SUMMER 2013 NEWSLETTER

Special Education Case Law Update

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FIFTH CIRCUIT COURT OF APPEALS

1. *Mann v. La. High Sch. Athletic Ass'n*, No 12-30961, 2013 U.S. App. LEXIS 14084 (5th Cir. July 11, 2013).

A student who qualifies as disabled under the Individuals with Disabilities in Education Act does not necessarily qualify as disabled under the Americans with Disabilities Act. The ADA includes a more stringent requirement: that the plaintiff prove that his impairment substantially limits a major life activity.

A student diagnosed with an anxiety disorder sought a preliminary injunction based on his likelihood of success with respect to a claim under the Americans with Disabilities Act. In order to establish that he is disabled under the ADA, the student needed to show that he had a physical or mental impairment that substantially limits one or more major life activities. The student had not argued that his anxiety disorder qualified as a disability under the ADA, relying instead on the definition of disability in the Individuals with Disabilities Education Act. The Court explained that the scope of the ADA and IDEA and their respective definitions of disability differ, and it stated that the ADA definition of disability is more stringent due to its requirement that a plaintiff prove that his impairment substantially limits a major life activity, an inquiry not required by the IDEA definition.

The Court did not accept the student's doctor's conclusory assertion that the student's anxiety disorder met the criteria for a disability under the ADA because it substantially limits his life activities of learning, concentrating, thinking, and working. Instead, the Court required further analysis or articulation of the particular way that the student is substantially limited in any of those major life activities due to his anxiety disorder.

2. *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513 (5th Cir. 2013), *vacated and withdrawn*, No. 11-51067, 2013 U.S. App. LEXIS 11102 (June 3, 2013).

School districts should be aware that there is considerable confusion in the Fifth Circuit regarding the proper standards to apply to disability discrimination claims brought by students under Section 504 of the Rehabilitation Act.

Stewart, a disabled high school student, sought recovery from the school district under Section 504 of the Rehabilitation Act, claiming that she had been repeatedly sexually abused by another student at school. Stewart argued that her disability-related student-on-student sexual harassment claim should be analyzed like a Title IX claim,

given the similarity in language between Title IX and Section 504. Under such an analysis, Stewart argued, the school district should be held liable for demonstrating deliberate indifference to the sexual assaults she experienced at school. Additionally, Stewart claimed that the school district grossly mismanaged her IEP and failed to provide her with necessary accommodations to keep her safe from sexual assault at school. The school district brought a motion to dismiss Stewart's claims, which was granted by the district court.

On appeal, the Fifth Circuit panel indicated that a Title IX type analysis appears consonant with the bad-faith and gross-misjudgment standard found under Section 504, and also comports with the high standard applied in the context of a state actor's liability for constitutional claims based on third-party harms, but they stated that they need not decide the viability of such a cause of action, because Stewart had failed to allege facts sufficient to state a claim for deliberate indifference by the school district. The court affirmed the dismissal of Stewart's claim under this theory of liability.

However, with respect to whether the school district refused to provide Stewart with reasonable accommodations, the panel concluded that "a school district refuses reasonable accommodations under § 504 when it fails to exercise professional judgment in response to changing circumstances or new information, even if the district has already provided an accommodation based on an initial exercise of such judgment." The majority then explained that the gross misjudgment standard, which they equated with gross negligence, applies to a school district's refusal to make reasonable accommodations. Judge Higginbotham strongly dissented from this portion of the panel's decision, stating that it defies precedent and that deliberate indifference, bad faith, and gross misjudgment rest upon substantially identical levels of culpability.

The court also addressed questions about administrative exhaustion for Section 504 claims. The majority declined to decide whether administrative exhaustion under IDEA was jurisdictional because they held that Stewart's claims under Section 504 sought relief that was not available under IDEA, and therefore her claims were not subject to administrative exhaustion. The majority counseled that courts should look to the plaintiff's prayer for relief in determining whether exhaustion applies. Because Stewart sought money damages for past and future pain and suffering, as well as medical expenses, relief not available under IDEA, Stewart's claims under Section 504 were not subject to the exhaustion requirement. Judge Higginbotham strongly dissented from this portion of the panel's decision, as well, arguing that at the heart of Stewart's claims is a dispute over the content and implementation of her IEPs and stating that Stewart's failure to exhaust her administrative remedies under IDEA should bar her from seeking money damages under Section 504.

The school district filed a petition for rehearing and for rehearing en banc, asking the Fifth Circuit to rehear the decision on the gross misjudgment claim. On June 3, 2013, the panel withdrew and vacated its decision and remanded the case to the district court, noting, "Stewart's § 504 claim presents difficult questions that, in our view, should not be reached unless necessary. The district court did not address whether Stewart's claim was

barred by any alleged failure to exhaust or as untimely, defenses that may be dispositive of the entire matter."

3. *Alief Indep. Sch. Dist. v. C.C.*, No. 12-20628, 2013 U.S. App. LEXIS 6748 (5th Cir. April 3, 2013).

In a claim under the IDEA in which the hearing officer ruled in favor of the school district, but rejected the school district's request for attorney's fees, the parents are not "prevailing parties" who are entitled to recover their own attorney's fees against the school district.

The parents of a special education student brought an administrative complaint against the district alleging violations of IDEA. Although the hearing officer ruled in favor of the district with respect to the parents' complaint, the court rejected the school district's request for attorneys' fees. The parents then sought to recover their attorneys' fees, arguing that they had become a prevailing party under IDEA by successfully defending against the school district's request for attorneys' fees.

The court explained that under the IDEA, a prevailing party is one that attains a remedy that both alters the legal relationship between the school district and the student and fosters the purposes of IDEA. To become a prevailing party, a party need not have succeeded on every issue, but must have won on some significant issue and have achieved some of the benefit the party sought in brining suit. A party must obtain some relief on the merits of its claim, not just a technical victory, in order to become a prevailing party under IDEA.

The court dismissed the parents claim, holding that successfully refuting the school district's claim for attorneys' fees was not a benefit that the parents sought in bringing suit, did not constitute relief on the merits, and did not cause the parents to become prevailing parties under IDEA.

TEXAS DISTRICT COURTS

1. *Turner v. Houston Indep. Sch. Dist.*, No. H-13-0867, 2013 U.S. Dist. LEXIS 93152 (S.D. Tex. July 3, 2013).

A five year old girl with cerebral palsy, Ebonie King, alleged that she had been assaulted on a school bus by another student. Ebonie sued the school district claiming violations of state and federal law, including claims under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Although the school district assigned an aide to accompany Ebonie on the school bus, Ebonie alleges that the aide failed to ensure her safety.

The court granted the school district's motion to dismiss finding that Ebonie did not alleged discrimination on the basis of her disability and that she did not allege that she was excluded from or denied benefits because of her disability.

2. *C.L. v. Leander Indep. Sch. Dist.*, No. A-12-CA-589, 2013 U.S. Dist. LEXIS 78621, W.D. Tex. June 4, 2013).

***C.L. v. Leander Indep. Sch. Dist.*, No. A-12-CA-589, 2013 U.S. Dist. LEXIS 102585, W.D. Tex. July 23, 2013).**

C.L., a disabled student, brought suit under Section 504 of the Rehabilitation Act alleging that the school district failed to provide him with an appropriate environment in which to obtain an education due to repeated incidents of peer harassment and bullying. C.L.'s parents were dissatisfied with the outcomes of three ARD meetings, and unilaterally removed C.L. and placed him in a private school. C.L.'s claims under IDEA were settled through mediation and were not part of this lawsuit.

Initially, relying on *Stewart v. Waco Indep. Sch. Dist*., the magistrate recommended that the court deny the school district's motion to dismiss C.L.'s Section 504 claim because C.L. pled that the school district knew of his disabilities but failed to investigate disability-based discrimination and harassment complaints or to take appropriate and effective remedial measures once notice of the harassment was provided to school authorities. C.L. therefore raised a question as to whether the district had acted with gross misjudgment with respect to the student. The opinion contained no analysis of how the alleged bullying or harassment was based on C.L.'s disabilities.

After the Fifth Circuit vacated and remanded *Stewart*, the magistrate issued a supplemental report regarding C.L.'s Section 504 claim. The magistrate acknowledged that there is room for disagreement regarding the proper standard to apply to C.L.'s claim, recognizing that the appropriate standard may be gross misjudgment or deliberate indifference. The magistrate chose to apply the gross misjudgment standard, and did so using the same definition and application of this standard as he had used in the report he issued prior to learning that the *Stewart* decision had been withdrawn. The magistrate again recommended that the court deny the district's motion to dismiss C.L.'s Section 504 claim. Again, the opinion contains no analysis of how the alleged bullying or harassment was based on C.L.'s disabilities.

3. *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978, 2013 U.S. Dist. LEXIS 63350 (W.D. Tex. May 3, 2013).

M.J., a disabled student, brought suit under Section 504 of the Rehabilitation Act claiming that he was subject to disability-based bullying and harassment which the school district failed to remedy, in violation of M.J.'s right to a FAPE under Section 504. M.J. also claimed that the school district failed to develop an IEP commensurate with his unique educational needs, in violation of Section 504.

The court applied a Title IX type analysis to M.J.'s claim of disability-based peer harassment and found a genuine question of material fact concerning whether the school district acted with deliberate indifference because M.J. presented evidence that one of his

teachers failed on numerous occasions to respond to M.J.'s complaints that he was bullied in her classroom. The court made reference to the Fifth Circuit's reasoning in *Stewart*, but held that the question of whether a Title IX type analysis should apply in these circumstances was a matter of first impression.

With respect to M.J.'s IEP claim, the court relied on the Fifth Circuit's decisions in *Stewart* and in *D.A. v. Houston Indep. Sch. Dist*., 629 F.3d 450, 455 (5th Cir. 2010), to hold that a school district may be liable under Section 504 for exercising gross misjudgment in managing a disabled student's IEP. Following the majority opinion in *Stewart*, the court also held that, because M.J. sought relief not available under IDEA, including monetary damages for physical and mental pain in the past, he need not have exhausted his administrative remedies with respect to such claims.