FILED
United States Court of Appeals
Tenth Circuit

December 12, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALBUQUERQUE PUBLIC SCHOOLS BOARD OF EDUCATION,

Plaintiff - Appellant,

v.

CLAIRE ARMSTRONG; DANIEL ARMSTRONG, as Parents of D.A., student (a minor),

Defendants - Appellees.

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.,

Amicus Curiae.

No. 22-2012
(D.C. No. 1:21-CV-00396-WJ-JHR)
(D.N.M.)

ORDER AND JUDGMENT*

Before **HARTZ**, **McHUGH**, and **MORITZ**, Circuit Judges.

Claire and Daniel Armstrong ("Parents") filed an administrative request for a due process hearing under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, claiming Albuquerque Public Schools ("APS") failed to

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

provide a free, appropriate public education ("FAPE") to their minor son, D.A., who suffers from severe dyslexia. A Due Process Hearing Officer ("DPHO") conducted a hearing and determined that APS had failed to provide D.A. a FAPE. The DPHO fashioned an equitable remedy requiring APS to provide D.A. with one-on-one reading support throughout the week from a reading therapist, subject to Parents' approval. APS responded by filing a complaint in the district court, arguing the DPHO erred in her analysis and APS had not denied D.A. a FAPE. The district court disagreed and affirmed the DPHO's conclusions of law and selected remedy. Now, before this court, APS argues for the first time that the equitable remedy fashioned by the DPHO and affirmed by the district court was an abuse of discretion. This argument fails because APS waived any argument directed at the selected remedy by not raising it before the district court and not arguing plain error on appeal.

I. BACKGROUND

We begin by providing a brief overview of the IDEA framework and then proceed to the relevant factual and procedural background. Parents and APS disputed many aspects of D.A.'s education before the DPHO and the district court, engaging on the issue of whether APS had met its obligation to provide D.A. with a FAPE. On appeal, however, APS does not challenge the district court's determination that APS denied D.A. a FAPE and instead argues only that the chosen remedy was an abuse of discretion. Accordingly, we limit our review of the factual history to the facts relevant to this issue.

A. Overview of the IDEA

"The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.*, ensures that children with disabilities receive needed special education services." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017). Specifically, the Act "requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009) (quoting 20 U.S.C. § 1412(a)(1)(A)). The IDEA defines a FAPE as:

> special education and related services that--
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9). To ensure that all children have access to a FAPE, the IDEA requires schools to create individualized education programs ("IEPs") with input from the children's parents. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368–69 (1985). Congress anticipated school officials and parents may at times have disputes about the provision of a FAPE. And because "in any disputes the school officials would have a natural advantage, Congress incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Id.* at 368. Under these procedural safeguards, parents may seek an "impartial due

process hearing" to resolve their complaints. *Id.* at 369 (quoting 20 U.S.C. § 1415(b)). "The Act also provides for judicial review in state or federal court to '[a]ny party aggrieved by the findings and decision' made after the due process hearing." *Id.* (quoting 20 U.S.C. § 1415(e)(2)).

B. Factual Background[1]

Parents first noticed their son, D.A., was struggling with reading skills when he was in the first grade. D.A. was evaluated for learning disabilities in the second grade, and the evaluation revealed that D.A. suffered from "specific learning disability in basic reading, reading fluency, and math calculation and that he had the characteristics of dyslexia." App. at 18. The evaluator determined D.A.'s dyslexia was severe. Despite D.A.'s struggles with reading and writing, D.A.'s teachers recognized he was a bright, capable student.

Over the following years, Parents met with APS employees regularly through the IEP process, often disagreeing with APS about what interventions D.A. needed. On several occasions, APS denied Parents' requests for a dyslexia therapist to work with D.A. and for him to receive one-on-one reading instruction. APS employees told Parents that rather than using dyslexia therapists, APS relied on its teaching staff to provide its chosen reading curriculum for dyslexic students, SPIRE. APS also claimed that D.A. benefitted from reading instruction made available to all students through the iReady computer software program. Although D.A. also struggled with

[1] These facts are drawn from the DPHO's findings of fact.

writing due to his dyslexia, APS did not create writing-related goals or writing-specific interventions in D.A.'s IEPs.

D.A. continued to struggle with basic reading and writing from the third through the sixth grades. Due to D.A.'s lack of progress, Parents found a certified dyslexia therapist to work with D.A. outside of school from 2017 through 2020. Nonetheless, D.A.'s struggles intensified when he made the transition to middle school in the sixth grade, and the schools turned remote due to the Covid-19 pandemic. Much of D.A.'s school-conducted testing on reading level over the years was not reliable because the teachers conducting the tests often read to him, invalidating the results. Based on the limited valid test results, D.A. remained at approximately a first-grade reading level from the third through the sixth grades, despite a strong oral vocabulary and good word comprehension.

C. Procedural Background

Frustrated by D.A.'s lack of progress and APS's unwillingness to provide one-on-one instruction or dyslexia therapists to work with D.A., Parents filed a request for a Due Process Hearing with the Local Educational Agency—the New Mexico Public Education Department. A DPHO conducted a five-day hearing and, as relevant to this appeal, considered (1) "whether any of the actions and inactions of APS denied [D.A.] a free and appropriate public education ("FAPE")," and (2) "[w]hether [D.A.] is entitled to equitable remedy and what that remedy should be." *Id.* at 15. The DPHO ultimately determined that APS had denied D.A. a FAPE and D.A. was entitled to an equitable remedy.

In fashioning an equitable remedy for D.A., the DPHO noted she was skeptical of APS's ability to determine an appropriate remedy for D.A. when the school district had failed to provide D.A. a FAPE over the last three years. The DPHO also noted that because D.A. had been denied a FAPE for several years, he would now need a more intensive intervention to make up for the lost time. *Id.* As an equitable remedy, the DPHO ordered APS to:

> provide [D.A.] 1/1 daily reading instruction during the school day (in place of an elective and for 60 minutes daily, 5 days per week) at the school campus (or remotely if campuses are closed due to public health orders) from a Certified Academic Language Therapist ("CALT") or dyslexia therapy-level trained instructor . . . . The selected contractor or employee must be acceptable to [Parents]. The selected contractor or employee will be given authority by APS to select a reading instruction curriculum specific to dyslexia therapy (e.g., Sounds and Syllables or Wilson Reading) for a student of D.A.'s severity and age; with such reading instruction to continue through [D.A.'s] APS education until completion of the program whether that be in two school years or more, and at APS's expense; and with such reading instruction to also be available for [D.A.] each summer beginning with summer 2021; with attendance of the selected contractor or employee at all IEP meetings.

Id. at 68.

APS filed a complaint in the United States District Court for the District of New Mexico seeking judicial review of the DPHO's decision. In the complaint, APS argued that "the DPHO erred in finding that [Parents] have me[t] their burden of proof that [APS] deprived D.A. of a free appropriate public education." *Id.* at 10. APS argued the DPHO's factual findings and legal conclusions supporting her determination that D.A. was denied a FAPE were erroneous. Parents responded, asking the district court to "uphold the decision of the [DPHO] and deny APS's

appeal." *Id.* at 74. In its brief before the district court, APS raised five arguments: (1) Parents failed to meet their burden of proof before the DPHO; (2) the DPHO erred in her application of the preponderance of the evidence standard; (3) the DPHO erred in determining APS failed to provide D.A. with a FAPE; (4) the DPHO erred in her FAPE determination by not recognizing APS's discretion in choice of methodology; and (5) the DPHO erred by not recognizing APS's affirmative defense based on D.A.'s attendance issues.

The district court rejected these arguments, affirming the DPHO's decision. Specifically, the district court agreed with the DPHO that (1) Parents had met their burden to "prove that D.A.'s teachers failed to provide SPIRE instruction, or any reading instruction, with fidelity," *id.* at 157 (quoting App. at 52), and (2) "APS failed to ensure that [D.A.'s] teachers had the professional training, professional development, and oversight throughout the school year, to ensure that they had the capacity to provide the instruction [D.A.] required to enable him to make progress appropriate in light of his circumstances," *id.* at 162–63 (quoting App. at 56). The district court also rejected APS's arguments based on D.A.'s attendance, "declin[ing] to release the school from its responsibility to provide a FAPE to a student whose disability makes it particularly challenging or frustrating for him to attend his online courses regularly." *Id.* at 167. The district court determined APS had denied D.A. a FAPE, stating "[t]he education that APS provided to D.A., with all its irregularities, lack of access to appropriate technology, untrained instructors, and lack of fidelity to the SPIRE program, [wa]s not 'reasonably calculated to enable [him] to make

progress appropriate in light of [his] circumstances."' *Id.* at 171 (quoting *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017)). The district court concluded its opinion by "affirm[ing] DPHO's ultimate conclusions on each issue as well as the DPHO's decision regarding a remedy." *Id.* at 173.

APS timely filed a notice of appeal.

II. DISCUSSION

APS appeals the district court's decision affirming the DPHO's decision and selection of remedy. But APS presents an entirely new argument on appeal. APS accepts the district court's determination that APS denied D.A. a FAPE and instead argues the DPHO abused her discretion in fashioning an equitable remedy. *See* Appellant's Br. at 16. Parents contend APS waived any challenge to the remedy selected by the DPHO, and affirmed by the district court, by not challenging the remedy before the district court.[2] In its reply brief, APS counters that it "has at all

[2] The Council of Parent Advocates and Attorneys ("COPAA") filed a motion seeking leave to submit an amicus brief in support of Parents, which this court's motions panel provisionally granted. *See* COPAA's Motion for Leave to File Amicus Brief, *Albuquerque Pub. Schs. Bd. Of Educ. v. Armstrong*, No. 22-8004. Federal Rule of Appellate Procedure 29 provides that "amicus curiae [other than the government] may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Fed. R. App. P. 29(a)(2). Here, APS does not consent to the filing. Accordingly, COPAA may file its brief only by leave of this court. The Tenth Circuit has granted motions for leave to file amicus briefs when the motions comply with Federal Rule of Appellate Procedure 29, the brief provides the court with useful information, and the "briefing is relevant to the disposition of the case." *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1176 (10th Cir. 2021). COPAA's amicus brief complies with Federal Rule of Appellate Procedure 29, but it is not useful to the resolution of this case because the brief addresses the merits of APS's arguments, which we do not reach. Accordingly, we deny COPAA's motion for leave to file the amicus brief.

times challenged the [DPHO's] decision as being overly broad and unsupported by the facts and the law," and merely "finely tuned" its argument on appeal. Reply at 2.

When an appellant raises an argument for the first time on appeal, we deem it "waived" if the argument "was intentionally relinquished or abandoned in the district court," and deem it "forfeited" "if the theory simply wasn't raised before the district court." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011). A party preserves an issue for appeal when the party "alert[s] the district court to the issue and seek[s] a ruling—a party does not preserve an issue merely by presenting it to the district court in a vague and ambiguous manner, or by making a fleeting contention before the district court." *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1206 (10th Cir. 2022) (brackets, ellipses, and internal quotation marks omitted). A party cannot preserve an argument for appeal by "rais[ing] [it] in the District Court in a perfunctory and underdeveloped manner." *In re Rumsey Land Co.*, LLC, 944 F.3d 1259, 1271 (10th Cir. 2019) (quotation marks omitted).

Waived arguments are not considered at all on appeal, and this court "will reverse a district court's judgment on the basis of a forfeited theory only if failing to do so would entrench a plainly erroneous result." *Richison*, 634 F.3d at 1128. "If an appellant does not explain how its forfeited arguments survive the plain error standard, it effectively waives those arguments on appeal." *In re Rumsey Land Co.*, LLC, 944 F.3d at 1271; *see also Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1201 (10th Cir. 2021) ("When the appellant fails to argue for plain error, we consider the theory waived and not entitled to review."); *Richison*, 634 F.3d at 1131 ("[F]ailure to

argue for plain error and its application on appeal—surely marks the end of the road for an argument for reversal not first presented to the district court.").

APS (1) forfeited its remedy argument by not raising the argument before the district court and (2) subsequently waived it by failing to argue for plain error on appeal. In its complaint before the district court, APS challenged the DPHO's conclusions of law and some associated findings of fact—not her chosen remedy. Specifically, APS challenged several of the DPHO's conclusions that APS failed to provide D.A. with a FAPE at various points in his education. The closest APS came to disputing the DPHO's chosen remedy in its complaint was its allegation stating:

> In paragraph 101, the DPHO erred in finding that [APS] failed to design and implement a strategy to provide the student with FAPE and to remedy this, [APS] must hire additional personnel to provide services to the student. This conclusion of law includes erroneous and conclusory statements not supported by the evidence.

App. at 12. Although APS disputed this one conclusion of law related to the chosen remedy in its complaint, APS did not allege that the DPHO abused her discretion in crafting the remedy or suggest any alternative remedy for the denial of a FAPE. Tellingly, in the prayer for relief section of the complaint, APS sought "revers[al] of the DPHO's Decision insofar as the DPHO granted Petitioners relief" and "[a] declaratory judgment holding that [APS] did not deprive D.A. of a free appropriate public education for any time relevant hereto and in particular the time period covered by the complaint." *Id.* Beyond arguing the DPHO's decision should be reversed entirely, APS did not challenge any specific aspects of the remedy. *Id.*

APS's briefing before the district court also included no arguments disputing the remedy selected by the DPHO. As Parents note on appeal, APS did not even use the word "remedy" in either of its briefs before the district court. Instead, APS argued (1) Parents failed to meet their burden of proof before the DPHO; (2) the DPHO erred in its application of the preponderance of the evidence standard; (3) the DPHO erred in determining APS failed to provide D.A. with a FAPE; (4) the DPHO erred in its FAPE determination by not recognizing APS's discretion in choice of methodology; and (5) the DPHO erred by not recognizing APS's affirmative defense based on D.A.'s attendance issues. Not surprisingly, the district court's opinion and order affirming the DPHO's decision addressed these five arguments but included no analysis of the DPHO's chosen remedy.

Further, Parents' brief on appeal made APS aware of this preservation issue. But in APS's reply brief, it did not identify any place in the record where APS "alert[ed] the district court to the issue and [sought] a ruling." *GeoMetWatch Corp.*, 38 F.4th at 1206. APS claims to have raised its remedy argument throughout these proceedings, but tellingly does not support that claim with any citations to the record. According to APS, "[it] has finely tuned its appeal to address those specific portions of the remedy which it finds to be outside of the applicable law and regulations." Reply at 2. But APS cannot finely tune its appeal by raising an issue on appeal that it did not present to the district court. Before the district court, APS argued only that the DPHO's determination that APS denied D.A. a FAPE should be reversed, causing there to be no remedy at all. This "vague, arguable reference[]" to the remedy issue

was not sufficient to preserve the argument for appeal. *See In re Rumsey Land Co.*, LLC, 944 F.3d at 1271.

Despite raising the remedy issue for the first time on appeal, APS made no plain error argument in either its opening or reply brief. Accordingly, APS has waived its argument challenging the DPHO's remedy decision by failing to argue for plain error review on appeal. *See id.* ("If an appellant does not explain how its forfeited arguments survive the plain error standard, it effectively waives those arguments on appeal."). Because this is the only argument APS raises on appeal, we affirm the district court's decision without reaching the merits.

III. CONCLUSION

We AFFIRM the district court's order and judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge