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JUDGE RULES KANAWHA COUNTY SPECIAL EDUCATION LAWSUIT CAN PROCEED AS CLASS ACTION

August 27, 2021 – Federal Judge Irene Berger has ruled that [a lawsuit on behalf of Kanawha County students with disabilities](#) can proceed as a class action lawsuit. The decision to certify the class will affect hundreds of Kanawha County’s students with disabilities who are removed from their classrooms for behavior related to their disabilities. The case was filed by Mountain State Justice, Disability Rights of West Virginia, The Arc of the United States, the Bazelon Center for Mental Health Law, and represented pro bono by the law firm Latham & Watkins LLP.

Judge Berger’s decision states that the plaintiffs, two individual Kanawha County Schools (KCS) students and The Arc of West Virginia, “have provided significant evidence that KCS does not provide the oversight, support, and resources necessary to support students with disabilities whose behavior impedes their learning or that of their classmates. It is clear from the Plaintiffs’ data that for many students with emotional and intellectual disabilities, behavior issues are interfering” with the students’ ability to receive an appropriate education. Judge Berger also stated that “[i]t is equally clear that KCS’s approach is not working.”

Judge Berger’s ruling significantly widens the lens of the lawsuit, *G.T. v. Board of Education of Kanawha County*, which was filed in January 2020. As a class action, the lawsuit will look beyond the education provided to the two individual KCS students, and will focus on a school district-wide examination of KCS policies, practices, and procedures that result in the denial of a free and appropriate education, free from discrimination, to all KCS students with disabilities who need behavior supports and are suspended or otherwise taken out of their classrooms because of their disability-related behavior.

Judge Berger’s opinion noted that the students and their families provided “exhaustive” and “significant” evidence of district-wide problems with how KCS addresses the behavior support needs of its students with disabilities, including “a pattern of continuing behavior problems and continuing classroom removals, with repeated suspensions, office referrals, lunch detentions, classroom exclusions, bus suspensions, expulsion petitions, and unofficial parent pick-up requests.”

Judge Berger also noted plaintiffs’ evidence that “KCS staff went through the motions of completing appropriate paperwork without adequately identifying and addressing issues.” Among other things, evaluations of the students’ needs “do not fully address the needs of students with significant or consistently recurrent behavioral challenges, do not provide sufficient information to develop recommendations for behavioral supports, and do not address developmental, family, or sociocultural issues that have clear relationships to patterns of problem behavior.”

Lydia Milnes, Senior Attorney with Mountain State Justice, stated “Judge Berger’s order recognizes that the KCS administration has failed to take a leadership role in ensuring that students with disabilities get the support they need to stay in school, and has instead shifted that burden to classroom teachers, who already have too much on their plates.”

Lori Waller of Disability Rights of West Virginia, the state’s “protection and advocacy” agency that advocates for children and adults with disabilities, added, “This litigation is a great opportunity to improve the school experience for children with disabilities.”

Shira Wakschlag, Senior Director of Legal Advocacy & General Counsel, The Arc of the United States, said “This is a critical step towards justice for students with disabilities in Kanawha County and ensuring that they have the supports they need to thrive in their neighborhood schools among their peers without disabilities. We will continue to fight for them in this litigation.”

Lewis Bossing, Senior Staff Attorney of the Bazelon Center for Mental Health Law, stated “Judge Berger’s opinion makes clear that KCS’s failures to support its students with disabilities are systemic, and that systemic changes are needed. We hope that KCS will work with us to address the problems that Judge Berger has identified.”

Judge Berger ordered the plaintiffs and KCS to try to negotiate a resolution to the class action, with the assistance of attorney Robert B. Allen of the Charleston law firm Kay Casto & Chaney PLLC. If the parties are unable to resolve their differences, the litigation will move forward, with trial currently scheduled for August 2022.

Robin Hulshizer, a partner with the pro bono law firm Latham & Watkins LLP, which also represents the plaintiffs, stated “As Judge Berger noted in her opinion, Kanawha County Schools rarely provides behavior supports that are customarily offered in other school districts. Instead, the behavior supports KCS does provide ‘tend to be directed at performance deficits, with an implicit assumption that the student is capable of performing the desired behavior but chooses not to.’ With this lawsuit, we seek for students to be given the supports they are entitled to by law to be successful both in school and their communities.”

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About Mountain State Justice

Mountain State Justice is a non-profit legal services firm dedicated to redressing entrenched and emerging systemic social, political, and economic imbalances of power for underserved West Virginians, through legal advocacy and community empowerment offered regardless of ability to pay. To learn more, visit <https://mountainstatejustice.org/>.

About Disability Rights of West Virginia

Disability Rights of West Virginia (DRWV) is the federally mandated protection and advocacy system for people with disabilities in West Virginia. DRWV protects and advocates for the human and legal rights of persons with disabilities. To learn more, visit <https://www.drofww.org/>.

About The Arc

The Arc is the largest national community-based organization advocating for and serving people with intellectual and developmental disabilities (IDD) and their families. In partnership with its network of more than 600 chapters across the country, including The Arc of West Virginia, The Arc works to promote and protect the rights of people with IDD to live, work, and learn in the community free from discrimination. To learn more, visit www.thearc.org and www.thearcfwv.org

About the Bazelon Center for Mental Health Law

The Bazelon Center for Mental Health Law is a national legal advocacy organization protecting and advancing the rights of people with mental disabilities. The Center promotes laws and policies that enable adults and children with mental disabilities to live independently in their own homes, schools, and communities, and to enjoy the same opportunities that everyone else does. To learn more, visit www.bazelon.org.

About Latham & Watkins LLP

Latham & Watkins LLP is global law firm with more than 2,700 lawyers located in Asia, Europe, the Middle East, and the United States. For more information, please visit its website at www.lw.com.