No. 15-10556

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

C.C., Individually and b/n/f/ Kristi and Charles Cripps

Plaintiff - Appellant

v.

THE HURST-EULESS BEDFORD INDEPENDENT SCHOOL DISTRICT,

Defendants, Appellees

Appeal from the United States District Court
Northern District of Texas
Fort Worth Division
4:14-cv-01042-A

APPELLANTS' BRIEF

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

In compliance with Fed. R. App. P. 28.2.1 and Fifth Circuit Local Rule 28.2.1, Counsel notes the number and styling of this case, is as follows:

C.C., Plaintiffs, Appellants v. THE HURST-EULESS BEDFORD INDEPENDENT SCHOOL DISTRICT, Defendants, Appellees, No. 15-10556, IN THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

Further, and also in compliance with these rules, the undersigned counsel for Plaintiffs-Appellants certifies that they know of no other persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this particular case save for the parties noted in the style of this case and their counsel of record. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ - Martin J. Cirkiel
MARTIN J. CIRKIEL
Attorneys for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

C.C. by and through his parents, Charles Cripps and Kristie Cripps, requests Oral Argument and reasonably believes the decisional process would be significantly aided by oral argument, as otherwise contemplated by Fed R. App. P. 34(a)(1) and Fifth Circuit Local Rule 28.2.3.

Respectfully submitted,

/s/ - Martin J. Cirkiel
MARTIN J. CIRKIEL
Attorneys for Appellants- Plaintiffs

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I. STATEMENT OF JURISDICTION

1. This is an appeal by C.C., now Appellant in a civil case. C.C. first brought claims against the Defendant Hurst-Euless-Bedford Independent School District, now Appellee, with the Texas Education Agency alleging his rights pursuant to the *Individuals With Disabilities Education Act* ("IDEA"), 20 U.S.C. §1401 et seq., were violated by the School District. The case were heard by a Special Education Hearing Officer, who found for the School District on all of C.C.'s claims. C.C. appealed to the District Court, who has jurisdiction over such appeals, who affirmed.

2. C.C. filed his *Notice of Appeal*[1] in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure. This Court of Appeals has jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291 and Federal Rule of Appellate Procedure 4.

[1]. Pursuant to Local Rule 28.2.2, the record from the District Court Of The United States has been filed with this Court Of Appeals for the Fifth Circuit and will be cited as "ROA. at p. __ accordingly.

STATEMENT OF THE ISSUES

1. Did the District Court err when denying C.C.'s *Motion To Remand* the case back to the Texas Education Agency Hearing Officer?

2. Did the District Court err when refusing to hear additional evidence at the request of C.C.?

3. Did the District Court err when affirming the Hearing Officer's *Decision* that the Hurst-Euless-Bedford Independent School District, did not violate C.C.'s rights pursuant to the *Individuals With Disabilities Education Act*?

STATEMENT OF THE CASE

A. Procedural Resume

4. During the 2013 school year C.C. was a student with a disability pursuant to the *Individuals With Disabilities Education Act* ("IDEA"), 20 U.S.C. §1401 et seq. As such the School District had a duty to provide him a *Free Appropriate Public Education* ("FAPE") but C.C. believed they failed to do so. As such, he filed a *Request For A Due Process Hearing*, with the Texas Education Agency ("TEA"), asking that a Hearing Officer be appointed to hear his complaints. One was held and the Hearing Officer ruled in favor of the School District on all issues and that C.C. did in fact receive a FAPE from the School District. (ROA. 15-10556.20-54)

5. Shortly thereafter, C.C. discovered new evidence and filed a *Motion For A Rehearing.* The Hearing Officer refused to consider the issue, writing that he had no jurisdiction to do so (ROA. 15-10556.389).

6. C.C. filed an appeal to the Federal District Court, arguing the Hearing Officer erred when determining the School District had provided him a FAPE. He also appealed the jurisdictional issue on the *Rehearing*. C.C. also added claims that the School District had violated his civil rights pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as well as constitutional claims, against certain school officials, including Principal Hurbough and Vice Principal Emery ("the School District Defendants"). It was originally given cause number 4:14-cv-0046-A [and is now in Appeal 15-10098].

7. Early in the litigation C.C. filed a *Motion To Remand* the case back to the TEA Special Education Hearing Officer on this jurisdictional issue. The District Judge denied the request (ROA. 15-10098.3670).[2]

8. The Court considered a *Motion To Dismiss* by each School District Defendant on C.C.'s civil rights claims, and rather than rule on it, severed the IDEA Appeal from the civil rights claims (ROA. 15-10556.160).

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[2]. The severance created a procedural anomaly in that this *Remand* issue, remained with the civil rights case and not the IDEA case, where it was related. C.C. did not appeal it in

9. The IDEA Appeal was given cause number 4:14-cv-01042-A. On December 24th, Judge McBryde ordered C.C. to file a new Complaint, solely related to the appeal of the IDEA case, on this severed action (ROA. 15-10556.160-161).

10. On January 8, 2015 the District Judge denied all of C.C.'s constitutional and statutory claims in cause 4:14-cv-0046-A. That case has since been appealed in Cause No. 15-10098.

11. In regard to the IDEA appeal, C.C. asked that the Judge permit him to complete additional discovery. It was denied. (ROA. 15-10556.2412-2417)

12. The District Judge required C.C. to file a *Statement of Contentions* regarding his allegations as to how the Hearing Officer erred. Among other things, he argued that the Hearing Officer erred in a number of manner and particulars. First, that the District had failed to provide C.C. a *Free Appropriate Public Education* by failing to provide him academic benefit, by failing to provide him educational services in the least restrictive environment, by failing to develop and provide him educational services in a collaborative manner and overall, failed to provide him educational services commensurate with his unique and individualized needs. (ROA. 15-10556.2365). The District Judge denied C.C.'s appeal and affirmed the Hearing Officer on all claims. (ROA. 15-10556.2520).

13. C.C. has appealed the Judge's Order accordingly (ROA. 15-

10556.2557).

B. Factual Resume[3]

1. ABOUT C.C.

14. C.C. was born on April 6, 2000. He is the product of a pregnancy contemplated by toxemia, high blood pressure, Rh factor and placenta previa. He was born five (5) weeks prematurely after a labor of fourteen (14) hours and had some post-natal complications. His developmental milestones were affected such that he was slower than average for his physical and motor development (ROA. 15-10556.291, ¶32, 33).

15. That being said, C.C. did develop normally physically and intellectually, save for the behavioral issues. He plays football and had dreams of becoming a Navy Seal, and was already in a Sea Cadet program for youth. (ROA. 15-10556.84). He enjoys acting and music lessons, and was previously in a program called "Arts For Christ," (ROA. 15-10556.303, ¶90).

2. THE FALL OF 2012

16. The family and school officials met on September 18, 2012 and C.C. was deemed to be a student with a disability and eligible for what is termed "Section 504 Services." (ROA. 15-10556.291, ¶36).

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[3]. Plaintiffs substantially rely upon their *First Amended Complaint* [ROA. 146-180].

17. The District began to make a number of disciplinary referrals for what the family perceived as minor violations, with the focus on punishing C.C. rather than working with him to address his behaviors. (ROA. 15-10556.291, ¶34-38) On or about October 19th, the Cripps withdrew him from school (ROA. 15-10556.292, ¶38).

18. On November 12th, the parties met in mediation. The HEB ISD agreed to provide C.C. a *Full and Individual Evaluation* ("FIE") and have it completed by December 19th. The evaluation was to include a psychological assessment, an assistive technology assessment, a functional behavioral assessment, intellectual and achievement assessments (including writing), an occupational therapy assessment and a counseling assessment. (ROA. 15-10556.292, ¶40).

19. A meeting was held in mid-December over concern about C.C.'s grades and he was failing a number of classes. (ROA. 15-10556.83)

20. The District also agreed to provide an "Adult Mentor" for C.C. Further, the District agreed to provide the report within five (5) days of the *Admission, Review & Discharge Committee* meeting, then set for January 15, 2013. The District agreed not to consider any behavioral infractions during this assessment period. (ROA. 15-10556.292, ¶41).

21. The Mentor was not provided. Nor was the report completed by the agreed upon date or within five (5) days of the scheduled ARD Committee meeting,

as required by law. The family and their Advocate complained about these problems. C.C. continued to suffer educationally and continued to be written up for behavioral infractions. (ROA. 15-10556.294, ¶48, 49)

22. During this period, Lynn Parsons, the Educational Diagnostician completed a "Kaufman Assessment Battery for Children," which measures cognitive abilities. In his processing speed C.C. received a 59, which is in the lower end of processing, which indicates it is difficult for him to process information rapidly. He was thus deemed eligible for Special Education services, also as a student with a Learning Disability. (ROA. 15-10556.293, ¶47)

23. Due to the fact portions of the agreement were not being met in a timely manner, the ARD Committee meeting set for January 15, 2013, which was set to implement the educational and behavioral interventions was again set off. It was rescheduled for January 31, 2013. Later C.C. was also deemed eligible for Special Education services under the designation of *Other Health Impaired* due to having Attention Deficit Hyperactivity Disorder and problems in *Written Expression* (ROA. 15-10556.294, 50)

3. SCHOOL DISTRICT OFFICIALS BEGIN CONSPIRE AGAINST C.C.

24. During this period, C.C. continued to be written up for a number of rules infractions. (ROA. 15-10556.295, ¶52, 53, 54). C.C. reports being followed around

by the School Principal, Scott Hurbrough and that he would peer at him through the glass window, and lean on the door with exaggerated movements. He also reported being followed around campus, including the bathroom and counselor's office (ROA. 15-10556.1575-1576).

25. The ARD Committee re-convened on the 31st of January. The committee also learned that C.C. was experiencing significant Anxiety and decided to provide him social skills training, so as to better address the behavioral concerns. (ROA. 15-10556.295, ¶55, 56)

26. As early as February 5th, Mr. Emory, the Vice-Principal, began to contemplate holding an MDR (Manifestation Determination Review) for what he was planning. (ROA. 15-10556.296, ¶57).

27. On February 11th Mr. Emory, the Vice-Principal, met with C.C. regarding some referrals from the previous week. Apparently he had asked a girl in class "if she was making porn." The child's parents were contacted by Mr. Hurbough to see if they would like file charges against C.C. for a felony charge of sexual harassment, but they refused. (ROA. 15-10556.296, ¶59)

28. On the 14th C.C. expressed concern to his mother that he was being followed around school and into the bathroom. (ROA. 15-10556.296, ¶60; ROA. 15-10556.77).

29. On the 14th and during his science class with Coach Shackelford, Ms. Dee McNosky was standing at the rear of the class. When C.C. left his seat to get a pencil from the front desk but when he got there, he saw that there were no pencils available. He turned his back and started walking to another group of students seated at a table a couple of rows from his table. (ROA. 15-10556.296, ¶61)

30. Ms. McNosky told him to return to his seat and began walking towards him. She stepped directly and abruptly into his path so he veered to one side to avoid making contact with her. At this time she again moved directly into his path and he again veered in the other direction. They repeated this movement at least once more as they continued walking, she towards C.C. and he towards the group of students. (ROA. 15-10556.296, ¶61; 15-10556.297, ¶62-64)

31. This happened very quickly and McNosky surprised C.C. by moving into his path when they were so close. C.C. thought he had avoided colliding with her but her last move into his path occurred when they were too close to each other to avoid contact. C.C. reports he was surprised because she had stepped into his path before but not when they were too close to each other to avoid contact. In fact, two or three days earlier she did the same thing to C.C. in another classroom. That time C.C. reports they were far enough apart that they did not collide when she stepped into his path. Except for the distance, the situation was the same as the one mentioned above.

C.C. would change direction to avoid colliding with her and she would purposefully change direction to block his path. There is nothing in the educational record provided any reason as to why McNosky was in Shackleford's class. (ROA. 15-10556.296, ¶61; 15-10556.297, ¶62-64)

32. On or about this same date C.C. told his therapist that he overheard two teachers commenting, when they say him tapping a pen against a wall, that now they "...could get him for destroying public property." (ROA. 15-10556.297, ¶65)

33. On February 19th, 2012 Ms. Bowen, the keyboarding teacher, reported that C.C. was yelling across the room at a student named A.T., that his penis was so small that you couldn't even see it. When Emery investigated the issue, he spoke with A.T.'s parents about the comment and attempted to get them also to file charges against C.C. for felony charges of sexual harassment. They refused. (ROA. 15-10556.297, ¶66)

34. Also that day C.C. was seen bumping into another student's chair, leaning over its side, grunting loudly and belching in a student's face. Emery characterized this incident as one of sexual harassment also. It was during these investigations that Emery learned that about a week before, C.C. had photographed a student in a restroom, around the 14th. (ROA. 15-10556.297, ¶66; 15-10556.298, ¶67)

35. C.C. was later charged with assault with the contact by McNosky, which she filed as two separate Class C Misdemeanors. One of the alleged incidents occurred on February 14, 2012 and the other on February 20, 2012. Nevertheless, both tickets were written on March 12, 2012, well after the incidents in question. (ROA. 15-10556.298, ¶67). Later the family was told that McNosky was the Mentor who was supposed help C.C. not file criminal charges against him (ROA. 15-10556.80-81). The local courts did not prosecute these charges. (ROA. 15-10556.74)

36. Hurbough also approached Mrs. Cripps during this period and told her that C.C. had licked his own finger and put it in another students ear (known as a "wet-willie") and said that another child's parent may be pressing charges against C.C. for sexual assault for "exchange of bodily fluids." CITE

4. THE PICTURES IN THE BATHROOM INCIDENT

37. On February 21st, Assistant Vice-Principal Emery began investigating the allegation that C.C. had called out in class that another male student had a small penis, as one of sexual harassment. During this inquiry the complaining student also told Emery that a friend of his had witnessed a photo on C.C.'s phone of another student, R.L. while he was in the F-Wing boys bathroom. (ROA. 15-10556.283, ¶1; ROA. 15-10556.298, ¶68)

38. Emery initiated an investigation into this allegation and took a number

of statements. R.L. is known to C.C. and others as someone who often does crazy and funny things at school. On at least one occasion he was seen "mooning people." In fact that was why he and another student N. followed R.L. into the bathroom on that day, especially since R.L. had a "goofy smile" and was moving fast. When R.L. laughed C.C. took it as a signal that R.L. was going to do something funny. And in fact he did. R.L. went past two empty stalls with doors that were closed and maintained a person's privacy and proceeded to enter the third stall, which had no door at all and was open for anyone to see. R.L. giggled again, as he entered the stall, signaling to C.C. once again that something funny was about to happen. R.L. took his pants down in front of C.C. and N. (ROA. 15-10556.283, ¶1; ROA. 15-10556.284, ¶2)

39. When C.C. and N. followed R.L. to the open stall, R.L. continued to laugh and make exaggerated noises and gestures to both of them. Both he and N. took pictures of R.L. and in fact R.L. never told them not to. In fact during the taking of the pictures R.L. continued to laugh as well and even struck a pose with his palms up while making a funny face. He also had a smirk on his face like he wanted attention. N. and R.L. looked at the picture on C.C.'s phone and R.L. kept on laughing. In fact, he said "Look a this! and he held up toilet paper smeared with poop" and waved it around for all to see. N. , R.L. and C.C. all "groaned and laughed"

Not surprisingly, C.C. thought the picture he took was funny. (ROA. 15-10556.284, ¶3)

40. In his written statement, R.L. wrote that C.C. took a picture of him while in the bathroom and that he asked him not to show anybody, which aside from N. who as present and also took pictures, he did not. The other boys who were there also thought it too was funny that R.L. used a toilet without a door, and one boy reportedly even laughed about it, as had R.L., N. and C.C. (ROA. 15-10556.284, ¶4)

41. Nevertheless and notwithstanding significant evidence otherwise, Emery wrote on the 20th that at the time of his inquiry he determined that C.C. did not have R.L. 's consent to take the pictures. Further that C.C. intended to invade his privacy "by sharing the photos with other students, including the victim's girlfriend, which he actually did" (which was not true). At the conclusion of the investigation, he submitted the results to R.L.'s girlfriend and the pictures to Mr. Hurbough and determined that the taking of the pictures in the bathroom were a Title V Felony warranting suspension from school. (ROA. 15-10556.285, ¶5)

42. On the next day, February 21st, the School Resource Officer Eberling completed a report based upon the information received from Emory. It included portions of three witness statements and basically reiterated what Emery reported, though she confirmed that only one student in the bathroom saw any pictures, and not

students, as Emery wrote and especially not the girlfriend. Importantly, it did include at least part of C.C.'s side of the story, where C.C. stated he only took the pictures because there were "several students telling him to take the pictures, so he did. (ROA. 15-10556.285, ¶6-7)

43. Emery spoke to R.L.'s father in an effort to get him to file charges against C.C. and he did file a police report. On the 26th Officer Ripley with the local law enforcement, reviewed the case and pursuant to Section 15.27 of the Texas Code of Criminal Procedure, a notification letter was sent to the school that C.C.'s case had been referred to the Tarrant County Juvenile Probation Department (TCJPD) for a felony. (ROA. 15-10556.285, ¶8)

44. C.C. was removed from school on February 21. (ROA. 15-10556.77)

5. THE MANIFESTATION DETERMINATION REVIEW HEARING

45. On March 4th Emery convened a specialized type of Committee meeting called a "Manifestation Determination Review" (MDR). The intent is to determine whether or not the behaviors that got C.C. in trouble were caused by or had a direct and substantial relationship to his behavioral issues and disability. The Committee found that it did not and C.C. was removed from school and placed in a *Disciplinary Alternative Educational Placement* ("DAEP") for 60 days. (ROA. 15-10556.285, ¶9)

46. On March 8th, C.C. visited the Tarrant County Juvenile Justice Authority

(TCJJA) with his attorney and family, regarding the felony. C.C. is walked through a security area and was searched. (ROA. 15-10556.299, ¶75)

47. As noted above, McNosky charged C.C. with assault by contact by McNosky on March 12th, well after the alleged events of February 14th and 20th. Plaintiffs reasonably believe this action was directed by Hurbough and Emery. (ROA. 15-10556.299, ¶74).

6. THE INVESTIGATION IS RE-OPENED

48. On March 21st Emery reports he began a follow up investigation pertaining to new evidence that another student was in the bathroom at the same time as C.C. who also took pictures of R.L. One student interviewed reported that they did in fact see another student besides C.C., use a camera and take a picture of R.L. while sitting on the toilet. Three out of six students also reported they thought it was funny that R.L. would use a bathroom stall without a door. One student reported that he too saw R.L. wipe himself and then held up his toilet paper smeared with poop, to show everyone. Notwithstanding the above Emery held firm on his decision that C.C. invaded R.L.'s privacy and that R.L. did not provide consent for C.C. to take any pictures. CITE

49. In and around April 4th, the Tarrant County Juvenile Justice authority refused to prosecute the case and sent an email was sent to the School District's

attorney shortly thereafter. Further, the prosecuting attorney for Tarrant County sent to the school district, notice of same within two days of the refusal pursuant to Section 15.27(g) of the Texas Code of Criminal Procedure. Importantly, Mr. Cripps spoke with Ms. Riek, the Special Education Director at the school, about the charges being dropped, as well. This information is shared with school officials (ROA. 15-10556.286, ¶11; ROA. 15-10556.299, ¶76).

50. In regard to C.C.'s grades in Speech for the first six weeks he received a 100, for the second a 90 and for the third a 57, with a 70 on his semester exam. For Math, the first six weeks he received a 70, for the second a 51 and for the third a 52, with a 68 for the semester exam. For Science, the first six weeks he received a 66, for the second a 86 and for the third a 70 with a 63 for the semester exam. For History, the first six weeks he received a 77, for the second a 50 and for the third a 62 but did get a 82 for the semester exam. For English, the first six weeks he received a 63, for the second a 93 and for the third a 85 but only got a 50 for the semester exam. (ROA. 15-10556.1030). By the time he was removed from school his grades for the time period he was there were 81 in Speech, 59 in Math, 72 in Science, 66 in History and 70 in English (ROA. 15-10556.1032).

7. THE PERIOD AFTER C.C. WAS REMOVED FROM SCHOOL.

51. The ARD Committee met again on April 11th to address whether or not

the Cripp's request that C.C. be provided Home-Bound services. The Committee also failed to consider the changed legal circumstances, that both the felony and misdemeanor criminal charges had been dropped against C.C. (ROA. 15-10556.300, ¶77-79; ROA. 15-10556.1581). The parents disagree with the committee's determinations and refuse to sign (ROA. 15-10556.300, ¶80)

52. On May 20th, 2012 the ARD Committee met again and again failed to consider the changed circumstances, that both the felony and misdemeanor criminal charges had been dropped against C.C. or reconsider the DAEP placement. (ROA. 15-10556.300, ¶81; ROA. 15-10556.1581).

53. On May 29th, 2012 the ARD Committee met again to address the family's refusal to sign off on the previous committee decision. The Committee again failed to consider the changed circumstances, that both the felony and misdemeanor criminal charges had been dropped against C.C. or reconsider the DAEP placement. (ROA. 15-10556.302, ¶88; ROA. 15-10556.1581)

54. The Committee reconvened on August 29th. The committee did discuss that the Juvenile Justice authorities had not prosecuted the purported felony against C.C. C.C.'s parents wanted the ARD Committee to review the original placement in the DAEP but the school refused. On May 20th, 2012 the ARD Committee met again and again failed to consider the changed circumstances, that both the felony and

misdemeanor criminal charges had been dropped against C.C. or reconsider the DAEP placement. (ROA. 15-10556.302, ¶89; ROA. 15-10556.1581)

8. THE DUE PROCESS HEARING

55. On January 13, 2014 and pursuant to the *Individuals With Disabilities Education Act* ("IDEA")[4], Plaintiffs filed an *Original Petition and Request For A Due Process Hearing* with the Texas Education Agency. (ROA. 15-10556.68)

56. In that *Petition* they argued that the District failed to provide C.C., what is termed a *Free Appropriate Public Education* ("FAPE") by failing to satisfy the procedural and substantive requisites of a *Manifestation Determination Review*[5] meeting and when placing him in a Disciplinary Alternative Educational Placement ("DAEP") and failing to provide him educational services in the least restrictive environment. (ROA. 15-10556.115)

57. Further, that the District's one-sided view of the incident in question, could hardly be considered collaborative and in fact was actually hostile as to C.C.. Moreover, that while at the time of the incident he was failing five out of six of classes so his IEP could hardly be seen to be providing academic benefit. Last, and in relation to all the above, the educational plan provided and the educational

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[4]. 20 U.S.C. §1400 et seq, *see also* 34 C.F.R. §300.1 et seq. and 19 TEX. ADMIN. CODE §89.1001 et seq.

[5]. C.C. does not appeal that issue.

placement mandated was not commensurate with his unique and individualized needs. Plaintiffs also brought forward civil rights claims pursuant to 42 U.S.C. Section 1983, Section 504 of the Rehabilitation Act of 1973 and the Americans With Disabilities Act. (ROA. 15-10556.115-118)

58. On February 3rd the Hearing Officer issued *Orders* dismissing all non-IDEA claims from the suit, including those related to Section 1983, Section 504 and the ADA, as he had no jurisdiction over such claims. (ROA. 15-10556.68)

59. The Due Process Hearing was held on March 19-20, 2014. (ROA. 15-10556.68). Among other things, the Hearing Officer did find that C.C. had problems with his grades during his tenure at the Bedford junior High School. (ROA. 15-10556.069). As of March 4, 2014 just after C.C. was removed from school had a grade of 100 in athletics, 83 in keyboarding and failing grades, for all his other classes. (ROA. 15-10556.76)

60. The Hearing Officer heard argument on Plaintiffs contentions that the picture taking was not a felony and that Emery and others purposefully built a case against C.C. At the Hearing C.C. first spoke on the issue and testified that in regard to the taking pictures of his friend R.L. while they were both in the bathroom. C.C. reiterated that he followed his fried N. and R.L. to the open stall that R.L. had a smirk on his face and his hand were up, that he did not cover up his face and had in fact

struck a pose with hands up. No one for the District cross-examined C.C. (ROA. 15-10556.2372; 15-10556.74-75).

61. On the same matters Emery states that "What I saw in the pictures was the other student, who was sitting, sitting on the toilet and he had one hand down grasping his pants and the other hand grasping his shirt. And that was pretty much the pose for all three pictures that were taken. When asked what was Rogelio's "demeanor" in the pictures, Emery responded:

A. "... He was very upset" and later as to the same question about demeanor asked by the School District's Counsel, Ms. Mathews:

A. "... his demeanor was he doing everything he possibly could, not to be embarrassed, humiliated in such a manner." And then with a follow up question by the Hearing Officer:

Q. "... are you indicating that he was trying to shield (his) private area .... his genitalia."

A. "Yes, sir, that's my indication."

Q. (By Ms. Matthews) "And did all three pictures depict what you've just described to us?"

A. "Yes, all three pictures did depict that."

(ROA. 15-10556.2372; 15-10556.87).

62. Based upon this particular testimony by Emery about R.L.'s demeanor in the pictures, that the Hearing Officer found particularly credible, he determined, among other things, that the District's decision that C.C. had committed a felony was correct.(ROA. 15-10556.98)[6]

9. POST-HEARING EVENTS

63. As noted above, on May 13, 2014, the Honorable Hunter Burkhalter, Administrative Law Judge with the *State Office Of Administrative Hearings* issued his *Decision And Order*, in the above-referenced and styled cause finding for the school district on all claims. (ROA. 15-10556.65-110). Specifically, and most relevant to this appeal that the School District did not err when determining C.C.'s conduct was a felony (ROA. 15-10556.82-84); that C.C. was served in the least restrictive environment (ROA. 15-10556.102-103); that development of his IEP was collaborative (ROA. 15-10556.103-105); that C.C. received positive academic benefits (ROA. 15-10556.105); that his IEP was sufficiently individualized (ROA. 10556.103) and that the District had no duty to modify the DAEP placement, in light of the Juvenile Justice Authority's decision not to prosecute the felony charge (ROA. 15-10556.96-97).

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[6]. The HO also determined that the procedural and substantive portions of the MDR had been correctly fulfilled, that the process was collaborative and not hostile, that C.C. had received academic and non-academic benefits from the school's educational plan for him, that he served in the least restrictive environment and that the program was sufficiently individualized. As we know Plaintiffs appealed that Decision.

64. A few days later and on or about May 19th, Mr. Cripps went to the Bedford Police Department in an effort to retrieve his son's phone, now that the case was over. Mr. Cripps picked it up on the 21st. (ROA. 15-10556.368)

65. When he opened up the telephone he was surprised to see that pictures had not been deleted as he had previously been told but were still on the phone. Further, that the testimony of Mr. Damon Emery at the recent *Due Process Hearing*, was a gross deviation from what in actuality is depicted in the photographs. Moreover, since the Hearing Officer's *Decision* significantly relied upon Emery's testimony, and in fact part of the decision absolutely *turned* on such misleading testimony. In fact, a review of the pictures evidence a markedly different description than what Emery offered at the Hearing. (ROA. 15-10556.369)

66. Plaintiffs provided the three pictures in question and additionally described them. First and foremost all three pictures show the young man sitting on the toilet. There is no door on the bathroom stall. The pictures are similar to each other but are somewhat different as well. (ROA. 15-10556.376-378)

a. THE FIRST PICTURE

67. The first picture shows R.L. sitting on the toilet with his clothing completely covering up his body, including his genital area. He is wearing a sweatshirt covering up his arms. He is also wearing sweat pants that appear to be

entirely covering his waist. There is no skin showing beneath his waist at all or anywhere at all for that matter, except for the skin showing is his hands. His face is looking downward and again, there is no skin showing here at all. Only the hair on his head is showing. There is no demeanor of R.L. in this picture at all. If he was upset, embarrassed or humiliated there is absolutely nothing in the picture at all that would support Emery's statement. (ROA. 15-10556.376)

68. More importantly, at the Hearing, and while it would not show up in the transcript, Emery made a grimace attempting to show how R.L. looked while sitting on the toilet. This too was an absolutely false representation of what the picture(s) depict. There is no grimace.

69. Emery also stated that R.L. had one hand down grasping his pants and the other hand grasping his shirt. This statement is likewise 100% incorrect, as was the other. Rather both of R.L.'s arms are resting on the area between his knees and upper thighs with his hands clasped together easily about 12-16 inches away from his genital area and quite obviously not intending to cover anything up at all. (ROA. 15-10556.369-370)

70. There is nothing in R.L.'s placement of his arms that evidences a conscious effort to cover up his body or his genitalia as Emery both stated and quite emphatically stated. Nor is R.L. using his hands or arms to cover up his genital area,

his face (for instance to hide embarrassment as Emery also specifically stated) or use his hands, arms, feet or legs in any way to support his statement.

71. C.C.'s simple rendition of the picture is 100% consistent. Emery's testimony is not 100% consistent with the pictures. In fact his statements noted above are 100% inconsistent. There is nothing in the picture at all that would supports Emery's statements, let alone any reasonable inference, that R.L. did not consent to the picture or expected any aspect of privacy while he was defecating.

72. As we know, C.C.'s testified that when R.L. defecated and wiped some of the feces on a toilet paper he showed to at least two other students, which Emery's second investigation confirmed.

b. THE SECOND PICTURE

73. The second picture is substantially similar to the first except that it appears to taken from a closer position. All the misrepresentations and mischaracterizations made by Emery for the first picture hold equally true for the second. (ROA. 15-10556.377)

c. THE THIRD PICTURE

74. This picture is also substantially similar to the first except it too was taken from a closer position. In this picture R.L.' s hands are not clasped anymore. His arms and elbows are clearly apart, so much so that his genital area (which was

covered up by his pants, not his arms as Emery clearly misstates) is absolutely open. Most strikingly, in this picture a very small part of R.L.'s face is showing. It is somewhat difficult to tell but it seems that R.L. is smirking which would be consistent with the testimony of C.C. and the other witnesses, and not Emery's. (ROA. 15-10556.378; (ROA. 15-10556.369-370)

75. Of course, even if for a moment we consider Emery's perception as correct (or at least not depicting that R.L.'s face shows a grimace (which is somewhat normal when defecating), that is surely not the same thing as Emery's adamant statement that R.L. appeared to be upset, embarrassed and humiliated or attempting to cover up his genital area. (ROA. 15-10556.370)

76. In lieu this newly discovered evidence; *see* Tex. R. Civ. P. 324(b)(1); Plaintiffs filed a *Motion For Expedited Rehearing* (Tex. Gov't Code §2001.145) and that it be granted; that Emery's testimony be stricken from the record or in the alternative given little weight, that Plaintiff be given the opportunity to procure limited discovery on the issue; that Emery be appropriately sanctioned, 89 T.A.C §89.1170(e), and that previous *Decision And Order* be vacated or in the alternative, modified accordingly. (ROA. 15-10556.368)

77. The Hearing Officer denied the request noting he had no jurisdiction to *Reconsider* his previous decision under IDEA. (ROA. 15-10556.389)

78. C.C. appealed the Hearing Officer decision. (ROA. 15-10998.19)

79. The District Judge upheld the Hearing Officer's Decision.

SUMMARY OF THE ARGUMENT

80. First and foremost the Hearing Officer erred when he stated he had no jurisdiction to hear C.C. *Motion For An Expedited Rehearing.* There is nothing in the law that supports the position the Hearing Officer does not, and much to say he does. The District Judge erred when affirmed this decision.

81. Second, the District Judge erred when he refused to permit C.C. to conduct limited discovery in his appeal of the Hearing Officer decision. While it is true the Judge has discretion to permit or deny a request that "additional evidence" be entered into the record, he has no such discretion to forbid its consideration. The District Judge erred when he did not permit C.C. to conduct limited discovery.

82. Third, and in regard to the appeal of the Due Process Hearing Decision itself, C.C. has met his burden that the School District failed to provide him a *Free Appropriate Public Education*. Specifically, that C.C. did not receive academic benefit, that the educational was not developed and implemented in a collaborative manner in that the environment was hostile as to him, that he was not educated in the least restrictive environment, and as to all, that he did not receive an education commensurate with his unique and individualized needs.

STANDARD OF REVIEW

83. Under the IDEA, "any party aggrieved by the finding and decision made by a Hearing Officer following an impartial due process hearing, shall have the right to bring a civil action with respect to the complaint presented." 20 U.S.C. §1415(i)(2)(A),(3)(2000). Accordingly, the District Court shall (i) receive the records of the administrative proceedings; (ii) hear additional evidence at the request of a party; and (iii) grant such relief as it determines appropriate based upon the preponderance of the evidence. *See* 20 U.S.C. § 1415(i)(2)(B) (2000). *See* Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245, 252 (5th Cir. 1997) *citing* Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

84. While the District Court must give the Hearing Officer's findings "due weight," it must make an independent, "virtually *de novo*" decision based on preponderance of the evidence before it. 20 U.S.C. § 1415(i)(2)©; Michael F., 118 F.3d at 252. In applying the "due weight" standard, "the HO's findings are not conclusive and the court may take additional evidence and reach an independent conclusion based on the preponderance of evidence." Teague ISD v. Todd L., 999 F.2d 127, 131 (5th Cir. 1993). Moreover, this due weight and deference is not implicated with respect to *issues of law*, such as the proper interpretation of the

federal statute and its requirements." Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ., 397 F.3d 77, 82 (2d Cir.2005)[internal quotation marks and alteration omitted].

85. As such, the Fifth Circuit likewise reviews the Hearing Officer's decision as a *virtually de novo* standard. Michael F. at 252. The Fifth Circuit reviews *de novo,* as a mixed question of law and fact, the District Court's decision that a school district provided FAPE under IDEA. Teague at 131. The District Court's findings of underlying fact as reviewed for clear error. Id. Whether the student received educational benefits is a finding of underlying fact. Id.

86. With all this in mind, Plaintiffs proceed accordingly.

ARGUMENT AND AUTHORITIES

87. Appellants incorporate by reference the above noted paragraphs, as if fully set forth herein, and in addition, each following section incorporates the section before it.

A. The District Judge Erred When He Failed To Remand The IDEA Case Back To The Texas Education Agency

88. As noted above, after the completion of the Due Process Hearing, and after the Hearing Officer issued his opinion, C.C. first learned that the pictures that gave rise to the incident in question, became available. As noted above, C.C. filed a *Motion For Expedited Rehearing* and the Hearing Officer refused to hear the

request, stating he had no jurisdiction to do so (ROA. 15-10556.389) C.C. asked the District Court to revisit the issue before the case was severed (ROA. 15-10098.3670) and the Judge refused to do so.

89. C.C. recognizes that this particular motion and order was in a sister case and was severed from this cause. C.C. did file a motion to consolidate the cases but this Court denied that request. C.C. appeals that decision by this Court solely to the extent to reconsider this one issue.

90. In any case, this Court can address the issue *sua sponte,* as they did in Stewart v. Waco Indep. Sch. Dist., No. 11-51067, 2013 U.S. App. LEXIS 5145 *24-25 (5th Cir. March 14, 2013) [opinion vacated at 2013 U.S. App. LEXIS 11102 (June 3, 2013)].

91. In Stewart the school district filed a *Motion To Dismiss* that was granted by the District Court Judge. Stewart appealed. At first the panel reversed and remanded, though a dissent was filed, by the Honorable Patrick E. Higgonbotham, Circuit Judge. In his dissent the Judge argued the case should be sent back to District Judge to determine whether or not the case should have first gone through administrative exhaustion, as otherwise required by 20. U.S.C. §1415(i)(2) and 3(A), and 1415(l); 34 C.F.R. 300.516©. He stated that "The cardinal function of exhaustion is to "enable the agency to develop a factual record, to apply its expertise

to the problem, to exercise its discretion, and to correct its own mistakes." Importantly, in that case, the issue of exhaustion was never brought up by the School District in Federal District Court. Nor did they bring it up in their briefs before the 5th Circuit. It was brought up *sua sponte* by the Panel itself.

92. As C.C. briefed in the District Court below, there is nothing in the federal law, the rules promulgated thereunder, or Texas law, that states the Hearing Officer does not have jurisdiction as to a request for a rehearing. The underlying strong public policy that special education issues should be completely considered, with a complete "factual record," before it could be appealed into federal court was and continues to be paramount. Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982); Honig v. Doe. 484 U.S. 305; 108 S.Ct. 592 (1988).

93. For this reason, this cause should be remanded back to the TEA Hearing Officer for a rehearing on the merits.

B. The District Court Erred By Failing To Permit C.C. To Conduct Limited Discovery In This Case

94. C.C. filed a *Motion* and *Brief in Support* of his request he be permitted to seek discovery in this cause The District Judge refused this request (ROA. 15-10556.2412-2417). He erred in doing so.

95. First, the plain language of the statute is simple, clear and unmistakable, the IDEA explicitly directs federal courts to accept additional evidence. Section

1415(i)(2)(c) of the IDEA reads in relevant part: [I]n any action brought under this paragraph, the court - -(ii) shall hear (emphasis added) additional evidence at the request of a party. While the caselaw has given courts discretion as to whether or not to admit such additional evidence, there is no such discretion as to whether or not a District Court can refuse to hear a Plaintiff's request the Court hear some additional evidence or information. When refusing C.C.'s request to seek further discovery he precluded the possibility he hear any additional evidence, a violation of IDEA.

96. Second, there is nothing in the *Individuals With Disabilities Educational Act* that precludes discovery but rather supports it. In fact, Rodriguez v. Indep. Sch. Dist of Boise City No. 1, 1:12-cv-00390-CWD (Idaho 2013); N.P. v. East Orange Board of Education, 06-5130-DRD, (D.N.J. 2008, unpublished) and Jordan S. v. Hewlett Woodmere Union Free School Dist., CV-08-1446-LDW (E.D.N.Y. 2009) all affirm the right to seek additional discovery in an apepal of a special education proceeding.

97. Of course after permitting reasonable discovery, a court may reject the proffered "additional evidence" in total or in part, Brown v. School Dist. Of Philadelphia, 11-6019 (E.D. Pa. 2013) based upon the usual standards of admissibility. *See* Marc V. b/n/f Eugene V. v. North East Independent School District, 455 F.Supp. 2d (W.D. TX.- San Antonio Div., 2006) *citing* Burlington at 790. But

there is no discretion to deny a reasonable request for discovery, as C.C. did in this cause. To do so would be manifestly unjust, and as noted in Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1971), it would be very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error. Importantly, "trial preparation and defense…are important interests, and great care must be taken to avoid their unnecessary infringement." Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985).

98. As the District Judge infringed upon C.C.'s motion to seek adduce additional discovery, in addition and in the alternative to the request above, C.C.' asks that this case be remanded back to the District Court accordingly.

C. The District Judge Erred When He Determined That The School District Had Provided C.C. *A Free Appropriate Public Education*

99. It is well-settled that for a school district to satisfy their duty to provide a child receiving special educational services, a *free appropriate public education* it must, by a preponderance of the evidence, be provided in the least restricted environment, be developed and provided by key stake holders in a collaborative manner; provide the student academic and non-academic environment and last, be commensurate with the student's unique and individualized needs. Cypress-Fairbanks ISD v. Michael F., 118 F.3d 245, 252 (5th Cir. 1997) *citing* Bd. of Educ. of Hendrick

Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The Hearing Officer determined that C.C. did not meet his burden on any of these elements. C.C. appealed this decision and the District Judge affirmed. A *de novo* review of the evidence would show that the Judge erred.

1. C.C. Did Not Receive Academic Benefit

100. A child's educational benefit must be more than *de minimus* – there must be some tangible gain in abilities. R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801 (5th Cir. 2012); *see also* Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). In fact, It is without doubt C.C. did not receive an educational benefit from the educational services provided by the Defendant School District, whether it be solely related to his *Individualized Educational Plan* in particular or when viewed overall to the educational services provided to him, in their entirety by the School District. *See* Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390 (5th Cir. 2012).

101. At the *Due Process Hearing* and again before the Federal Judge, he argued that the School District failed to provide him any academic benefit. Both found the education provided C.C. satisfied this 'academic benefit" prong of Michael F. The facts absolutely speak otherwise.

102. A review of the educational records from the Fall of 2012 through the

Spring of 2013 evidences the District did little in support of his academic problems and rather the record is replete with C.C.'s worsening grades. In regard to Speech he barely passed with a 70 on his semester exam; had 68 in the semester exam for math, 63 for the semester exam in science, did get a 82 for the semester exam in History and 50 for the semester exam in English. (ROA. 15-10556.1030). By the time he was removed from school his grades for the time period he was there were 81 in Speech, 59 in Math, 72 in Science, 66 in History and 70 in English (ROA. 15-10556.1032). When mother met with staff about her concern, she was told that C.C. "Had to bring his grades up." Nothing more was offered. (ROA. 15-10556.1582)

103. In fact, right before he was forced to leave the School District, and on February 14, 2013 Sandra Rierson had a meeting with C.C. and his mother to address the recent six week grading period, which included the period starting just after the beginning of 2013. At that time he was failing five classes, English, Math, History, Keyboarding and Band (R29:4; Tr. Vol. I, p. 95, l. 1-4; 18-21).

104. It is well-settled if a student does not receive academic benefit from the provision of his educational plan, the School District has failed to provide him FAPE pursuant to both Michael F and Rowley.

105. The Hearing Officer found that the School District provided C.C. academic benefit by relying upon the District's argument, that he had only been in

special education services for a few weeks. First, that is not exactly correct, he had been identified as a student requiring special education services as early as mid-November of 2013. The only uncertainty was as to what would be his eligibility criteria. Second, in focusing too narrowly on the time period related to C.C. (then) recent admission into special education services and not on the entire grading period going back to when C.C. first entered the school district, he failed to fail to follow the directives set forth Klein Indep. Sch. Dist. v. Hovem, to look at the child's overall educational experience, when determining whether or not he received academic benefit.

106. The preponderance of the evidence is that C.C. did not receive academic benefit from the School District from the time he was identified as a student with special needs in November of 2013 until his dismissal, almost five months later. For this reason alone the District Judge's decision should be over-ruled.

2. C.C.'s Educational Plan Was Not Provided In A Collaborative Manner By Key Stakeholders

A. Staff Was Not Collaborative But Were Hostile To C.C.

107. In order to satisfy this element the District must convene what is termed an *Admission, Review & Dismissal* ("ARD") Committee meeting consisting of what is termed "key stakeholders," 20 U.S.C. §1414(d)(1)(B), which includes the parents as well as school district personnel. R.C. v. Keller Indep. Sch. Dist. at 735. It is well-

settled, and further denoted in Michael F., this team must work together, to collaborate when developing an educational plan for a student with a disability so that the child receive a *free appropriate public education* ("FAPE").

108. The failure to effectively collaborate can create a hostile educational environment, and a violate a student's right to receive to receive a FAPE. T.K. v. New York City Dept. of Educ., No. 10-cv-00752, 2011 U.S. Dist. LEXIS 44682, 2011 WL 1549243 (E.D. N.Y. April 25, 2011); Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 992; [2014 U.S. App. LEXIS 3863] (5th Cir. 2014).

109. For instance, the School Principal, Hurbough evidenced hostility when he had C.C. followed around campus and even looked into his classrooms (ROA. 15-10556.1575-1576).

110. Emory, the Vice-Principal, evidenced hostility when planning to remove C.C. from school (ROA. 15-10556.296, ¶57), by attempting to have a parent to file sexual harassment charges against C.C., a felony and a sure ticket out of school.

111. Emery again evidenced this hostility when he attempted to steer the parents of a young lady, to file charges against C.C. for a felony charge of sexual harassment, after he made a remark about her. (ROA. 15-10556.296, ¶59)

112. On the 14th C.C. sensed the hostility and reported it to his mother as he was being followed around school by Hurbough and others, and even into the

bathroom. (ROA. 15-10556.296, ¶60; ROA. 15-10556.77).

113. On February 19th, Emery again displayed his hostility towards C.C. by trying to have another set of parents file charges against C.C. for felony charges of sexual harassment, after he made fun of the child's penis. (ROA. 15-10556.297, ¶66)

114. Also on that day Emery evidenced his hostility as to C.C. when he characterized an incident where C.C. passed gas on another student, also as one of sexual harassment. (ROA. 15-10556.297, ¶66; 15-10556.298, ¶67)

115. Also during this period, C.C. experienced the hostility of Ms. McNosky, who forced herself into contact with C.C. and then filed charges in Court against him also, (ROA. 15-10556.298, ¶67), attempting to have him thrown out of school also.

116. In fact, other staff also sensed the hostility against C.C. that now permeated the campus. It was so well known that Hurbough and Emery were hostile towards C.C. and wanted to get rid of him, that on one occasion C.C. overheard two teachers in hall commenting that when C.C. touched a wall with his pen, they "...could get him for destroying public property." (ROA. 15-10556.297, ¶65).

117. Finally, after the incident in the bathroom, Emery evidenced his hostility by first filing felony charges against C.C. so he would surely be thrown out of school, and then finding a parent (finally) who would do so (ROA. 15-10556.285, ¶8).

118. It is absolutely evident that C.,C. was a victim of a hostile educational

environment, and as such, an environment like this could not satisfy the element of Michael F., that key stakeholders must collaborate.

B. Staff Was Not Collaborative As It Failed To Respond To Information From The Juvenile Justice Authority

119. In addition, the District failed to collaborate with the Juvenile Justice Authority, surely a key stakeholder in C.C.'s life, at the time. Moreover, the ARD Committee also has a special duty to consider recent information especially when related to the *special factor* of children whose behavior impedes their learning. 34 C.F.R. §300.324. As noted in Corpus Christ Indep. Sch. Dist. v. Joe P., 12-51105 (W.D. Tex. 2014) *affirmed* at 51 F3d 490, 493 (5th Cir. 1995), IDEA guarantees a cooperative and interactive process and is required on an ongoing basis, Id. *citing* Honig v. Doe, 484 U.S. 305-311-12 (1987), which certainly did not occur in this case.

120. In Joe P. Judge Sparks found the School violated the child's right to FAPE because it had failed to consider relevant information. Such a reading is also supported by the statute itself, and rules related to IDEA, which requires an ARD Committee to consider all new and relevant information, pursuant to 34 C.F.R. §324(b)(1)(ii)©, D and E).

121. Surely, the information that the Juvenile Justice Authority had failed to prosecute C.C. for any criminal activity, let a lone a felony, is surely "relevant" and important to the ARD Committee when considering placement. Yet time after time,

they failed to consider this information. They violated C.C.'s right to FAPE, thereby

122. Moreover, the District failed to be collaborative, when members of the student's ARD Committee, fail to consider information provided by the parents' at the meeting, as has occurred in this case, then the collaborative process is again undermined. *See* H.B. v. Las Virgenes, 48 IDELR 31 (9th Cir. 2007) *on remand* 52 IDELR 163 (C.D. Ca. 2008); *aff'd* 54 IDELR 73 (9th Cir. 2010). Such an event is called *Predetermination* and is likewise a violation of the duty for key stakeholders to consider information and collaborate on translating that information into the student's Individualized Educational Plan.

123. Here the intent of the District to *predetermine* Coleman's placement was evidenced as early as February 5th, when Mr. Emery first contemplated holding an MDR for Coleman (ROA. 15-10556.296, ¶57). Further, even in the face of the fact that the Tarrant County Juvenile Authority refused to prosecute the case as a felony, in early April, the school failed to respond to changing circumstances. When the issue was revisited it twice in May and again in August of 2013, the District again considered this information irrelevant.

C. The Environment Was Not Collaborative Because The District Failed To Consider Information From A Key Collaborator

124. As a matter of law, the local Juvenile Justice Authority is a key stakeholder, whenever a student is engaged in that system. A reading of Article

15.27, Code of Criminal Procedure, is another area the HO apparently failed to review.

125. Subsection (g)(1) requires the office of the prosecuting attorney or the office or official designated by the juvenile board shall, within two working days, to notify the school district that a student who had been removed to a disciplinary alternative education program under Section 37.006, Education Code, if prosecution of the student's case was refused for lack of prosecutorial merit or insufficient evidence and no formal proceedings, deferred adjudication, or deferred prosecution would be initiated.

126. Surely, the Texas Legislature wanted the School District to know the Juvenile Authorities had refused to prosecute the case, for some reason. What could those reasons be? Surely one reason, likely the most important one would certainly have the school district re-visit the placement of the student sent to the DAEP, now that the underlying reason for the placement in the first instance, the felony, had fallen away. It is bedrock to American Jurisprudence that a person once determined to be innocent of a criminal charge should no longer suffer its stain, as if they had committed the crime. *See* Student v. Humble Indep. Sch. Dist., Docket No. 307-SE-0505; 45 IDELR 58, Texas Education Agency (June 27, 2005) [student removed from school and sent to DAEP for committing felony, returned to school when felony

charges were dropped].

127. The Hearing Officer mistakenly believes, as does the District Judge, that a school be able to impugn a child's character by affixing a felony finding against him, and then has no parallel duty to clean up the mess of their mistaken decision. This reasoning not only conflicts with the law, but absolutely conflicts with common sense. Why would the Legislature permit a School District to be the sole authority on the topic? Clearly the language in the Education Code and in the Code of Criminal Procedure, read together, they let us know they did not. They specifically wanted communication between a school district and prosecution to be open and timely, so that the "best interest" of the child would continue to be of the highest concern, and avoid he exact problems noted in this case.

128. This reading is further supported by the *Juvenile Justice Code* which requires us to remove taint of criminality, *see* Texas Family Code §51.01(2)(A), for juveniles.

129. Last, if this if this Court would let this determination by the Hearing Officer and District Judge stand, it would be ratifying a position that a School District could reasonably believe and determine for instance, a student had raped a student on one day, suspend the student on the next for committing a felony, find out the next day they were incorrect and the student in question had raped no-one, yet still keep

the student in a suspended status for committing a rape, even though they hadn't. This is a proposition found by the Hearing Officer and District that not only leads to an absurd result, but one that is patently unjust and morally reprehensible.

3. C.C. Was Not Provided His Education In The Least Restrictive Environment

130. One of the primary mandates of the IDEA "is 'mainstreaming,' which is the requirement an IEP place a disabled child in the least restrictive environment for his education." R.C. v. Keller Indep. Sch. Dist. at 733 *citing* R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1008 (5th Cir. 2010). The IDEA provides:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A);

131. In this section, Plaintiffs significantly rely upon the above-written sections addressing the District's duty to collaborate with key stakeholders and consider relevant information in the development of the student's educational plan. As we know, the District's failure to do also effected C.C.'s placement, which relates back to this "least restrictive" element.

132. Specifically the ARD Committee kept C.C. in a *Disciplinary Alternative Education Placement* ("DAEP") for at least 60 days, which is a significantly more restrictive environment then *In School Suspension* or attendance for C.C. in the regular education environment, with his non-disabled peers, even after the felony was dropped.

133. As the Defendant School District failed to consider this crucial piece of information from the TCJJA when determining C.C. needed to remain in the DAEP, the IEP can be considered *null and void*. M.L. v. Federal Way. Sch. Dist., 394 F.3d 634 (9th Cir. 2005) [failure to consider relevant information was a procedural violation rising to a substantive denial of FAPE because it failed to consider placement in the least restrictive environment].

4. C.C. Was Not Provided An Educational Plan Commensurate With His Unique And Individualized Needs

134. It is uncontroverted that C.C. had a number of disabling conditions that provided him eligibility for special education services. Rather than address his behavioral needs, School District personnel, especially Hurbough and Emery developed a plan to rid themselves of C.C., by trying to get family after family, to file charges against him for sexual harassment, a sure way to make sure C.C. was removed from the school.

CONCLUSION AND PRAYER

135. For the all foregoing reasons the Appellant respectfully requests this Panel reverse the decision of the District Court, remand the case back to the Texas Education Agency, or in the alternative, remand the case back to the District Court, or also in addition in the alternative, render a decision in favor of C.C., and for any and all other relief that may be afforded, whether it be by equity, by law or by both.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that, on November 23, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF system, which will send electronic notification of such filing to the following:

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Appellants-Plaintiffs

CERTIFICATIONS

I further certify that the (1) required privacy redactions (if any) have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1 and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I further certify that I will mail the correct number of copies of the foregoing document to the Clerk of the Court.

I further certify that two (2) true and correct copies of the foregoing document was served to all counsel of record on May 13, 2015 *via* Overnight Mail by Federal Express and addressed to Counsel, and the Clerk of The Court, as noted above.

/s/ - Martin J. Cirkiel
Martin J. Cirkiel
Attorney Of Record For
Appellants-Plaintiffs

CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(a)(7)(c) and Local Rule 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and Local Rule 32.2 because:

this brief contains 10045 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 32.2, or

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2. Pursuant to Fed. R. App. P. 32(a)(7)(c) and Local Rule 32.3, the undersigned certifies this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and Local Rule 32.1 because:

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_____

/s/ Martin J. Cirkiel
Martin J. Cirkiel, Esq.