SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions addressing issues of "twice-exceptional" students under the IDEA and, alternatively or additionally, Section 504. For related information about these various issues, see **perryzirkel.com**

In an officially published decision in *Wong v. Bd. of Educ.* (2020), a federal district court in Connecticut addressed the tuition reimbursement claim of the parents of a gifted middle-school child initially identified with the primary classification of SLD and subsequently, upon reevaluation, reclassified as OHI based on ADHD. Concluding that the period at issue was limited to the last month of grade 6 to the end of grade 9, the hearing officer decided that the district provided FAPE during these school years, thus denying the requested reimbursement. The parents appealed on various grounds, which included Section 504 (§ 504) and, on a paired basis, the Americans with Disabilities Act (ADA).	
The parents contended that the district violated their right to meaningful participation in the development of the successive IEPs.	Emphasizing that this right is for the opportunity for such participation, the court rejected their claim, finding that even for the meeting held without them, the district had made reasonable efforts for their participation.
The parents also contended that the IEPs did not include all of the services that their outside evaluators recommended and, thus, were not substantively appropriate.	Again agreeing with the hearing officer, the court ruled that the IEP teams sufficiently took into consideration the outside evaluations and—pointing to the student's consistently high grades and the *Endrew F.* standard—that the IEPs were reasonably tailored for the student's progress.
The parents alternatively relied on § 504/ADA, contending that the district's accommodations were not reasonable and that the district retaliated against their zealous advocacy.	The court concluded that the IDEA FAPE ruling effectively killed two birds with one stone and that their retaliation claim failed in terms of the successive steps of causal connection and legitimate nondiscriminatory reasons. Ultimately, they failed to show bad faith or gross misjudgment.
This decision is largely typical of the uphill slope that parents face under both the IDEA and § 504/ADA, including the non-nuanced treatment of giftedness that makes the slope even steeper against students who are twice-exceptional. Note too that, sadly, the ponderous adjudicative process took almost four years between the hearing officer's decision and this court's rulings.	

An unpublished decision in *E.P. v. Twin Valley School District* (2021) illustrated the interaction of the IDEA, § 504, and giftedness. The complications for the elementary school child in this case included prenatal drug exposure, interracial adoption, and various family traumas. His functioning at school and at home were dramatically different. He entered kindergarten with an IEP from preschool for sensory processing and social-emotional developmental delay. A mid-year reevaluation concluded that the child did not qualify under the IDEA but did qualify for a gifted IEP under Pennsylvania's strong gifted education law. The next four years included various IEEs yielding diagnoses ranging from intermittent explosive disorder to eating problems. His mother, whom school personnel perceived as "pushy," shared these various IEEs, and she repeated requests for accommodations and reevaluations. However, based largely on the child's excellent report cards, the school representatives continued to maintain that he did not qualify for special education. In the second semester of grade 3, the district provided an evaluation for visual skills that resulted in a 504 plan for visual impairment. In grade 4, based on escalated absenteeism, a hospitalization for suicidal ideation, and his mother's complaints of bullying and reports of paranoia, the school added to his 504 plan accommodations for social skills and transition time limits. At the end of grade 4, in response to a notably worse report card, the school agreed to fund an IEE, which again found dramatic differences between school and parent perceptions. The parents filed for a due process hearing, which in Pennsylvania extends to jurisdiction for Section 504 and GIEPs. The hearing officer ruled for the parents under Section 504. He ordered (a) reimbursement for the previous IEEs and (b) compensatory education as determined by an independent evaluator to place the student in the position he would have been if the district had provided him with § 504 FAPE. The school district appealed.	
First, the district challenged the hearing officer's ruling of a § 504 child find violation starting in kindergarten, which was that the district failed to evaluate the child under § 504 with reasonable promptness upon various warning signs of eligibility.	The court affirmed the hearing officer, concluding that the district focused solely on the IDEA despite reasonable suspicion of emotional dysregulation and other impairments that limited major life activities of eating or social interaction (but without specifically addressing the "substantially" element though referring broadly to mitigating effects).
Second, the district challenged the hearing officer's finding of a denial of FAPE under § 504, which was based on the district's inadequate, "ad hoc" accommodations.	The court affirmed this ruling too, concluding that this failure to provide reasonable and impairment-targeted accommodations "exacerbated his conditions and led to a spiral or worsening outcomes."
Finally, both parties challenged the hearing officer's order for compensatory education. The district argued that the parent failed to meet her burden for this remedy, whereas the parent sought a straightforward quantitative calculation for the four years.	The court again affirmed the hearing officer, concluding that the third-party delegated qualitative approach recognized the difference between the IDEA and § 504 and allowed for equitable deductions for any partially compensating effects of the school's ad hoc accommodations.
A careful reading of the court's § 504 analysis reveals various questionable conclusions, including the seeming conflation of child find and eligibility and the imprecise interrelationship between the IDEA and § 504 standards for FAPE and remedies.	