

WINTER 2013 NEWSLETTER

SCHOOL LAW UPDATE

by John D. Husted

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

1. *R.P. v. Alamo Heights Independent School District*, No. 11-50956, 2012 U.S. App. LEXIS 26452 (5th Cir. December 27, 2012)

For a student's claim that a school district failed to provide a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA), even if a school district failed to provide a sufficiently individualized "Individualized Education Program" (IEP), so long as the student received an overall educational benefit when all relevant factors are evaluated together, the student received a FAPE.

R.P., a student at Alamo Heights School District, was essentially non-verbal, so a variety of communication methods, including sign language and voice communication devices ("assistive technology"), were used at school to help her communicate. When R.P.'s Admissions, Review, and Dismissal (ARD) committee convened during R.P.'s third grade year, the School District failed to discuss or incorporate a required assistive technology assessment into her IEP because school personnel did not timely complete a required assistive technology evaluation. As such, R.P. was not issued her own voice device. R.P., by and through her parents, brought suit alleging that she was denied a FAPE for various reasons, including because the School District delayed in providing R.P. with an assistive technology device.

The Court stated that whether a student demonstrates positive academic and non-academic benefits is one of the most critical factors when analyzing whether the substantive requirements for a student's IEP are met, and achieving one's maximum educational potential is not what is required by law. Considering all of the facts in light of the *Michael F.* factors for analyzing whether a student receives a FAPE, the Court held that R.P. demonstrated positive academic and non-academic benefits from her IEP. Therefore, even though the School District's handling of the assistive technology assessment was not optimum, when all relevant factors were evaluated together, R.P. received a FAPE.

2. *Dixon v. Alcorn County School District*, No. 12-60515, 2012 U.S. App. LEXIS 24885 (5th Cir. December 4, 2012) (unpublished)

The Fifth Circuit continued to decline to adopt the "state-created danger" theory for substantive due process claims. The Court dismissed the student's claims against the School District under the "state-created danger" theory where the student was physically attacked by a mentally disabled classmate at school and the school district failed to remove the mentally disabled child from the classroom despite his history of troubling and aggressive behavior. The Court declined

to adopt the state-created danger theory as other Circuits have, but noted that even in light of the typical state-created danger factors, the student's case would not succeed.

TEXAS COURT OF APPEALS

***1. Ysleta Independent School District v. Franco*, No. 08-12-00061-CV, 2012 Tex. App. LEXIS 10727 (Tex. App. – El Paso December 27, 2012, pet. filed)**

Under the Texas Whistleblower Act, an employee's reporting of an asbestos hazard to the School District's superintendent and trustees may survive a plea to the jurisdiction if there is sufficient evidence that the employee had an objectively reasonable belief that the superintendent and trustees were authorized to regulate under or enforce the Asbestos Act, even if in fact they were not.

Franco was a principal of a pre-kindergarten school when he reported asbestos hazards in his school to District officials, including the superintendent and trustees. Slightly more than two months later, Franco was suspended. He then sued the School District pursuant to the Texas Whistleblower Act. The District filed a plea to the jurisdiction asserting that Franco's claims were barred by sovereign immunity because he failed to meet the necessary jurisdictional fact of reporting the violation to an "appropriate law enforcement authority." The District asserted that it was not charged with the authority to regulate, enforce, investigate, or prosecute the Asbestos Act.

The Court, however, concluded that Franco produced sufficient evidence of his good faith belief that the District superintendent and trustees were authorized to regulate under or enforce the Asbestos Act and that his belief was reasonable in light of his training and experience.