WINTER 2015 NEWSLETTER

Special Education Case Law Update

by Laura O'Leary

FIFTH CIRCUIT COURT OF APPEALS

***Fort Bend Indep. Sch. Dist. v. Douglas A.*, No. 14-20101, 2015 U.S. App. LEXIS 1866 (5th Cir. February 5, 2015).**

A residential placement is appropriate under IDEA, and therefore subject to reimbursement by the school district, only if it is essential in order for the disabled child to receive a meaningful educational benefit and is primarily oriented toward enabling the child to obtain an education. Two factors are crucial in determining whether a residential placement is appropriate: 1) whether the child was placed at the facility for educational reasons; and 2) whether the child's progress at the facility is primarily judged by educational achievement.

The Fifth Circuit overturned a decision by the Southern District of Texas granting reimbursement for private residential placement of a student with ADHD and Emotional Disturbance because the district court improperly applied the relevant factors for determining whether the residential placement was appropriate. The school district was aware that the student, Z.A., smoked marijuana and had attempted suicide when he was in eighth grade. The school district provided the student with an IEP that included positive reinforcement, a behavior management plan, and meetings with the school psychologist. Z.A.'s parents unilaterally withdrew him during the first grading period of his ninth grade year due to a mental health and substance abuse emergency. Z.A.'s parents unilaterally placed the student in a private residential mental health facility. The Fifth Circuit found that the parents had not met their burden of proving that Z.A.'s private placement was appropriate under IDEA.

The Fifth Circuit explained that the question of whether a student is placed at a residential facility for educational reasons concerns the motivation of the person making the placement. IDEA aims to ensure that children receive an education, but it does not shift the costs of treating a child's disability to the school district. Whether a child in a residential facility will receive educational benefit is irrelevant if those educational benefits are incidental to the reasons for placing the student. Additionally, the court must consider whether the child's progress at the facility is judged primarily by educational achievement rather than disability treatment. Unless the child is placed at the facility primarily for educational reasons, the placement is not appropriate under IDEA and is not subject to reimbursement by the school district.

TEXAS DISTRICT COURTS

***T.C. v. Lewisville Indep. Sch. Dist.*, No. 4:13-CV-186, 2015 U.S. Dist. LEXIS 4191(E.D. Tex. January 14, 2015).**

A plaintiff may offer additional evidence in the form of rebuttal testimony by an expert witness when appealing a decision of a special education hearing officer if the expert witness was not available to provide such testimony at the administrative hearing.

The court acknowledged that, although the plain language of the IDEA directs courts to hear additional evidence at the request of a party, the Fifth Circuit has yet to address what constitutes "additional evidence" in this context. District courts in Texas and the majority of circuit courts permit a judge to exercise discretion and limit or disallow testimony from witnesses who did, or who could have, testified in the administrative hearing. This is necessary to prevent administrative hearings from becoming mere dress-rehearsals for subsequent civil trials in the district court.

The majority of courts permit parties to supplement the record with additional evidence addressing gaps in the administrative transcript due to: mechanical failure; unavailability of a witness; improper exclusion of evidence by a hearing officer; and evidence concerning relevant events subsequent to the administrative hearing.

In this case, because counsel for the plaintiff, as an officer of the court, represented that the expert witness had not been available to provide rebuttal testimony during the administrative hearing, the court permitted the plaintiff to supplement the record with rebuttal testimony from this witness.

***C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist.*, No. 4:14-CV-646-A, 2015 U.S. Dist. LEXIS 2615 (N. D. Tex. Janaury 8, 2015).**

A student's transfer to an alternative education program does not violate a Fourteenth Amendment interest. Additionally, a student who offers only allegations that school district personnel treated him badly does not state a claim under Section 504 of the Rehabilitation Act.

A student, C.C., who was diagnosed with ADHD was sent to a disciplinary alternative education program ("DAEP") after he took and published a photograph of another student sitting on the toilet in a school bathroom stall. The victim's family pressed felony charges against C.C., and, after conducting a manifestation determination review, the school district assigned C.C. to DAEP for an extended period. The court dismissed the student's lawsuit, including claims for alleged violation of his due process rights and for alleged violation of Section 504.

Although the parties agreed that a student has a property interest in receiving a public education and that this property interest is protected by the Fourteenth Amendment, the court explained that, "'a student's transfer to an alternate education

program does not deny access to public education and therefore does not violate a Fourteenth Amendment interest.'" *Id.* at *9 (quoting *Harris ex rel. Harris v. Pontotoc County Sch. Dist.*, 635 F.3d 685, 690 (5th Cir. 2011)). Additionally, because C.C. offered only conclusory allegations regarding any connection between the school district's actions and his disability, C.C. failed to state a claim for disability discrimination under Section 504.