The Legal Intelligencer

Overrepresentation of Minorities in Special Education

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In the 40 years since the enactment of the Individual with Disabilities Education Act (IDEA), minority students have consistently been overrepresented in special education. In the "Findings" section of the IDEA, the drafters expressed concerns that "more minority children [are] served in special education than would be expected from the percentage of minority students in the general school population." A Congressional House Report noted that "African-Americans are nearly three times as likely to be identified as [intellectually disabled] as their peers and nearly twice as likely to be emotionally disturbed." Today, African-American students continue to be disproportionately classified with such disabilities, and they account for 20.2 percent of the special education population but only 14.8 percent of the total student population. Commentators attribute the over-identification to implicit or overt racial bias.

The U.S. Court of Appeals for the Third Circuit recently confronted this issue in *S.H. v. Lower Merion School District*, 2013 U.S. App. LEXIS 18458 (3d Cir. Pa. Sept. 5, 2013). S.H. is an African-American student whose school district found her to be in need of special education services when she was in fifth grade. Based upon this finding, S.H. made several remarks to her school that "she did not want to be in special education." However, her mother repeatedly signed documents agreeing with the school's findings and recommendations about S.H.'s educational placement. S.H. continued in special education until tenth grade, when it was found that she did not, nor had she ever, had a disability.

As a result of being mislabeled as having a disability for most of her middle and high school years, S.H. alleged that her self-esteem suffered and her academic progress was impeded. In addition, she alleged that she had been deprived access to the general education curriculum. To remedy these alleged deprivations and address the overrepresentation of minorities in special education, S.H. brought claims against her school district under the IDEA, the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (RA).

S.H. argued that her right to a free and appropriate public education (FAPE) under the IDEA was violated. However, the court did not analyze the substance of this claim; it found that S.H. was not protected by the IDEA because she was not a student with a disability. While S.H. contended that the legislative history of the IDEA demonstrates the statute is meant to protect both students with a disability and those regarded as having a disability, the court found the plain language of the statute, which explicitly refers to students with a disability, to be controlling.

S.H. also asserted that she was discriminated against in violation of the ADA and the RA because her school district denied her the benefits of the general education curriculum on the basis of disability. S.H. sought compensatory damages for this violation. Unlike the IDEA, the ADA and RA clearly apply to individuals regarded as disabled. Nonetheless, the court also ruled against S.H on these claims.

The court held that in order to receive compensatory damages in an ADA or RA claim, a plaintiff must demonstrate "intentional discrimination." The court further found that deliberate indifference is the appropriate standard for intentional discrimination. Thus, to prevail, S.H. had to show that her school district had (1) knowledge that she was likely not disabled and therefore should not have been in special education; and (2) failed to act despite that knowledge.

Deliberate indifference is a burdensome standard for plaintiffs because demonstrating "knowledge that a federally protected right is substantially likely to be violated" is difficult. S.H. had protested her placement in special education, tested at or around grade level while in special education, and performed well in school from fifth to

tenth grade, yet the Third Circuit held that no factual dispute as to knowledge even existed in the case.

While many would view *S.H.* as a major blow to efforts to combat the overrepresentation of minorities in special education, the RA and ADA still present an opportunity for addressing this problem. Like the IDEA, the RA and ADA provide that school districts must provide a FAPE to students with disabilities. If a district fails to provide a student with a FAPE, a family can bring a claim for compensatory education services. Such claims are much more feasible than claims for monetary damages because in the Third Circuit they do not require a showing of intentional discrimination. A family need only show that their child has a disability, which includes being regarded as having a disability, and that the child's education is not reasonably calculated to provide him or her meaningful educational benefit. This strategy can help hold schools accountable for mislabeling minority students as disabled and, therefore, assist in addressing this seemingly intractable problem.

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