

# EQUAL-EDUCATIONAL OPPORTUNITIES

## REVIEW OF DISABILITY-RELATED CASES INVOLVING JUDGE BRETT KAVANAUGH

The Bazelon Center for Mental Health Law strongly opposes the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. The appointment of Judge Kavanaugh would threaten hard-won rights and protections for people with disabilities. Judge Kavanaugh’s record demonstrates his great skepticism of the Affordable Care Act, his hostility to civil rights—including the rights of people with disabilities—and his narrow view of the authority of executive branch agencies to interpret and enforce the law. His confirmation could add a fifth vote for such regressive views. A summary of his record is provided below.

### Equal Educational Opportunities

Judge Kavanaugh has long been a proponent of voucher programs, previously serving as co-chairman of the Federalist Society’s “School Choice Practice Group.”<sup>1</sup> As an attorney, he defended a Florida school voucher program called the Opportunity Scholarship Program, which provided state funding for some students to enroll in private schools. In 2006, the Florida Supreme Court declared that the Opportunity Scholarship Program violated the state constitution’s guarantee of “a uniform, efficient, safe, secure, and high quality system of free public schools.”<sup>2</sup> Students with disabilities who participate in school voucher programs are typically forced to waive their rights under the Individuals with Disabilities Education Act (IDEA), including the right to receive a free and appropriate education (FAPE). The Supreme Court’s 2017 decision in *Andrew F. v. Douglas County School District*, in which the Court held that the IDEA requires schools to provide “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,”<sup>3</sup> underscored the importance of these rights for students with disabilities. Judge Kavanaugh’s advocacy on behalf of school voucher programs raises concerns about his understanding of the importance of the IDEA’s protections for students with disabilities.

Judge Kavanaugh’s decision in *Hester v. D.C.*<sup>4</sup> further confirms that he lacks an appreciation for the IDEA’s high standards for educating children with disabilities. In this case, he overturned a

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<sup>1</sup> *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to Be Circuit Judge for the District of Columbia Circuit Before the Committee on the Judiciary*, 108th Cong. 72-73 (2004).

<sup>2</sup> *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

<sup>3</sup> 137 S. Ct. 988, 1001 (2017).

<sup>4</sup> 505 F.3d 1283 (D.C. Cir. 2007)

district court order requiring the District of Columbia to provide compensatory education to a student with a disability who had been incarcerated in a Maryland facility. The student and the District had entered into a settlement agreement in which the District agreed to provide the student with educational services during his incarceration. However, the Maryland facility denied access to the District's education provider. The facility indicated that it would itself provide the student with educational services, but testimony at the trial indicated that he received minimal educational benefit while at the facility: his testing scores declined; he did not receive transition services; there were significant reductions in the number of hours of both special and general education he received; and he spent a significant amount of time in segregation, during which he received no general education and only two hours per week of special education.<sup>5</sup> The district court held the District to its obligations under the settlement agreement and required the District to provide appropriate compensatory education.<sup>6</sup> Judge Kavanaugh reversed, writing that as a matter of contract law, the District was relieved from its obligations because the Maryland facility had made it impracticable for the District's provider to enter the facility.<sup>7</sup> Judge Kavanaugh's commitment to the high standards required under the IDEA is less than clear, given his approach to this case.

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<sup>5</sup> *Hester v. D.C.*, 433 F. Supp. 2d 71, 80 (D.D.C. 2006), *rev'd and remanded*, 505 F.3d 1283 (D.C. Cir. 2007).

<sup>6</sup> *Id.* at 81.

<sup>7</sup> 505 F.3d at 1286.