

## SPECIAL EDUCATION LEGAL ALERT

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This latest monthly legal alert summarizes two recent federal appellate court decisions that are significant as illustrative of two continuing lines of litigation—(a) peer harassment under Section 504/ADA, and (b) eligibility under the IDEA. The format follows the usual format of a two-column table, with highlights (on the left) and general practical implications (on the right). For automatic e-mailing of future legal alerts, sign up at [perryzirkel.com](http://perryzirkel.com)

**In Doe v. Columbia-Brazoria Independent School District (2017), the Fifth Circuit Court of Appeals upheld the dismissal of the Section 504 and ADA peer harassment claims of a student with a disability due to the lack of a sufficient causal connection, i.e., the requirement that the alleged discrimination be based on the student's disability.**

The factual allegations of this case were sketchy, including that (a) the student received services under Section 504 that resulted in a location separate from the classroom for testing or study, and (b) another male student sexually assaulted him in the bathroom. His Section 504 and ADA claim was that this “isolation due to disability” put him in a vulnerable position for the assault. However, the court concluded that the disability-discrimination connection was not sufficiently clear and direct.

This decision is officially published, meaning that it has high precedential weight, but is only binding in the states in the Fifth Circuit—Louisiana, Mississippi, and Texas. Moreover, in the same case, the court also upheld dismissal of the alternative federal claims, here based on Section 1983 (in connection with the Fourteenth Amendment equal protection and due process clauses) and Title IX (due to male-on-male sexual assault).

While focusing in this case on the third essential element, the appeals court recited the three successive prerequisites for a Section 504/ADA peer harassment claim:

- the student has a disability (as defined under this pair of statutes)
- the district denied the student the benefits of its programs, services, or activities
- this denial was based on the student's disability

Beyond its specific factual and jurisdictional contours, this decision illustrates the broader and continuing line of litigation based on bullying of students with disabilities, which implicates possible claims under IDEA FAPE, state law (e.g., negligence in relation to anti-bullying statutes), and Section 504/ADA. The liability claims under Section 504/ADA generally have the strongest basis for potential liability for money damages but face high hurdles in terms of not only the aforementioned prerequisites but also deliberate indifference, bad faith, or gross misjudgment.

**In *D.L. v. Clear Creek Independent School District* (2017), the Fifth Circuit Court of Appeals upheld the district's determination that high school student who had an IEP for emotional disturbance (ED) based on diagnoses<sup>1</sup> of pervasive developmental disorder NOS, depression, anxiety, and ADHD no longer needed special education. The determination at issue was in April of the student's junior year after the district exited him in compliance with applicable IEP procedures during his sophomore year based on the need prong. During the intervening period, the student had very good grades, attendance, and behavior, but an independent educational evaluation (IEE) concluded that he continued to meet the criteria for ED.**

<p>The parents' first claim was that the district overlooked the IEE. In response, the court concluded that the district met its obligation to "consider" the IEE and that the expert opinions of the child's teachers on the need for special education "are especially instructive as they spend more time with students than do outside evaluators."</p>	<p>In general, outside experts, such as physicians, may well be experts about the underlying diagnoses; however, the focus here was on the ultimate eligibility prong, the need for special education, for which school district professional staff have expertise based on both their specialization and their familiarity with the child "in situ."</p>
<p>The parents' second claim was that their child's disability was undetectable to the untrained eye, thus making teacher observations unreliable. The court concluded that the teachers had detected the student's ED in the original determination establishing his eligibility and the case law supported their reliability for such determinations.</p>	<p>This court's disposition of this second claim shows the importance of the relevant evidentiary record and the applicable case law. It is also another reflection of the general, but certainly not absolute, judicial deference to school authorities.</p>
<p>The parents' third claim was that the district's challenged determination as based solely on academics. The court found instead that the IEP team considered the student's academic, behavioral, and social progress.</p>	<p>This claim and conclusion serve as a reminder of the continuing blurred boundary not only between the academic and other dimensions but also—per the September 2016 legal update—between special and general education.</p>
<p>The parents' final claim was that the district should have looked not only at the student's present need but his subsequent needs. In response, the court ruled that the team is responsible for what it knew or had reason to know at the time of the determination.</p>	<p>This frame of reference shows the extension of the so-called "snapshot approach" from the formulation of IEPs to the evaluations of eligibility. Here, the student had a disastrous senior year, but the court observed that the parents failed to identify "any information the District should have, but did not, consider that indicated [his] success was likely to be short lived."</p>
<p>This appellate decision, although from the same three-state circuit, is not officially published. Nevertheless, it is significant in terms of its rather representative facts, claims, and conclusions.</p>	<p>The case had a potentially overlapping child find claim for the student's senior year, but the Fifth Circuit upheld the decision that the parents had forfeited this claim by not raising it in their original complaint.</p>

<sup>1</sup> Illustrating the more complex background that the court noted but did not find pertinent here, the student's wide array of previous diagnoses, including, for example, Ehler-Danlos syndrome, IBS, mitral valve prolapse, POTS, and OCD.