tests, and bars further relevant evidence related to adaptive function.

Presentation of evidence of adaptive function was not barred in *O'Neal*, and ultimately this decision may be unaffected by *Hall*. Regardless, the *Hall* holding raises the question of what weight should be given to an IQ score that falls within the standard error of measurement of a threshold score, similar to the question raised in *O'Neal*. The *Hall* case means that future hearings about *Atkins* eligibility in marginal cases are likely to be contested, with experts disagreeing about both IQ scores and adaptive functioning.

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Misdiagnosed Learning Disability and the Individuals with Disabilities Education Act

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Student Sues School District Alleging Failure to Assure Proper Diagnosis and Discrimination after an Earlier Diagnosed Learning Disability Is Later Found to be Erroneous

In *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248 (3rd Cir. 2013), a student (S.H.) was judged by the school district to have a learning disability, but the decision was later found to be erroneous. The student, through her mother, filed suit against the Lower Merion (Pennsylvania) School District (hereafter, School District), alleging violations of the Individuals with Disabilities Education Act (IDEA), § 504 of the Rehabilitation Act (RA), and § 202 of the Americans with Disabilities Act (ADA). S.H. alleged that the School District violated its duty to ensure that S.H. was properly assessed as not disabled and sought compensatory education under the IDEA and compensatory damages under the RA and ADA.

Facts of the Case

S.H. began receiving Title I services (instruction made available through the federally funded Elementary and Secondary Education Act Title I intended to provide assistance to students who do not meet state academic standards) through the Lower Merion School District to improve academic performance in the first grade. In the fourth grade, S.H.'s mother, Ms. Durrell, consented for two evaluations to determine S.H.'s eligibility and need for special education services. The school counselor finished the evaluation for special education services at the beginning of S.H.'s fifth-grade year, determined that S.H. had a learning disability in reading and math, and recommended special instruction. Although S.H. voiced her unhappiness with the disability designation and stated she that did not belong in special education, Ms. Durrell signed the evaluation reports, indicating agreement with the recommendations.

In the seventh grade, Ms. Durrell sent an e-mail to the School District requesting individual instruction with a reading specialist for S.H. In the eighth grade, due to special education requirements, S.H. did not have time to take science and Spanish. Before ninth grade, the School District sent Ms. Durrell a list of suggested classes for S.H. Although Ms. Durrell had the option of picking different classes, she elected not to do so. Toward the end of S.H.'s ninth grade year, the School District, with Ms. Durrell's consent, issued an evaluation, which indicated that S.H. had a learning disability and still needed special education in reading and math. Ms. Durrell requested, when S.H. was in the 10th grade, that the School District remove S.H. from the instructional support lab (ISL) and place her in study hall. The School District made that change within two days. That same month, Ms. Durrell requested by e-mail that additional individual instruction be given to S.H., which the School District provided. Later the same month (November 2009), Ms. Durrell filed a Due Process Complaint Notice in which she requested an Independent Education Evaluation (IEE) for S.H. The IEE, which was completed in S.H.'s 10th-grade year (January 2010), revealed that S.H.'s IQ was 100. The report also stated that data used in the 2004 report did not support the School District's conclusion that S.H. had a learning disability. According to the 2010 report, the designation of S.H. as having a learning disability was erroneous. In April 2010, the School District removed S.H. from special education, and she received no special education in her junior and senior years.

In November 2010, S.H. filed suit in federal district court with three claims: under IDEA, the School District had violated its duty to ensure that S.H. was properly evaluated and assessed as not disabled; the School District discriminated against S.H. under § 504 of the Rehabilitation Act (guarantees rights to people with disabilities receiving federal assistance or in federal programs); and the School District discriminated against S.H. under § 202 of the ADA (guarantees rights to people with disabilities receiving state assistance or in state programs) by erroneously identifying her as a child with a disability. S.H. alleged that receipt of special education services damaged her self-confidence, hindered her academic progress, and prevented her from participating in certain regular-curriculum classes.

The district court granted the School District's motion to dismiss the first claim, reasoning that because S.H. asserted that she was not disabled, she could not, for pleading purposes, be "a 'child with a disability' and thus cannot seek relief under the IDEA."

The district court granted summary judgment in the School District's favor on claims two and three. The court held that S.H. must show evidence of intentional discrimination on the part of the School District, to seek compensatory damages under the RA and ADA, but S.H. had produced no such evidence.

S.H. filed an appeal.

Ruling and Reasoning

The U.S. Court of Appeals for the Third Circuit affirmed the District Court's dismissal of claim one, agreeing that because S.H. asserted that she was not disabled, she could not seek relief under IDEA.

The court noted that the plain language of IDEA did not provide protection for children who are mistakenly identified as disabled. The IDEA guarantees "procedural safeguards with respect to the provision of a free appropriate public education" to "children with disabilities and their parents" (20 U.S.C. § 1415(a); *S.H.*, p 257). The court found no indication that the term "child with a disability" includes children who are mistakenly identified as having a developmental disability.

Although S.H. pointed to the Findings section of the IDEA and to a House Committee report, both of which acknowledged the problem of misidentification of disability in minority students, the court held that legislative history has never been permitted to override the plain meaning of a statute. The court said, "The law is what Congress enacts, not what its members say on the floor" (quoting *Szehinskyj v. Att'y Gen.*, 432 F.3d 253 (3rd Cir. 2005), p 256). The court also noted that "legislative history may be referenced only if the statutory language is written without a plain meaning, i.e., if the statutory language is ambiguous" (quoting *Byrd v. Shannon*, 715 F.3d 117 (3rd Cir. 2013), p 123).

The court also rejected S.H.'s argument that IDEA's "Child Find" requirement permitted the lawsuit, noting that the Child Find provision imposes a duty on the school to identify "children with disabilities." As the duty is to "children with disabilities", S.H., who admits she has no disability, cannot make a claim under IDEA.

The U.S. Court of Appeals affirmed the district court's grant of summary judgment in the School District's favor as to the other two (RA and ADA) claims, agreeing that appellants are required to show intentional discrimination to prevail on these claims, but S.H. provided no such evidence.

The court held that the standard of deliberate indifference applies in showing intentional discrimination as to the RA and ADA claims. To satisfy the deliberate indifference standard, appellants must show: "1) knowledge that a federally protected right is substantially likely to be violated [i.e., knowledge that S.H. was likely not disabled and therefore should not have been in special education] and 2) *failure to act* despite that knowledge" (*S.H.*, p 265, emphasis in original). The court noted, "deliberate indifference must be a 'deliberate choice, rather than negligence or bureaucratic inaction'" (*S.H.*, p 262, quoting two previous cases).

S.H. asserted that she gave notice to the school district that it was likely that she was not disabled. She stated that she gave notice when she voiced her unhappiness with her disability designation. The court, however, rejected her argument, holding that "the relevant inquiry is knowledge, and evidence that the School District may have been wrong about S.H.'s diagnosis is not evidence that the School District had knowledge that it was a wrong diagnosis" (*S.H.*, p 265). The court noted that the School District immediately removed S.H. from special education following the evaluation in 2010, indicating that S.H. had no disability. The court found that S.H. presented no evidence that created a genuine dispute as to whether the School District knew, before the evaluation in 2010, that its judgement that S.H. had a learning disability had been a misdiagnosis.

Discussion

The standard of deliberate indifference was first introduced in *Estelle v. Gamble*, 429 U.S. 97 (1976), with the degree of intent defined by *Farmer v. Brennan*, 511 U.S. 825 (1994), as subjective rather than objective. Applying this subjective standard, courts consider what defendants know rather than what they should have known. In *Estelle v. Gamble* and *Farmer v. Brennan*, the Supreme Court, through the application of this standard of deliberate indifference, supported the autonomy and decision-making capacity of prison officials.

In this case of first impression, the appeals court provided important legal precedent in support of school districts. Matters of determining learning disabilities and whether the disability qualifies a child for special education services can be complex. With changing criteria for disabilities, changing regulations, and changes in a child's development, a child can qualify for special education at one point, but not later, and *vice versa*. In *S.H.*, the court provided support to school districts in its ruling that children who are later found to be without a disability cannot use the IDEA against school districts that relied on assessments that found a disability. By using this standard of deliberate indifference, the court supported the autonomy and decision-making capacity of the School District, much in the way the Court supported the prisons in *Estelle v. Gamble* and *Farmer v. Brennan*.

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Court-Ordered Psychiatric Examination Versus a Criminal Defendant's Fifth Amendment Rights

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When a Defendant Raises a Diminished-Capacity Defense, His Fifth Amendment Privilege Against Self-Incrimination Is Not Violated When the State Introduces Rebuttal Expert Testimony Obtained From His Court-Ordered Mental Evaluation

Scott Cheever was tried and convicted of capital murder and received a death sentence. During his trial in state court, and over his objection, the state introduced rebuttal testimony derived from his prior federal court-ordered evaluation. Mr. Cheever appealed the conviction, arguing that such testimony violated his Fifth Amendment right against self-incrimination. His appeal prevailed in the Kansas Supreme Court, and the state appealed to the U.S. Supreme Court, which reversed the state supreme court in *Kansas v. Cheever*, 134 S. Ct. 596 (2013). The issue before the Court was whether a defendant's affirmative defense of diminished capacity opens the door to expert rebuttal testimony derived from a previous court-ordered psychiatric evaluation.

Facts of the Case

On January 19, 2005, Mr. Cheever was at an acquaintance's residence cooking and smoking methamphetamine. Tipped off that authorities were on the way, Mr. Cheever and an acquaintance hid in the upstairs of the house. As Sheriff Matthew Samuels walked up the stairs, searching the home, Mr. Cheever shot him twice. Mr. Cheever then fired at other officers who attempted to assist the fallen officer.

Mr. Cheever was charged in state court with capital murder, and initial trial proceedings began. At about that same time, the Kansas Supreme Court struck down the state's death penalty statute in *State v. Marsh*, 102 P.3d 445 (Kan. 2004). State proceedings were suspended without prejudice, new federal death-penalty–eligible charges were filed, and trial proceedings began in the federal district court. Mr. Cheever announced a defense of diminished capacity based on his intoxication and chronic use of drugs. The federal district court judge ordered a mental health evaluation, which was conducted by a court-appointed psychiatrist, Dr. Michael Welner, who spent 5 ½ hours interviewing Mr. Cheever.

After the trial began in federal district court, it was halted by the illness of the defense attorney. Around the same time, the U.S. Supreme Court reversed the Kansas Supreme Court's prior *Marsh* decision and held that the state's death penalty statute was consti-