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THE DUTY OF CARE AND DELIBERATE INDIFFERENCE: POLICY IMPLICATIONS FOR SPECIAL EDUCATION

Overview

At times it is necessary for local school boards and administrators to make decisions mandated by federal and/or state law where the law itself is not clear—thus increasing the likelihood of future legal action being taken. One such body of law is special education, especially involving the mandates of both *IDEA 2004* (20 U.S.C., 1400, et seq.) and *Section 504 of the Rehabilitation Act of 1973* (29 U.S.C. 794). However, as case law demonstrates, courts have consistently held that the official acts of public school boards and administrators are initially presumed lawful—*i.e.*, are initiated and carried out in good faith. The burden of proof rests on the “party seeking relief” to prove otherwise. *Schaffer v. Weast* (2005)

Clear Mandates. As special education law moved into the late-1990s and early-2000s some mandates became clear. For example, but not limited to: (1) no disability is so severe as to keep any student from accessing a free appropriate public education (FAPE) in the least restrictive environment (LRE), (2) no student covered by special education law shall be either denied, or excluded from, or completely cut off from necessary related services, (3) procedural safeguards must be strictly followed when a change in program and/or placement (as included in a stay put IEP) is being considered, (4) students with disabilities must be integrated not separated from their general education student peers in the “mainstream of the school” to the maximum extent possible, and (5) substantive and procedural safeguards must be followed (*e.g.*, parental involvement, behavioral manifestation determination review conducted, behavioral improvement plan [BIP] developed) in non-emergency situations where a student’s behavior and safety to himself/herself or to others surfaces as a major concern.

Deliberate Indifference: What is it? There are three main areas of concern when providing for the safety and security of mainstreamed (integrated) students with disabilities with their age appropriate peers in general education settings. These areas of concern are: (1) placement in high risk classes (*e.g.*, physical education, vocational shops, and science laboratories), (2) participation in extracurricular activities and interscholastic athletics, and (3) placement in situations where

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bullying and/or taunting, or physical abuse by other students might occur (e.g., playground, cafeteria, bus loading areas, and the gymnasium).

While school officials, administrators, and teachers will not be judged as acting in bad faith simply because they failed to anticipate the outcome of an act, or acted out of ignorance, or mistake, or breached the standard of care owed students, *deliberate indifference* for violating or disregarding a student's constitutional or statutory rights, or in creating a potentially unsafe (dangerous) situation in which a student has been placed serve as a major reasons for courts holding school officials liable for their actions or failures to act. (Vacca and Boshier, 2012) *Deliberate indifference* in the public school context has been defined as a situation where: (1) a special relationship or duty of care exists to protect students from harm, (2) the harm is so severe and pervasive that it limits the student victim's ability to learn, (3) school officials have actual knowledge of either the potential for harm or actual harm, but (4) where school officials fail to take reasonable steps to remedy the situation. See, e.g., DeShaney v. Winnebago Department of Social Services (1989), Walton v. Alexander (5TH and Cir. 1994), and Davis v. Monroe Cty. Board of Education (1999) In my view deliberate indifference and gross negligence are very similar where, in my view, a degree of willfulness is found.

It is important to stress that the same elements of analysis are relevant and applied in situations involving students with educational disabilities—especially where the student is covered by IDEA and/or Section 504. (Vacca and Boshier, 2012) Recently I came across an interesting case on point involving a suit taken against a public school district by parents on behalf of their deceased fourth grade son. What makes this case even more relevant to today's school environment is that an element of bullying is present in the fact pattern.

Estate of Montana Lance v. Lewisville Independent School District (5th Cir. 2014)

Facts. A school district admission, review, and dismissal committee (ADR) had found that Montana Lance, a fourth grade student, qualified for special education services under IDEA (2004). The ADR said that he needed accommodations for a speech impediment (a "lisp"), and learning disability (ADHD). The ADR developed an Individualized Education Plan (IEP) and a Behavioral Improvement Plan (BIP) for Montana while he attended Stewart's Creek Elementary School where, beginning in kindergarten, he was provided with speech therapy, dyslexia services, and counseling.

When Montana was in the second grade his mother informed a teacher that "he was making verbal statements about hurting himself at home." Accordingly, the ADR requested that Montana undergo a full psychological evaluation. A psychologist reviewed the evaluation results and concluded that Montana should be identified as emotionally disturbed.

Two documented incidents revealed that Montana was involved in altercations with his peers at school. In one incident (December 18, 2009) involving physical contact with two other students, it was reported that Montana had been, physically picked up and "beat up." He called one of the students a "bully." Also, Montana "pulled out a pocket knife" during the fracas—he later explained, "I just pulled out my knife, but I didn't know it was there."

In response to the December incident Montana was placed in the Disciplinary Alternative Program (DAEP) for ten days. Montana's mother wrote a letter to the school principal in which she argued

that the ten days in DAEP was too harsh since he was “being bullied by other students and was fearful. The other students actually picked Montana off his feet.” She also wrote the school superintendent explaining that her son liked DAEP because “he has not experienced the hazing and bullying from other students in contrast to the experiences he has at his home campus [at Stewart’s Creek].” She also stated that she was concerned “that this is more of a reward for my child than a punishment.” Subsequently Montana’s stay in DAEP was reduced to eight days.

On January 4, 2010, Montana began his time in DAEP and he met with a school psychologist for counseling. On January 12, 2010, he told his DAEP teacher that “he wanted to kill himself.” A counselor met with Montana and also notified Mr. Lance of his son’s suicidal statements. The counselor also concluded that the “lethality” of Montana’s statements was low. Montana’s parents arranged a meeting with another psychologist who then met with Montana. This psychologist later testified that Montana “did not give any indication that he was intending to end his life.” On January 19, 2010, Montana returned the Stewart’s Creek Elementary School where, two days later, he and his classmates had another altercation. It occurred in the breakfast line at school when he was called a name. He “told the bullies to stop it, and he was shoved into the rods.” Montana “stormed off and sat by himself at an empty table.”

Later in the day a substitute teacher sent Montana and his classmates to the office for “talking and using profanity.” Montana met with an assistant principal. As required of all students Montana was allowed to use only the nurse’s bathroom. After he was in the bathroom for a significant amount of time the nurse checked on him. He responded that he would be right out. Soon thereafter he stopped responding to the nurse’s inquiries. Because the bathroom door was locked and the nurse did not have a key, a custodian was summoned. Because he did not have a key he opened the door with a screwdriver. Upon entering the bathroom the nurse and the custodian found Montana hanging by his belt—which was secured to a metal rod in the ceiling. Having no pulse Montana was pronounced dead upon arrival at the hospital.

Federal Court Action. Montana’s parents filed suit in federal district court against the school district. They claimed violations of 42 U.S.C 1983, Section 504 of the Rehabilitation Act of 1973, and Texas law. The school district moved for dismissal of the Lance’s Section 1983 claims and their claims for punitive damages. A magistrate judge recommended denying the school district’s motion to dismiss the Section 1983 claims based on “a special relationship theory,” but recommended dismissing the Lance’s Section 1983 claims based on a “state- created danger theory” and dismissing their claims for punitive damages. The district court accepted the report and recommendations.

The school district filed motions for summary judgment on the parents’ Section 504 claims and special-relationship based Section 1983 claims. The magistrate judge recommended, among other thing, granting the school district’s summary judgment motions. The district court overruled the parties’ objections and adopted the report and recommendations. Estate of Montana Lance v. Kyler (E.D. Tex. 2012) The Lances appealed to the United States Court of Appeals for the Fifth Circuit where they argued that they raised fact issues as to their Section 504 and Section 1983 claims.

Fifth Circuit Court Rationale. At the outset of the Fifth Circuit's *de novo* review the Court cited three sources of federal law implicated in appellants' disability claims. The sources of federal statutory law cited are: IDEA, the ADA (American with Disabilities Act), and Section 504—which the Court states “form a triptych in the school setting, guiding school administrators on how to best serve special-needs students.” The Court then focused on and discusses (citing relevant case law on each point) the requirements and similarities of both IDEA and Section 504 (*e.g.*, FAPE, establishing an IEP under IDEA is one method for a school district substantively satisfying Section 504, etc.), and differences in the two statutes (*e.g.*, each statute has a different definition of disability and of FAPE, and while some students may qualify for special services under both IDEA and Section 504, other students may qualify under Section 504 but not IDEA). Also, the Court emphasizes how IDEA requirements and coverage may be more restrictive than either the ADA or Section 504. “It is against this backdrop..., says the Fifth Circuit Court, “that the Lances invoke Section 504.”

In response to the Lances' first theory that the school district “acted with gross professional judgment by failing to provide Montana educational services necessary to satisfy [Section] 504's FAPE requirement,” the Court states that “[t]o prevail on this claim the Lances must show the School District ‘refused to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program.’” While the Lances concede that Montana qualified for special services under IDEA and the school district implemented an IEP, the Lances did not allege that Montana was denied FAPE under IDEA; instead, they argued that he was denied FAPE as defined by Section 504 regulations. Thus, said the Court, “they do not need to establish a violation of IDEA in order to show Montana was denied a FAPE under [Section] 504.” Following a detailed discussion and citing several relevant cases the Fifth Circuit concluded that the Lances could not sustain their Section 504 claim because the school district had procedurally and substantively developed and implemented a valid IEP under IDEA—including the fact that the Lances were involved in the process.

The Fifth Circuit then focused on the second Section 504 claim that the school district discriminated against Montana “because it was deliberately indifferent to the disability-based harassment that he suffered at the hands of his classmates.” Citing several cases on point, and applying the United States Supreme Court's student-on-student harassment standard of analysis articulated in Davis v. Monroe County Board of Education (1999), the Court carried out a detailed discussion of both the two documented incidents and other incidents involving allegations of bullying. In sum, said the Court, “school districts are afforded flexibility in responding to unacceptable behavior and may tailor their responses to the circumstances.” Here “[b]ecause the record evidences a pattern of active responses by the School District to incidents involving Montana, no such discriminatory intent against Montana and his disability may be imputed to the School District. Summary judgment is appropriate on this claim as well....”

In district court the Lances asserted three theories of Section 1983 liability which were: (1) “special relationship,” (2) “state-created danger,” and (3) “caused-to-be subjected.” However, on appeal they argued only theories (1) and (2) as issues of fact. Citing and quoting from DeShaney (1989) and Doe ex rel. Magee v. Covington County School District ex rel. Keys (5th Cir. 2012), the Fifth Circuit Court opined that “no special relationship exists in this case.” Regarding (2) the “state created danger” theory the Court stated that to succeed plaintiffs had to show that defendants used their authority to create a dangerous environment for plaintiff, and acted with deliberate

indifference to the plight of the plaintiff. In this case the evidence does not demonstrate that the school district knew about the immediate danger to Montana's safety and that it created a dangerous environment. At this point the Court relied on and quoted directly from Henjy v. Grand Saline I.S.D. (5th Cir. 2011) where it was concluded that "there was nothing to suggest that the School District affirmatively increased the chance" that the student would commit suicide.

The Fifth Circuit concluded that the Lances in their case could not make a constitutional claim based on student-on-student harassment or Montana's own suicide. Summary judgment on the section 1983 claim was appropriate.

Fifth Circuit Decision. Because the school district did not discriminate against Montana because of his disability nor deprive him of a constitutional right, the decision of the district court is affirmed.

Policy Implications

While Lance (2014) is but one decision from United States Court of Appeal for the Fifth Circuit, it nonetheless is both informative and instructive for local educational policy makers. First, it involves special education law and the relationship between IDEA (2004) and Section 504 (Rehabilitation Act of 1973). Second, it involves potential safety and security concerns associated with students with disabilities integrated (mainstreamed) into the general education setting—especially the standard of care owed and the question of deliberate indifference. Third, incidents of student-on-student bullying (harassment) are included in the fact sketch. Finally, the presence of 42 U.S.C. 1983 as a possible source of remedy within the context of special education law, on behalf of the estate of a diseased student, adds a unique and important dimension to this case.

What follow are some suggestions to consider as local policies are reevaluated and new ones drafted.

The Board must make it clear that:

- Where students are identified for and meet the eligibility requirements of special education, it is the intent of the school system to carry out the substantive and procedural mandates of federal and state special education law.
- Where the IEP team process determines that the appropriate and least restrictive environment for providing and implementing the individualized program of a student with educational disabilities is placement with age appropriate peers in the general education environment, reasonable accommodations will be made to see to it that the student will receive the full benefits of his/her program in a safe and secure environment.
- Bullying and/or any other form of harassing and harmful behavior are not tolerated on school property, including on school buses, and at any school sponsored or sanctioned activity.
- Where incidents of bullying and/or other harmful and/or dangerous conditions or behavior are reported directly to the school principal, immediate steps will be taken by the principal to investigate, halt, and remediate the situation.
- Parents of all students involved will be contacted and informed, and, where the situation warrants, parents will be actively involved in process and, where appropriate, in any disciplinary actions taken.

One final comment is in order. More than three decades ago my late research colleague and writing partner Professor H.C. Hudgins, Jr., and I published a book entitled, Liability of School Officials and School Administrators for Civil Rights Torts (The Michie Company, 1982). It was our intent in the 300-plus pages of that book to describe the potential and flexibility of 42 U.S.C 1983 (Civil Rights Act of 1871) as a potential source of remedy in situations involving employees and students in public school systems. While already found in employment-related cases, it was our prediction at the time that Section 1983 would become an often cited source of remedy in student-related cases. Among a growing number of cases, Estate of Montana Lance v. Lewisville Independent School District (5th Cir. 2014) adds to the body of evidence that our prediction was accurate.

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