SPRING 2015 NEWSLETTER

SPECIAL EDUCATION CASE LAW UPDATE

by Laura O'Leary

CIRCUIT COURTS OF APPEALS

***R.B. v. New York City Dep't of Educ*., No. 14-1405-cv, 2015 WL 1244298 (2nd Cir. March 19, 2015).**

The IDEA provides parents the opportunity to participate in the decision about a child's placement, but this applies only to the type of services to be provided and does not permit the parents to object to a student's placement at a particular school. Additionally, the requirement that a student be educated in the least restrictive environment applies only to the classroom setting, not to the level of additional support a student receives within an educational placement.

The parents of an autistic student challenged the student's assignment to a specific school and to a classroom with a two-to-one ratio of students to adults. The court rejected the parents' contention that they were denied meaningful participation in the selection of the school their child would attend, explaining that the IDEA only guarantees parents the opportunity to participate in decisions about a student's "educational placement," which refers to the general educational program including the classes, individual attention, and supplementary services the child is to receive, not the specific school building to which the student is assigned.

The court also rejected the parents' argument that their student was not being educated in the least restrictive environment because the school district provided too much support for him. The court explained that LRE applies only to the type of placement, not to the additional support a student receives within that placement. Because the parents had agreed with the school district's recommended placement for their son, the additional support provided by a paraprofessional did not deny their son the least restrictive environment.

***Laura A. v. Limestone County Bd. of Educ*., No. 14-12892, 2015 WL 1898416 (11th Cir. April 28, 2015).**

A parent seeking relief under Section 504 of the Rehabilitation Act must exhaust remedies under the IDEA before seeking relief in federal court.

The student's next-friend requested a due process hearing challenging the school district's determination that the student was no longer eligible for special education services. Because the student's only mention of Section 504 in this complaint was a comment that the school district found the student eligible for services under Section 504,

the due process hearing did not encompass any claims under Section 504. Consequently, the student did not exhaust her administrative remedies with respect to her Section 504 claims, and summary judgment was properly granted to the school district. The court explained that, whether claims are brought pursuant to the IDEA, the ADA, Section 504, or the Constitution, they must first be exhausted in state administrative proceedings because "it would subvert the purposes of the exhaustion requirement to allow exhaustion of an IDEA claim to also suffice for a Rehabilitation Act claim seeking some of the same relief, when the claims have different elements, the proof required under both statutes is different, and the Rehabilitation Act claim was not addressed at all during the administrative proceedings." *Id*. at *2.

TEXAS DISTRICT COURTS

***Z.H. v. Lewisville Indep. Sch. Dist.*, No. 4:12-cv-775, 2015 WL 1384442 (E.D. Tex. March 24, 2015)**.

Evidence of a subsequent diagnosis of autism was not relevant to the determination of whether a student had been provided with FAPE under IDEA before he was diagnosed as autistic.

A student who received special education services on the basis of a diagnosis of ADHD and emotional disturbance did not show that he was denied a FAPE merely because he was not initially diagnosed with autism. The student's IEP was reasonably calculated to enable the student to receive educations benefits, even if the school district later acknowledged a different label for the student's impairments. Because the student demonstrated strong academic progress and progress on his non-academic goals, he was not denied a FAPE. The court noted that, "while parties may disagree over the diagnosis of a student's disability, the IDEA charges the school with developing an appropriate education, **not with coming up with a proper label with which to describe the child**." *Id*. at *12 (emphasis in original) (citations omitted).

After the student was found to have created a "shooting list" including the names of some of his classmates, the school conducted a manifestation determination review, determined that the student's behavior was not a manifestation of his disabilities, and assigned the student to a disciplinary alternative education program for 35 days. The special education hearing officer determined that the student's conduct was a manifestation of his disabilities, and the school district challenged this decision in the district court. The court granted the school district judgment on this point because the school district had provided evidence to support the decision of its manifestation determination review committee, and because the student had not provided evidentiary citations to support the special education hearing officer's contrary decision. The court emphasized the narrow role of the judiciary in special education lawsuits and the deference properly accorded to decisions of educational professionals by noting that "[t]he role of the judiciary is not to second-guess the decisions of school officials or to substitute their plans for the education of disabled students with the court's." *Id*. at *20 (citations omitted).

The court granted judgment for the school district.

***Ripple v. Marble Falls Indep. Sch. Dist.*, No. 1:12-CV-827-DAE, 2015 WL 1640554 (W.D. Tex. March 27, 2015).**

Claims for violations of the "child find" provisions of the Rehabilitation Act and for violations of the ADA's requirements to provide disabled students with reasonable accommodations and modifications in programs are both subject to the IDEA's exhaustion requirements. A student who waits until after graduation to bring such claims against the school district cannot rely upon the futility exception to the IDEA's exhaustion requirements, because the student's own conduct prevented the school district from addressing the student's educational concerns.

However, a student's claims under Section 504 and the ADA alleging that the school district discriminated against him by failing to keep him safe from harm and provide him an environment that was not injurious to his physical well-being are not the type of claims addressable under the IDEA and are not subject to exhaustion under IDEA.

Two years after he graduated, a former high school football player who had suffered concussions during his high school years and who had received home bound services for two extended periods due to surgeries unrelated to the concussions, filed suit against the school district claiming violations of Section 504 and the ADA including failure to comply with Section 504's "child find" requirements, failure to provide reasonable accommodations and modifications, and failure to keep him safe from harm and provide him an environment that was not injurious to his physical well-being. The court found the plaintiff's "child find" and accommodations claims barred for failure to exhaust administrative remedies because Plaintiff never sought a due process hearing on these issues.

The court addressed the plaintiff's claims regarding his physical safety under the framework of disability discrimination under Section 504 which required, in part, that the plaintiff show that the school district excluded him from participation in, or denied him its benefits, services, programs, or activities, or otherwise discriminated against him. In order to prove this, the plaintiff needed to show that the school district intentionally discriminated against him by presenting facts that create an inference of bad faith or gross professional misjudgment. On the fact presented, which included annual statements from the plaintiff's doctors clearing him to play football, decisions by the coaching staff to keep plaintiff from continuing to play in games in which he had been injured, and provision of appropriate water breaks, plaintiff was unable to establish intentional discrimination.

The court granted the school district's motion for summary judgment.

REPORT OF THE OFFICE FOR CIVIL RIGHTS

The Office for Civil Rights ("OCR") of the U.S. Department of Education recently issued a report to the President and the Secretary of Education entitled "Protecting Civil Rights, Advancing Equity." This report reviews the actions of the OCR during the 2013-2014 fiscal year. The report can be found at http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf.

In the report, the OCR provides a review of its recent efforts to address the rights of students with disabilities. OCR received more than 9,500 complaints alleging violations of disability laws during the 2013-2014 fiscal year and initiated 17 compliance reviews related to disability issues. The issues most frequently raised in disability complaints involved FAPE, retaliation, different treatment/exclusion/denial of benefits, academic adjustments, and disability harassment.

In the context of disabled students, the OCR appears most concerned about issues involving discipline, provision of FAPE, equal access to educational opportunities, and academic adjustments for post-secondary students.

The OCR remains highly sensitive to disparities in school discipline which, based on the 2011-2012 Civil Rights Data Collection, negatively impact students with disabilities. The OCR addressed discipline of disabled students in complaints and compliance reviews in more than 400 school districts and 48 states during the relevant period. Resolution agreements in this area emphasize the provision of manifestation determination reviews prior to assigning discipline to disabled students.