2015 YEAR IN REVIEW

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

***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.

This case was further developed in

***C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist*., No. 4:14-CV-1042-A, 2015 WL 2443835 (N.D. Tex. May 21, 2015).**

An ARD committee which has made a negative finding in a special education student's manifestation determination need not consider subsequent evidence that the county's Juvenile Justice Authority declined to prosecute the student for the conduct that led to the manifestation determination.

After the student was sent to DAEP, C.C. and his parents filed a request for a due process hearing, arguing that the ARD committee should have adjusted CC's IEP and DAEP placement after the school district was informed that the Tarrant County Juvenile Justice Authority ("TCJJA") has declined to prosecute C.C. for taking the photographs of his classmate. The Court found that information concerning the TCJJA's decision not to prosecute was not relevant to any decision that the ARD committee made, as it was not

within the scope of the ARD committee's duties to determine whether C.C. had engaged in conduct on campus that was a felony.

Additionally, C.C. challenged the school district's provision of a Free Appropriate Public Education ("FAPE") on several bases, including failure to provide C.C. with education in the least restrictive environment, due to his 60 day placement in DAEP, and failure to demonstrate academic and non-academic benefits. The Court upheld the SEHO's decisions in favor of the school district on these issues as well, explaining that C.C. offered no authority to support his proposition that the IDEA contemplates a less stringent disciplinary placement than would otherwise be warranted. The Court noted that, to the contrary, the IDEA itself expressly authorizes school districts to apply its disciplinary procedures in the same manner and for the same duration as they are applied to students without disabilities, as long as the manifestation determination was negative. As to the provision of academic and non-academic benefits, the Court noted that C.C.'s IEP had only been in effect for three weeks before his parents unilaterally removed him from the school. Because the school provided one data point demonstrating improvement in academic functioning during that period and because the SEHO made a factual finding that C.C. had received non-academic benefit from the four meetings he had with the behavior interventionist during that period, C.C. failed to meet his burden of proving that his IEP was deficient and that he had failed to receive a FAPE.

***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.