

“WHY DO MODIFICATIONS?”

1. STUDENTS WITH DISABILITIES NEED THEM IN ORDER TO RECEIVE A FREE AND APPROPRIATE EDUCATION
2. TEACHERS HAVE A DUTY TO PROVIDE THEM AS REQUIRED BY FEDERAL LAW
3. TEACHERS DO NOT ENJOY BEING A WITNESS IN A FEDERAL DUE PROCESS HEARING.
4. BASIC TIPS TO KEEP IN MIND:

If modifications are to be done in the regular classroom, the ARD document should reflect exactly what modifications should be done in each class. The document should specify whether the modifications should always be done, or should be done only as needed. District staff should document provision of the modification sheet to all teachers immediately after the ARD meeting. Teachers should implement modifications as dictated by the student's IEP.

20 IDELR 422

20 LRP 2249

John Doe and Jane Doe, individually, and as next friends of their handicapped minor son, D.D., Plaintiffs v. Michael Withers, individually, and in his capacity as a teacher at Grafton High School; Greg Cartwright, individually, and in his capacity as a teacher at Grafton High School; Wendell Teets, individually, and in his capacity as Superintendent of Schools of Taylor County; and the Taylor County Board of Education, a public corporation, Defendants

West Virginia Circuit Court

92-C-92

June 16, 1993

Related Index Numbers

80.005 Civil Rights Act (Section 1983), Cause of Action

283.015 Learning Disability, In General

120. DAMAGES/CIVIL RIGHTS ACT

Judge / Administrative Officer

John L. Waters, Judge.

Case Summary

A jury returned a verdict in favor of the parents of a student with learning disabilities and against one of the student's high school teachers, and awarded \$5,000 in compensatory damages and \$10,000 in punitive damages to the parents. In their action under Section 1983, the parents alleged that the teacher had refused to provide their son with oral testing as required by his IEP.

The parents of a student with learning disabilities brought an action under Section 1983 against two high school teachers, the district superintendent, and the school board, alleging that the teachers and school officials refused to accommodate their son's disability in the classroom. At trial, the court granted directed verdicts in favor of the defendants, except one of the teachers. In their complaint against the remaining

defendant, the parents specifically alleged that the teacher refused to provide their son with oral testing as required by his IEP. The case against the teacher was then presented to the jury for deliberation.

HELD: for the parents.

The jury returned a verdict in favor of the parents and awarded \$5,000 in compensatory damages and \$10,000 in punitive damages. The court subsequently entered a final judgment against the teacher pursuant to the jury's verdict and award.

Full Text

Appearances:

Complaint

This is an action pursuant to 42 U.S.C. § 1983 for money damages by a handicapped child and his parents against a public school teacher and other school officials for refusing to accommodate the child's handicapping condition in the classroom and a claim for injunctive relief against the Taylor County Board of Education to enforce laws that protect handicapped students. The Plaintiffs request the right to bring this case under the names of John Doe and Jane Doe and the initials D.D. to protect the family and child from further embarrassment and publicity regarding the child's handicap.

1. The Plaintiffs, John and Jane Doe, are residents of Taylor County, West Virginia and are the parents of D.D., age 16, who has a learning disability as defined by state and federal law.

2. Defendant, Michael Withers, is a public school history teacher at Grafton High School and was Plaintiff D.D.'s teacher during relevant time periods and as such was responsible for the daily delivery of a Free Appropriate Public Education (FAPE) to the Plaintiff, D.D.

3. Defendant, Greg Cartwright, is the principal of Grafton High School and as such was responsible for the administration of Grafton High School and the duty to see that handicapped students at Grafton High School were afforded their rights to a FAPE under state and federal law.

4. Defendant, Wendell Teets, is the superintendent of Taylor County Schools and as such is responsible for the administration of educational services in Taylor County as well as the duty to see that principals and teachers under his supervision provide handicapped students with a FAPE as required by state and federal law.

5. The Defendant, Taylor County Board of Education, is a public corporation which has the duty to set educational policy and to ensure that the educational system of Taylor County protects the rights of handicapped students to a FAPE, pursuant to Public Law 94-142, 20 U.S.C. § 1400 et. seq. and implementing regulations; 34 C.F.R. 300.340 and 300.235.

6. Plaintiff D.D. was diagnosed as having a learning disability in the fourth grade while attending Anna Jarvis School in Taylor County. He was thereafter educated pursuant to an Individual Educational Program (IEP) designed to accommodate his learning disability as required by Public Law 94-142 and implementing federal regulations, 34 C.F.R. 300.130 and implementing State Policy No. 2419, Section 1.3, 1.4 and 2.11.

7. Because of Plaintiff D.D.'s learning disability his educational program was adapted to provide for oral testing by a learning disabilities teacher in a learning disabilities resource classroom.

8. Oral testing of Plaintiff D.D. was appropriate for him and was regularly provided at Anna Jarvis School and Grafton Middle School.

9. In the Fall of 1990, the Plaintiff, D.D., entered Grafton High School as a learning disabled student and was assigned to Defendant Michael Withers' history class.

10. The Plaintiff, D.D., received low grades in most subjects during the first quarter of his first year at Grafton High School.

11. Concerned about their son's low grades, the Plaintiffs, John Doe and Jane Doe, scheduled meetings with all of D.D.'s teachers to discuss their son's IEP and to stress the need for oral testing by a

learning disabilities teacher in a learning disability resource room.

12. The Plaintiffs, John Doe and Jane Doe, met with all of D.D.'s teachers.

13. All teachers but Defendant Michael Withers agreed to comply with the oral testing by the learning disabilities teacher in the learning disability resource room.

14. Thereafter the Plaintiff, D.D., delivered to the Defendant, Michael Withers, a note from the special education coordinator at Grafton High School directing the Defendant, Michael Withers, to have the Plaintiff tested orally by the learning disabilities teacher in the learning disability resource room.

15. The Defendant, Michael Withers, refused to comply with this directive.

16. Notwithstanding repeated notices and directives regarding D.D.'s handicap and his need for oral testing by a learning disabilities teacher in the learning disabilities resource room, the Defendant, Michael Withers, refused to comply and administered approximately nine (9) more written tests to Plaintiff D.D., most of which Plaintiff D.D. failed because of his handicap.

17. During history class, the Defendant, Michael Withers, insulted and belittled the Plaintiff, D.D., a handicapped student, in front of other students causing Plaintiff D.D. to become extremely embarrassed and angry.

18. On or about November 14, 1990, after grade reports were sent home to the Plaintiffs, John Doe and Jane Doe, regarding their son, the parents attempted to meet again with Defendant Michael Withers.

19. Defendant Michael Withers did not meet with the Plaintiffs because, upon information and belief, he was deer hunting.

20. During all relevant time periods Defendants Greg Cartwright, Principal of Grafton High School, and Wendell Teets, Superintendent of Schools of Taylor County, knew or should have known of the failure of Defendant Michael Withers to deliver to the

Plaintiff, D.D., a FAPE in conformance with state and federal law, but failed to require Defendant Withers' compliance.

21. As a direct and proximate result of the negligent and/or intentional acts and omissions of all Defendants, the Plaintiff, D.D., failed his history course during the Fall, 1990 school semester and received zero credits on his permanent school record.

22. As a result of having failed Defendant Michael Withers' course, the Plaintiff, D.D., was forbidden by school officials to participate in his extracurricular activities.

23. In or about January, 1991 the Defendant, Michael Withers, left Grafton High School on a leave of absence for Charleston, West Virginia, where the Defendant is in the State Legislature.

24. The Plaintiff, D.D., was then assigned a substitute history teacher who promptly complied with the modified testing procedures for the Plaintiff.

25. As a result of being properly evaluated during the second semester, the Plaintiff's grades dramatically improved in history.

26. The Plaintiffs, John Doe and Jane Doe, filed a grievance against the Defendant, Michael Withers, regarding his acts and omissions toward the Plaintiff, D.D., and prevailed on said grievance before the State Board of Education.

27. As a result of prevailing on the grievance against Defendant Withers, the Taylor County Board of Education was required to administer a comprehensive examination to the Plaintiff, D.D., which examination was administered by the learning disabilities teacher.

28. The administration of the comprehensive examination required the Plaintiff, D.D., to intensively prepare for an entire semester's examination and testing. This re-preparation and re-testing was extremely time consuming and embarrassing to the Plaintiff and caused the Plaintiff's grades in other classes to drop.

29. As a direct and proximate result of the

negligence and/or intentional acts and omissions of the Defendants, the Plaintiff, D.D., in addition to receiving zero credits for history was subjected to embarrassment and shame within the school community.

I. First Cause of Action

Deprivation of Civil Rights in Violation of 42 U.S.C. 1983

30. The Plaintiffs reallege and incorporate Paragraphs 1 through 29 as though fully set forth herein.

31. The Defendants, acting under color of state law as public school teachers, principals, administrators and the Board of Education of Taylor County deprived the Plaintiff, D.D., of his statutorily protected civil right to a FAPE as guaranteed by federal and state laws for the education of handicapped children and as protected by the Fourteenth Amendment to the United States Constitution and Article 3, Section 10 of the Constitution of the State of West Virginia.

32. As a result of these constitutional deprivations, the Plaintiffs were damaged as alleged herein.

WHEREFORE, the Plaintiffs pray for damages as follows:

COMPENSATORY

---\$30,000.00 against Defendant Michael Withers;

---\$10,000.00 against Defendant Greg Cartwright;

---\$10,000.00 against Defendant Wendell Teets; and

---\$10,000.00 against Defendant Taylor County Board of Education.

PUNITIVE

---\$30,000.00 against Defendant Michael Withers.

Furthermore, the Plaintiffs pray for injunctive relief requiring all Defendants to immediately comply

with the requirements of Public Law 94-142 as well as federal and state laws and regulations protecting the rights of handicapped children to a Free Appropriate Public Education. The Plaintiffs also pray for attorney's fees and costs and such other relief as this Court may deem appropriate.

Amended Complaint

This is an action pursuant to 42 U.S.C. § 1983 for money damages by a handicapped child and his parents against a public school teacher and other school officials for refusing to accommodate the child's handicapping condition in the classroom and a claim for injunctive relief against the Taylor County Board of Education to enforce laws that protect handicapped students. The Plaintiffs request the right to bring this case under the names of John Doe and Jane Doe and the initials D.D. to protect the family and child from further embarrassment and publicity regarding the child's handicap.

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3. Defendant, Greg Cartwright, is the principal of Grafton High School and as such was responsible for the administration of Grafton High School and the duty to see that handicapped students at Grafton High School were afforded their rights to a FAPE under state and federal law.

4. Defendant, Wendell Teets, is the superintendent of Taylor County Schools and as such is responsible for the administration of educational services in Taylor County as well as the duty to see that principals and teachers under his supervision provide handicapped students with a FAPE as required by state and federal law.

5. The Defendant, Taylor County Board of Education, is a public corporation which has the duty to set educational policy and to ensure that the educational system of Taylor County protects the rights of handicapped students to a FAPE, pursuant to Public Law 94-142, 20 U.S.C. § 1400 et. seq. and implementing regulations; 34 C.F.R. 300.340 and 300.235.

6. Plaintiff D.D. was diagnosed as having a learning disability in the fourth grade while attending Anna Jarvis School in Taylor County. He was thereafter educated pursuant to an Individual Educational Program (IEP) designed to accommodate his learning disability as required by Public Law 94-142 and implementing federal regulations, 34 C.F.R. 300.130 and implementing State Policy No. 2419, Section 1.3, 1.4 and 2.11.

7. Because of Plaintiff D.D.'s learning disability his educational program was adapted to provide for oral testing by a learning disabilities teacher in a learning disabilities resource classroom.

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17. The refusal of Defendant Withers and the negligence of the other Defendants in failing to assure the requirement of oral testing as required by the child's IEP resulted in an unauthorized and illegal change in special education services to the Plaintiff, D.D., in violation of Plaintiff D.D.'s rights to procedural safeguards as guaranteed by federal law and implementing regulations. 20 USC § 1400, et seq. and 34 CFR 300.500 et. seq.

18. During history class, the Defendant, Michael Withers, insulted and belittled the Plaintiff, D.D., a handicapped student, in front of other students causing Plaintiff D.D. to become extremely embarrassed and angry.

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Furthermore, the Plaintiffs pray for injunctive

relief requiring all Defendants to immediately comply with the requirements of Public Law 94-142 as well as federal and state laws and regulations protecting the rights of handicapped children to a Free Appropriate Public Education. The Plaintiffs also pray for attorney's fees and costs and such other relief as this Court may deem appropriate.

Motion In Limine

Now come the Plaintiffs by counsel, William F. Byrne and Lloyd W. Spring, III, and on grounds of *res judicata* and collateral estoppel, move this Court in Limine to prevent the Defendants at the trial of this action from denying that:

1. The Individualized Education Plan (IEP) of Douglas Devart called for modifications to his academic program which was deemed to include oral testing in October of 1990.

2. Following his receiving four (4) (failing) "F" grades in October, 1990 mid-term report on Douglas' progress, Mr. and Mrs. Devart sought and held conferences with affected Grafton High School teachers; and contacted special education coordinators at the High School and Taylor County School's central office regarding this deficiency report.

3. Subsequent to actions taken in No. 2 above, all of Douglas Devart's teachers except his American History instructor began administering oral tests; the result being that---with the exception of American History---Douglas improved all first semester 1990-91 class grades to passing.

4. Upon being assigned a new American History teacher who administered oral tests to Douglas, he successfully completed that second semester 1990-91 course.

5. Officials of Taylor County Schools admit the IEP was not properly followed due to no fault of Douglas's.

The matters set forth above were the subject of a grievance between Robert D. and Frankie V. Devart and the Taylor County Board of Education before the State Superintendent of Schools in Charleston, West

Virginia, Docket No. CG-91-7, which was decided by Order dated December 12, 1991 by Stephen Priestley, Assistant Bureau Chief, Bureau of Finance and Services, West Virginia Department of Education for Henry Marockie, State Superintendent of Schools. A copy of said Order is attached hereto and incorporated herein by reference as Exhibit 1 to this Motion.

There is an elementary rule of law that when there is a final judgment affirming the existence of certain facts, those acts are conclusive upon the parties to the action whenever the existence of that fact is again in issue between them. *Moore v. Sun Lumber Co.*, 166 W.Va. 735, 276 S.E.2d 797 (1981).

Even the individual Defendants, Wendell Teets, Greg Cartwright, and Michael Withers are bound by this prior judgment because in the case of these Defendants, they either participated in and exercised control over the conduct of the prior litigation, or, in the case of Mr. Withers, impliedly consented to abide by this prior judgment by his acts and omissions. *Glover v. Narick*, 400 S.E.2d 816 W.Va. (1990).

The doctrine of *res judicata* should be applied and collateral estoppel should preclude these parties from litigating these issues again because of their finality in the prior proceeding. The Taylor County Board of Education, the Respondent in the prior litigation, did not appeal the findings of Stephen Priestley and accordingly is bound by the finality of the said order of Stephen Priestley.

WHEREFORE, the Plaintiffs pray that their Motion be granted and that the above-referenced facts be read to the jury as established facts in the litigation currently before this Court.

Order

On the 4th day of December, 1991, Grievants Robert D. and Frankie V. Devart, together with their counsel, Lloyd W. Spring, III; and Respondent Taylor County Board of Education by Wendell D. Teets, Superintendent of Taylor County Schools, and Joan Henderson, Coordinator of Special Services, together with Gregory H. Cartwright, Principal of Grafton High School, appealed for a hearing on the *citizens'*

grievance heretofore filed by Mr. and Mrs. Devart. The hearing was held before Stephen Priestley, Assistant Bureau Chief, Bureau of Finance and Services, West Virginia Department of Education, as the designee of Henry Marockie, State Superintendent of Schools.

Based upon testimony heard and recorded during said Level IV grievance hearing, I do hereby make the following findings of fact:

1. The son of the Respondents, Douglas Devart, was a ninth grade special education learning disabilities student at Grafton High School during the 1990-91 school term, and has been identified as an exceptional student since the fourth grade.

2. The Individualized Education Plan of Douglas Devart called for modifications to his academic program which was deemed to include oral testing in October 1990.

3. Following his receiving four (4) failing ("F") grades in an October 1990 mid-term report on Douglas' progress, Respondents sought and held conferences with affected Grafton High School teachers; and contacted special education coordinators at the High School and Taylor County Schools central office regarding this deficiency report.

4. Subsequent to actions taken in item three, all of Douglas' teachers except his American history instructor began administering oral tests; the result being that---with the exception of American history---Douglas improved all first semester 1990-91 class grades to passing.

5. Upon being assigned a new American history teacher who administered oral tests to Douglas, he successfully completed that Second semester 1990-91 course.

6. Respondents are requesting that their son Douglas be given a passing grade for first semester 1990-91 American history since Grafton High School did not comply with his IEP.

7. Officials of Taylor City Schools admit the IEP was not properly followed due to no fault of Douglas, but they believe a student must demonstrate

proficiency in a subject matter, rather than arbitrarily receiving passing grade.

Based upon the above findings of fact, the hearing examiner does make the following conclusions of law:

1. Respondents' son Douglas was an identified learning disabilities student at Grafton High School during the 1990-91 school term with an IEP requiring certain academic modifications, one of which required the administering of oral, rather than written, tests.

2. The first semester 1990-91 American history instructor for Douglas failed to abide by provisions of his IEP, and that oversight may have had a bearing on his failure of the course.

3. Officials of Taylor County Schools are bound by the provisions of an exceptional student's IEP.

4. County school systems must document in some fashion that students have demonstrated an adequate knowledge of content subject matter in order to issue passing grades for students.

WHEREFORE, based upon the above, I do HEREBY GRANT THIS GRIEVANCE, REVERSING the decision of Respondent Taylor County Board of Education and ORDERING the County to prepare Douglas Devart for administration of an American History oral test generally covering the subject matter covered by Douglas' first semester 1990-91 class within a reasonable and agreeable time frame not to extend beyond April 1992. All necessary tutoring and re-teaching shall take place during the school day by Taylor County instructors, and appropriate credit shall be granted if such oral test is passed.

Jury Order

For this trial the Plaintiffs, Robert Devart, Virginia Devart and Douglas Devart, appeared in person and by their attorneys, William F. Byrne and Lloyd W. Spring, III, and the Defendants, Michael Withers, Greg Cartwright, Wendell Teets and the Taylor County Board of Education, appeared in

person and by their attorneys, James Wilson and Nancy Brown.

On June 9, 1993, thereupon came a jury of six (6) good and lawful jurors selected according to law to well and truly try the issues between the Plaintiffs, Robert Devart, Virginia Devart and Douglas Devart, and Defendants, Michael Withers, Greg Cartwright, Wendell Teets and The Taylor County Board of Education, and a true verdict render according to the evidence and so help you God.

On June 9, 1993, the jury heard opening statements on behalf of the Plaintiffs and Defendants and part of the testimony on behalf of the Plaintiffs.

On June 10, 1993, the jury heard the balance of the testimony on behalf of the plaintiffs. Thereupon, each of the defendants moved for a directed verdict. The Court granted the motions as to defendants Taylor County Board of Education, Wendell Teets and Greg Cartwright and denied the motion as to defendant Michael Withers. The defendant rested his case without additional testimony and after hearing the instructions of the court, the matter was argued by counsel.

The jury retired to their chambers to deliberate and did so on June 10, 1993 and after some time, the jury returned into Court and upon their oath and found in favor of the Plaintiff, Douglas Devart, and against the Defendant, Michael Withers, and awarded damages in favor of Douglas Devart in the amount of Five Thousand Dollars (\$5,000.00) compensatory damages and Ten Thousand Dollars (\$10,000.00) punitive damages.

It is therefore ADJUDGED, ORDERED and DECREED that the Plaintiff, Douglas Devart, recover of and from the Defendant, Michael Withers, the sum of Fifteen Thousand Dollars (\$15,000.00), with interest at the rate of ten percent (10%) per annum from June 10, 1993, and the costs of this action.

Statutes Cited

42 USC 1983

Regulations Cited

34 CFR 300.340

34 CFR 300.235

34 CFR 300.130

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