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U.S. Supreme Court Deliberates Important Special Education Case

By Candace J. Gomez

Last month, the U.S. Supreme Court heard oral arguments in a case that could affect the education of millions of students with disabilities, and the public schools that provide services to these students. In the case of *Endrew F. v. Douglas County School District RE-1*, the court must decide what level of educational benefit school districts must confer on children with disabilities to provide them with the free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act (IDEA). 2016 U.S. LEXIS 4467, 137 S. Ct. 29 (U.S. 2016). FAPE is one of the cornerstones of the IDEA. Therefore, the outcome of this case could signal a pivotal change in the field of special education.


Candace J. Gomez

Currently, the IDEA requires special education and related services to be "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690, 712, 1982 U.S. LEXIS 10, *51 (U.S. 1982). However, the circuit courts are currently split on how much of an educational benefit a school district must offer in order to meet this obligation pursuant to the IDEA.

The Second Circuit, which includes New York in its jurisdiction, represents the majority view among the circuit courts and has traditionally found that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP [individualized education plan] that is likely to produce progress, not regression, and if the IEP affords the student with an

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Black History Month Celebrated

Photo credit: Suffolk County Courts

Black History Month was celebrated on Feb. 16, which included an award ceremony. This year Magistrate Aletha V. Fields received the prestigious Marquette L. Floyd Award. For story and more photos, see page 17.

PRESIDENT'S MESSAGE

Celebrating African-American History Month — a 90 Year Tradition


John Calcagni

By John Calcagni

On February 16, 2017, I was honored to represent the Suffolk County Bar Association in celebrating the 90th anniversary of African-American History Month at the Courthouse in Central Islip. One of the highlights of this event to which the standing-room only crowd was treated were several stirring and flawlessly performed choral selections from the Central Islip High School Choir.

Equally uplifting was an emotional address by this year's Marquette L. Floyd Award recipient, Magistrate Aletha V. Fields. Following a warm introduction by her long-time friend, Judge Cheryl Joseph, Magistrate Fields recounted her journey from her childhood home in Brooklyn to being the first person of African-American and Hispanic heritage appointed as a Suffolk County Family Court Magistrate.

Many thanks to the Hon. Toni A. Bean, who acted as the Mistress of Ceremonies, and to our Co-Sponsor, the Amistad Long Island Black Bar Association, for graciously inviting our bar association to participate in

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BAR EVENTS

Young Lawyers Committee event
Thursday, March 9, from 6:30 to 8:30 p.m.
Butterfields, 661 Old Willets Path, Hauppauge

The Young Lawyers Committee is kicking off 2017 with an evening of cocktails and networking – Get involved – no charge, must RSVP marion@scba.org

Peter Sweisgood Dinner
Thursday, March 23, at 6 p.m.
Watermill Restaurant, Smithtown

The annual dinner is hosted by the Lawyers Helping Lawyers Committee. This year founding member and past co-chair William J. Porter will be honored.

FOCUS ON
COMMERCIAL LITIGATION
SPECIAL EDITION

TRO Limited After Being "Put to the Test of the Adversary System"

By Leo K. Barnes Jr.

A recent decision issued in the Southern District by Judge Jed Rakoff provides counsel with an important perspective concerning the viability of short-term success on an application for a temporary restraining order submitted *on papers only*, compared to the prospect of prevailing after plenary analysis in open court, subject to cross examination, neutral third party computer forensic examination and judicial scrutiny.

As in state court, a federal court's determination of whether to grant a temporary restraining order ("TRO") is typically guided by a similar standard as that applied in the context of a preliminary injunction. See N.Y. C.P.L.R. §6301; see also, *Free Country Ltd v. Drennen*, 2016 WL 7635516, at *3, 16 Civ. 8754 (S.D.N.Y. 2016) (*citing Andino v. Fischer*, 555 F.Supp.2d 418, 419 (S.D.N.Y. 2008)). In New York State courts, the three-part test determining whether a preliminary injunction should be granted under Article 63 of the CPLR is well-known amongst practitioners, wherein the movant must demonstrate: a likelihood of ultimate success on the merits; the prospect of irreparable injury if the provisional relief is withheld; and a balance of equities tipping in the moving party's favor. See, e.g., *Doe v. Axelrod*, 73 N.Y.2d 748 (1988). Under the federal equivalent governed by Federal Rule of Civil Procedure 65, a movant seeking a preliminary injunction typically must show: a likelihood of success on the ultimate merits of the lawsuit; a likelihood that the moving party will suffer irreparable harm if a preliminary injunction is not granted; that the balance of hardships tips in the moving party's favor; and that the public interest is not disserved by the relief granted. See *Free Country Ltd v. Drennen, supra*, 2016 WL 7635516, at *3 (*citing JBR, Inc. v. Keurig Green Mountain, Inc.*, 618 Fed.Appx. 31, 33 (2d Cir. 2015)).

One notable difference between the state and federal courts is the method of determining such applications. As noted by Professor Siegel, "[w]hen an application for a preliminary injunction arrives before the court, it will usually be decided on papers alone in New York practice, while an actual testimonial hearing frequently occurs in federal court." See Siegel, *N.Y. Prac.*, § 640 (5th ed.).

In *Free Country Ltd v. Drennen, supra*, Southern District Judge Jed S. Rakoff limited a previously issued TRO after subjecting the application "to the test of the adversary system" during a three-day evidentiary hearing. The key issue at the hearing was whether the individual defendants, former employees of the plaintiff — a recreational clothing manufacturer — should be prohibited from soliciting plaintiff's customers as new employees of plaintiff's direct competitor in connection with the fall 2017 season, based upon the individual defendants' alleged misappropriation of plaintiff's trade secrets. As discussed below, *Free Country* is notable for the role that live testimony of witnesses plays concerning applications for injunctive relief. Additionally, as discussed below, the decision is also noteworthy for the court's early utilization of a neutral forensic expert at the very inception of the case.

Leo K. Barnes

FOCUS ON COMMERCIAL LITIGATION SPECIAL EDITION

Factual background

On November 10 2016, Free Country Ltd. ("Free Country"), filed a complaint against defendants Brian Drennen ("Drennen"), Matthew Vander Wyden ("Vander Wyden"), Rousso Apparel Group, Inc. ("Rousso") and Sante Fe Apparel, LLC ("Santa Fe") (collectively, the "Defendants"), alleging, among others, claims for misappropriation of Free Country's trade secrets under state and federal law.[1] The complaint alleged that Drennen and Vander Wyden were former sales executives for Free Country, a manufacturer of recreational outwear and other items for men, women and children, whose products are sold to well-known retailers including Costco and Walmart and other specialty stores. During their employment, Drennen and Vander Wyden were given access to Free Country's "confidential information" including, *inter alia*, Free Country's critical customer information, customer preferences, purchasing history, pricing and manufacturing costs, profit margins and marketing plans, and product designs. Both Drennen and Vander Wyden had entered into confidentiality agreements with Free Country and signed acknowledgements that they had received Free Country's employee handbook which, *inter alia*, aimed to protect Free Country's confidential information and limited the individual defendants' use thereof.

Near the end of October 2016, Vander Wyden and (approximately one week later) Drennen, both resigned and went to work for Rousso and/or its affiliate Santa Fe to establish a business that would directly compete with Free Country. Free Country subsequently received information that Vander Wydren and Drennen were working for Rousso/Sante Fe. Soon thereafter, Free Country reviewed its computer systems and determined that Drennen utilized the cloud storage program Dropbox to transfer certain Free Country company files to his personal Dropbox account prior to his resignation. Free Country alleged that the transfer of files was tremendous, claiming that its preliminary examination of Drennen's laptop revealed that his Dropbox folder contained 274 GB of data in 5,152 folders and 58,841 files containing most of Free Country's confidential, proprietary and trade secret information that it developed for, *inter alia*, each of its ladies and menswear lines for 2016 and 2017. Free Country's forensic review showed that nearly all of the transfer activity occurred in the six months prior to Drennen's resignation, with almost 50,000 files created in October 2016 just prior to his resignation. Free Country alleged that the individual defendants conspired together to misappropriate its confidential information and were using the information to unlawfully compete against Free Country by, among other things, identifying and contacting Free Country's customers, targeting their preferences and undercutting Free Country's pricing.

Free Country's application for a TRO

Upon filing the action, Free Country moved *ex parte* by order to show cause for a TRO and preliminary injunction against the defendants. The court initially issued a TRO which, *inter alia*, temporarily enjoined defendants from accessing or disclosing Free Country's confidential, proprietary, or trade secret documents or information and temporarily restrained defendants and all those acting in concert with them from "directly or indirectly, soliciting, continuing to solicit, initiation contact with, or accepting business from any of the customers identified in the Confidential Information."[2] Free Country's application also sought expedited discovery of any laptop computer, desktop computer, mobile phone or tablet utilized by Drennen so that Free Country's forensic expert, or a neutral forensic expert agreed upon or appointed by the court, could determine whether the information contained in the Dropbox account was transferred or downloaded to the aforementioned devices or otherwise distributed or shared.[3] The court directed defendants to show cause on November 15, 2016 why the TRO should not be continued pending a preliminary injunction hearing pursuant to FRCP 65, and directed that it would consider Free Country's request for expedited discovery at the November 15, 2016 show cause hearing.

After oral argument from counsel during the November 15, 2016 show cause hearing, the court issued a modified and extended TRO on November 17, 2016 pending the conclusion of an evidentiary hearing scheduled by the court to proceed in early December 2016. The modified TRO provided, *inter alia*, that Drennen and Vander Wyden were prohibited from soliciting Free Country's customers identified in the confidential information at issue "unless and until Drennen and Vander Wyden establish to Free Country that such customer contact information was in Drennen or Wyden's possession at a time prior to the commencement" of either of their employment with Free Country.[4] The court also ordered expedited discovery and specifically ordered Drennen, pursuant to Federal Rule of Civil Procedure 34, to permit inspection by a neutral forensic expert agreed upon by the parties or appointed by the court:

> of any cloud storage account or any other devices, including but not limited to laptop computer, desktop computer, mobile phone, tablet, or other device subject to the Court's direction…to determine whether the Confidential Information contained in Drennen's Dropbox account was transferred or downloaded to any electronic device not owned and/or controlled by Free Country…[5]

A neutral forensic expert was appointed and a protocol was subsequently established for the neutral forensic expert's examination by two Consent Orders issued a few days later and the neutral forensic expert subsequently submitted a report to the court prior to the evidentiary hearing.

A three-day evidentiary hearing was subsequently held in early December in order to "put the TRO to the test of the adversary system." The court explained that the key issue at the hearing was whether the court should continue its TRO and "prohibit defendants Drennen and Vander Wyden from soliciting Free Country's customers in connection with the fall 2017 season."[6] By order dated December 9, 2016, on the basis of the court's assessment of the evidence presented at the evidentiary hearing including its assessment of the witnesses' demeanor and credibility, the court granted in part Free Country's motion for a renewed TRO prohibiting defendants from using or disseminating Free Country's confidential information, but denied Free Country's request that defendants be prohibited from

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