTS HAVE ERRED IN THE OPINIONS BELOW.

The United States Court of Appeals for the Fourth Circuit erred by misapplying inappropriate case law to improperly distinguish between procedural violations, substantive or educational benefit component violations, and implementation violations of the IDEA.

In *Rowley* the Court addresses the procedural requirements of the IDEA. *Westchester County v. Rowley*, 458 U.S. 176 (1982). The requirements of the Individual Education Plan (IEP). In *Endrew F.* the Court addresses the substantive or educational components of the IEP. *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017). The IEP must be reasonably calculated to enable the student to make progress in light of the student’s circumstances. However, the Court has not directly addressed the failure to implement the IEP as agreed upon by the IEP team. An IEP is of no use if it is not implemented. The lower

courts have inconsistently addressed the issue of IEP implementation often relying on the *Rowley* standard. *Westchester County v. Rowley*, 458 U.S. 176 (1982). The Eleventh Circuit in *L.J. v. School Board of Broward County* supports the full implementation of an IEP. *L.J. v. School Board of Broward County*, 927 F.3d 1203 (11th Cir. 2019). The Ninth Circuit in *Van Duyn* found a denial of FAPE when the school district failed to provide special education mathematics services similar to this case. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2017). Also, in *M.C. Antelope Valley Union*, failure to implement the IEP was a denial of FAPE. *M.C. v. Antelope Valley Union High School District*, 858 F.3d (9th Cir. 2017). The Fourth Circuit also determined that a failure to provide seven and a half hours of ABA therapy was a denial of FAPE. *Sumter County School District 17 v. Hefferman*, 642 F.3d 478 (4th Cir. 2012).

In this case not only did the United States Court of Appeals for the Fourth Circuit not apply the failure to implement IEP standard from *Hefferman*. *Id.* but also inappropriately and erroneously applied *T.B., Jr. ex rel. T.B., Sr. v. Prince George's County Bd. Of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018). Furthermore, the implications of *Endre F.* were ignored. *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

The IDEA provides safeguards to ensure students with disabilities receive FAPE. 20 U.S.C. § 1400. First, an IEP must be developed. The IDEA details the specific process. A team must meet, consisting of parents and educators, develop the IEP, and then the school must implement the IEP. The procedural, content, and implementation components of an IEP must be completed under the IDEA to ensure FAPE. In this

case The United States Court of Appeals for the Fourth Circuit incorrectly labeled the failure to implement O.P.'s special education mathematics instruction during the second and third grades a procedural violation of the IDEA. Examples of procedural violations under the IDEA include the composition of the IEP team, required components, and date requirements. Failure to provide the special education services agreed upon by the parents and educators of the IEP team is an implementation issue. This distinction is very important as an implementation violation of an IEP can result in a denial of FAPE. This has been specifically addressed by both the Court and lower courts.

II. THE LOWER COURTS HAVE EXPRESSED CONFLICTING VIEWS ON THIS ISSUE.

In this case the United States Court of Appeals for the Fourth Circuit inappropriately determined that a procedural violation had occurred. Rather than a failure of implementation. This is very important because the United States Court of Appeals for the Fourth Circuit then applied the procedural violation standard of *T.B.* rather than the appropriate implementation violation standard of *Hefferman*. *T.B., Jr. ex rel. T.B., Sr. v. Prince George's County. Bd. of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018). *Sumter County School District 17 v. Hefferman*, 642 F.3d 478. (4th Cir. 2012).

By finding that the failure to implement the mathematics special education services was a procedural violation and not an implementation violation of the IDEA, the United States Court of Appeals for the Fourth Circuit compounded its error by misapplying *T.B., Jr. ex rel. T.B., Sr. v. Prince George's County. Bd.*

Of Educ., 897 F.3d 566, 573 (4th Cir. 2018). “A procedure violation of the IDEA may not serve as a basis for recovery, unless it resulted in the loss of an educational opportunity for the disabled child. *T.B., Jr. ex rel. T.B., Sr. v. Prince George’s County Bd. Of Educ.*, 897 F.3d 566, 573 (4th Cir. 2018). In *T.B. v. Prince George’s County Board of Education*, T.B. was not provided adequate testing for his disability and did not receive appropriate placement. However, due to his severe truancy, these services would not have been effective.

The U.S. Fourth Circuit Court of Appeals further compounded its error by ignoring *Hefferman* (Fourth Circuit) which directly found a failure to implement 7.5 hours of ABA therapy rather than the 15 hours in the student’s IEP a denial of FAPE. *Sumter County School District 17 v. Hefferman*, 642 F.3d 478. (4th Cir. 2012).

Furthermore, the United States Court of Appeals for the Fourth Circuit failed to apply the *Andrew F.* standard in which a student’s IEP should be calculated to enable a student to make progress appropriate in light of the student’s circumstances. *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

It is directly inferred that if the IEP team agrees to include hundreds of hours of special education services, such as special education mathematics instruction, in an IEP, it must be also implemented to provide educational benefit to the student.

The United States Fourth Circuit Court of Appeals incorrectly agreed that the District Court’s findings from the Due Process Hearing indicating possible improvement on standard math testing, despite testing

2-3 years below grade level with a normal IQ, inappropriate grade inflation, receiving private tutoring (at parent's cost) to compensate for the failure to provide the special education mathematics instruction during the second and third grades as prescribed in the student's IEP met the *Rowley* standard but failed to apply the *Endrew F.* standard. *Luna Perez v. Sturgis Public Schools Et Al.*, 598 U.S. (2023), *Westchester County v. Rowley*, 458 U.S. 176 (1982), *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

The student had previously received special education instruction in reading that enabled the student to read and test near grade level and special education mathematics instruction was included in the IEP to obtain a similar educational benefit in mathematics. The IEP team in conjunction with his teachers and consulting neuropsychologists thought the autistic student with a normal IQ would be able to perform mathematics on grade level with appropriate progress if provided the opportunity to learn mathematics in a special education mathematics class. The IEP reasonably calculated to enable the student to make progress in light of the student's circumstances was consistent with *Endrew F. Id.* Failure to implement the special education mathematic services was not consistent with the intent of *Endrew F. Id.*

III. THIS ISSUE IS OF GREAT LEGAL/NATIONAL SIGNIFICANCE.

Not only did O.P. fail to receive the special education mathematics instruction during the second and third grades outlined in his IEP. The United States District Court, District of Maryland and the United States Fourth Circuit Court of Appeals failed O.P. Ignoring the student safeguards of the IDEA as

previously applied in its own circuit. *Sumter County School District 17 v. Hefferman*, 642 F.3d 478 (4th Cir. 2012).

It is important for the Court to address the failure to implement IEP special education services by school districts pursuant to *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

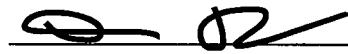
Millions of autistic students with the proper support and services can and have contributed to society as adults in meaningful and often extraordinary ways. A writ of certiorari is requested to reverse and remand the United States Court of Appeals for the Fourth Circuits decision as discussed.



CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



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