

## **SPRING 2014 NEWSLETTER**

### **Special Education Case Law Update**

by Laura O'Leary

#### **FIFTH CIRCUIT COURT OF APPEALS**

***Estate of Lance v. Lewisville Indep. Sch. Dist.*, No. 12-41139, 2014 U.S. App. LEXIS 3863 (5th Cir. Feb. 28, 2014).**

A plaintiff who receives special education services must, as a threshold matter, demonstrate a denial of a free, appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”) in order to recover under Section 504 of the Rehabilitation Act on the basis of a failure to provide necessary educational services. A deliberate indifference standard may be applied to measure a school district’s liability for a claim of disability discrimination under Section 504 alleging peer harassment or bullying. School districts are afforded flexibility in responding to students’ behavior and may tailor their responses to the circumstances.

Additionally, a plaintiff bringing a constitutional claim, under 42 U.S.C. Section 1983, based on peer harassment or based on a student’s suicide must establish a special relationship between the school district and the student such that the school was required to ensure the student’s safety from private actors. The Court declined, once again, to recognize a cause of action under Section 1983 based on a state-created danger theory.

Montana Lance, a fourth grade special education student, took his own life in a restroom at school. His parents brought suit against the District alleging that the school failed to provide necessary educational services to Montana and that Montana had been the victim of peer harassment and bullying at school. The Court analyzed the Lances’ claims under Section 504 as falling into two categories: a claim for failure to provide a FAPE and a claim of disability discrimination based on peer harassment and found that the District was entitled to judgment. The Court also found that the District was entitled to judgment under the Lances’ claims under Section 1983.

#### **The “failure to provide” claim under Section 504.**

With respect to the “failure to provide” claim, the Lances were required to show that the District *refused* to provide reasonable accommodations for Montana to receive the full benefits of the school program. Because Montana was a special education student, at a minimum, the Lances were required to allege a denial of a FAPE under IDEA in order to sustain a Section 504 claim based on the denial of a Section 504 FAPE because Section 504 regulations state that adopting a valid Individual Education Plan (“IEP”) is sufficient, but not necessary, to satisfy the Section 504 FAPE requirements.

The Lances were unable to sustain their Section 504 FAPE claim because the

District implemented an IEP for Montana in accordance with IDEA, and the Lances consented to the design and implementation of Montana's IEP. Mr. and Ms. Lance's signatures on ARD documentation and their agreement with the IEP goals played an important role in the Court's decision, as did ARD documentation from teachers demonstrating Montana's improvement as evidence that he was provided meaningful access to education under Section 504.

The peer harassment claim under Section 504.

The Court applied a deliberate indifference analysis derived from *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999), a Supreme Court case involving student-on-student sexual harassment. The Court set out the elements a plaintiff must show to establish a peer harassment claim in the Section 504 setting: 1) the plaintiff was an individual with a disability; 2) he was harassed based on his disability; 3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment; 4) defendant knew about the harassment; and 5) defendant was deliberately indifferent to the harassment.

Section 504 does not require schools to eradicate each instance of bullying from their hallways, and the deliberate indifference inquiry does not transform every school disciplinary decision into a jury question. The Court noted that, "[j]udges make poor vice principals," and that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." School districts are afforded flexibility in responding to unacceptable student behavior and may tailor their responses to the circumstances. However, if a school district consciously avoids confronting harassment or responds to harassment in another clearly unreasonable manner, such as by implementing pretextual or knowingly ineffective interventions, it may be found to have discriminated against the harassed student.

The Court found that Lewisville ISD responded to bullying incidents involving Montana in a manner that precludes a finding of deliberate indifference because the District investigated reported incidents, punished the students involved, responded to other incidents involving Montana, and promoted his relationship with other students. The Court emphasized that the District's appropriate anti-bullying policies and provision of employee training regarding bullying and harassment in schools supported a finding that the District's responses to Montana's alleged peer harassment was not clearly unreasonable.

Because the record showed a pattern of active responses by Lewisville ISD to incidents involving Montana, no discriminatory intent against Montana and his disability could be imputed to the District, and summary judgment in the District's favor was appropriate.

The Lances' claims under Section 1983.

The Court rejected the Lances' argument that they created an issue as to whether

the District caused Montana to be subjected to a deprivation of his rights under Section 1983, explaining that such a claim would require the Lances to show a special relationship between the District and the student such that the school was required to ensure the student's safety from private actors. The Court held that no such special relationship existed in this case, so the Lances cannot make a constitutional claim under Section 1983 based on peer harassment or Montana's suicide.

Additionally, the Court reiterated that it has never adopted a state-created danger theory and declined to do so in the circumstances of this case. A state-created danger theory would require evidence that defendants used their authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff. In this context, deliberate indifference means that the environment created by the defendant is dangerous, the defendant knows it is dangerous, and the defendant used its authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.

With respect to the Lances' bullying allegations, the Court held that the District did not create an opportunity that would not otherwise have existed or take any action that made Montana more likely to be bullied. Instead, the evidence shows that the District attempted to alleviate tensions between Montana and other students.

As to Montana's suicide, the Court held that no evidence established that the District knew that Montana's suicide was imminent, and, therefore, the evidence does not demonstrate that the District knew about an immediate danger to Montana's safety. Additionally, the Lances cannot show that the District created a dangerous environment for Montana, and there was nothing to suggest that the District affirmatively increased the chance that he would commit suicide.

For a link to the full opinion, please [click here](#).

## **TEXAS DISTRICT COURTS**

***MM. v. Plano Indep. Sch. Dist.*, No. 4:12-CV-204, 2014 U.S. Dist. LEXIS 36277 (E.D. Tex. March 19, 2014).**

A remand to a special education hearing officer does not constitute a decision on the merits and, therefore, does not create prevailing party status to enable recovery of attorneys' fees. A private settlement agreement also does not create prevailing party status because it does not entail judicial approval or oversight.

Plaintiffs requested a due process hearing to determine whether the District had failed to provide their child with a FAPE under IDEA. The special education hearing officer determined that it lacked jurisdiction to hear the claim and dismissed the complaint. Plaintiffs appealed the dismissal to the district court, which held that the hearing officer did have jurisdiction to hear Plaintiffs' claims. The Court remanded the case for a determination on the merits of the Plaintiffs' IDEA claim. Plaintiffs then

moved for attorneys' fees, claiming prevailing party status on the basis of the Court's remand of the case to the hearing officer.

The Court denied the Plaintiffs' motion for fees, explaining that in order to be a prevailing party entitled to attorneys' fees under IDEA, the relief obtained must be a judgment on the merits, a consent decree, or some similar form of judicially sanctioned relief. To be a prevailing party, a party must attain both a remedy that alters the legal relationship between the parties and fosters the IDEA's purposes, and some judicial imprimatur on a material alteration of the legal relationship between the parties.

Plaintiffs argued further that they were entitled to attorneys' fees under IDEA because the parties had entered into a private settlement agreement addressing Plaintiffs' concerns. The Court rejected this argument, explaining that private settlement agreements are not enough to justify an award of attorney fees under the IDEA. Instead, a litigant must attain some judicial imprimatur on a material alteration of the legal relationship in order to be a prevailing party.

In this case, the Court ordered Plaintiffs' counsel to pay limited attorneys' fees to the District's counsel as a sanction for misrepresenting to the Court, the content of the private settlement agreement.

***Dawn G. v. Mabank Indep. Sch. Dist.*, No. 3:13-CV-135-L, 2014 U.S. Dist. LEXIS 47824 (N.D. Tex. April 7, 2014).**

A special education hearing officer may award relief without finding a denial of FAPE. A hearing officer's order of relief that was not sought by the Plaintiffs did not constitute relief on the merits sufficient to establish prevailing party status to support an award of attorneys' fees under IDEA.

Plaintiffs requested a due process hearing to determine whether the District had failed to provide their child with a FAPE under IDEA. The special education hearing officer determined that the student was not denied a FAPE, but nevertheless ordered the District to take additional actions to assess and address the student's behavioral issues stemming from his disability. Plaintiffs sought an award of attorneys' fees based on the hearing officer's decision, and the District appealed certain aspects of the decision.

The Court found that, despite procedural defects, the student had not been denied a FAPE. However, the Court also held that the hearing officer did not err in ordering certain relief because denial of a FAPE is not necessary to an award of relief.

The Court reviewed the standard for determining prevailing party status to support an award of attorneys' fees under IDEA, noting that 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 the IDEA. Although a party need not prevail on every issue, a plaintiff must receive at least some relief on the merits of his claim. In the present case, the type of relief ordered by the hearing officer was inconsistent with the

relief Plaintiffs requested. The Court held that the Plaintiffs are not prevailing parties under IDEA because the relief awarded was not a benefit that Plaintiffs sought and, therefore, does not qualify as relief on the merits.