

SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions respectively illustrating (a) the interaction of IDEA with Section 504/ADA and (b) the ongoing evolution of FAPE analysis and remedies. For related information about these various issues, see perryzirkel.com

In an officially published decision in *Reid-Witt v. District of Columbia* (2020), a federal district court addressed the Section 504 and ADA claims of a student at a selective public high school who was hospitalized for suicidal ideation in the middle of ninth grade. The parents requested various accommodations and special education. Upon her return to school full-time, the school provided her with a 504 plan, which included various testing and learning accommodations, but formally denied her IDEA eligibility. After her attendance and emotional problems increased in grades 10 and 11 despite updated 504 plans, the school informed the parents that she no longer met the school's grade point average and community service hours requirements. Rather than agree to a transfer to one of the district's non-selective high schools, her parents unsuccessfully tried home-schooling and filed for a due process hearing. The D.C. hearing officer upheld the district's decision that she did not qualify under the IDEA and dismissed her Section 504/ADA claims for lack of jurisdiction. The parents appealed to federal court, and the district filed a motion to dismiss the Section 504/ADA claims, leaving the IDEA eligibility claim for further proceedings.

The first Section 504/ADA claim was the alleged failure of the school to provide sufficient accommodations for her individual disabilities, including her physician's recommendation for home study and her request for permission to photograph the classroom whiteboard to augment her notes.

Applying the bad faith or gross misjudgment standard, the court ruled that the district's four successive 504 plans did not amount to the requisite complete indifference to her disabilities. Although acknowledging that the ADA is slightly less strict than Section 504 for the causal standard, the court concluded that her accommodation allegations constituted "garden variety IDEA violations," thus granting the dismissal motion.

The second Section 504/ADA claim was an alleged district policy or practice of failing to provide special education services at its selective high schools, including the absence of any students with IEPs at her elite high school.

The court denied dismissal of this claim, concluding that at this early stage of the litigation, including the open question as to whether she qualified under the IDEA, it was premature to rule out the requisite bad faith or gross misjudgment of asserting non-eligibility of IDEA eligibility as a pretext for exclusion-type discrimination under Section 504 and the ADA.

This decision is another illustration of the tricky intersection of the IDEA, Section 504, and the ADA, including the nuanced and not well settled differences among them. It remains to be seen whether this particular case ends with a settlement or proceeds to a more definitive determination as to the IDEA eligibility and, separable but related, Section 504/ADA policy/practice claims.

In an officially published decision in *R.B. v. Downingtown Area School District* (2021), a federal district court in Pennsylvania addressed the various IDEA claims of a primary school student OHI (based on ADHD) and S/LI. The parents sought compensatory education for the kindergarten and first-grade IEPs and tuition reimbursement for the next year, for which they had unilaterally placed him in private school. The due process hearing officer's rulings for the three years at issue were (a) the IEP for kindergarten was appropriate except for the baseline present educational levels (PELs); (b) the next year's IEP resolved the PEL deficiency but was not appropriate in terms of its behavioral component; and (c) the district's proposed IEP for the third year, which corrected both the PEL and behavioral deficiencies, was appropriate. The resulting remedies were one hour per week of compensatory education for the first year and two hours per week for the second year, but no reimbursement due to the appropriateness of the district's proposed IEP for the third year. The hearing officer also denied the parents' requested reimbursement for its two IEEs in relation to the district's reevaluation for the third year. Both parties appealed the hearing officer's decision.

For year 1, the court concluded that the lack of PELs was a procedural violation and the requisite resulting harm was the "lack of guidance regarding expected progress."	Likely attributable to the deferential standard it applied to the hearing officer's FAPE rulings, the court did not make clear whether the resulting harm was based on substantive loss to the student, per the <i>Endrew F.</i> progress standard, or to the parents' right to meaningful participation.
For year 2, the court also upheld the hearing officer's FAPE determination based on the lack of timely and reasonable revisions to the BIP.	Although again within the deferential review standard for FAPE rulings, here the court clarified that its ruling was based on the substantive side of FAPE.
For year 3, the court also upheld the hearing officer's FAPE determination, including the methodology issue for reading instruction.	For example, the court ruled that the district provided a reasonable basis for the IEP's lack of Wilson reading within its discretion for the choice of methodology in the specific circumstances of this case.
Applying the quantitative approach of the Third Circuit, the court also upheld the hearing officer's limited compensatory education awards.	Agreeing with the hearing officer's conclusion that the FAPE denials were successively limited in years 1 and 2, the court found the hourly awards to be "equitable and reasonably-related [amounts]."
Finally, the court upheld the denial of IEE reimbursement based on alternative grounds starting with the parents' failure to express disagreement with the district's reevaluation.	Again, the court's ruling, like the hearing officer's IEE analysis, was less than clear-cut in relation to the applicable regulations and case law. It was imprecise whether the alternative basis was that the district's reevaluation was appropriate or that the IEEs were not appropriate.
Although generally aligned with the prevalent trend of judicial deference to hearing officer decisions and to district methodology determinations, this case also illustrates on closer examination (a) the broad scope of this court's deference rather than being focused on the hearing officer's factual findings as contrasted with legal conclusions; (b) the resulting lack of nuanced precision in the specific IDEA rulings; (c) the relatively unusual treatment of FAPE as a divisible rather than unitary issue; and (d) the Third Circuit's quantitative approach to compensatory education, which the more flexible qualitative or hybrid approach is increasingly eclipsing (although it may result in a similar amount of compensatory education).	