SPECIAL EDUCATION LEGAL UPDATE
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This month's update identifies recent court decisions that illustrate issues arising from teacher advocacy and focusing on student FAPE, respectively. For related publications and earlier monthly updates, see **perryzirkel.com**.

On September 25, 2023, a federal district court in Pennsylvania issued an unofficially published decision in *Morrow v. South Side Area School District* that addressed the school district's motion to dismiss a special education teacher's lawsuit. Because the decision is at this preliminary pretrial stage, it is based on the plaintiff-teacher's allegations. Specifically, she alleged that the district had taken various discriminatory actions during 2019–2021, including frequently changing her duties, denying her the support of a paraprofessional, and denying her accommodations provided to other similarly situated employees, that led to her forced retirement. She claimed that these employment actions constituted (a) retaliation based on her First Amendment freedom of association based on her role as teacher union president; (b) retaliation under the IDEA and Section 504/ADA for her complaints to the superintendent and the board about the district's noncompliance with the IDEA and Section 504 rights of eligible students; and (c) direct discrimination under Section 504/ADA based on her diagnoses of ADHD and anxiety. To decide whether to dismiss these claims, it is well established that the court must interpret the plaintiff-teacher's allegations in the light most favorable to her so that she has a fair opportunity to move to the next step in the litigation process.	
For the First Amendment retaliation claim, the threshold elements for a triable case are (a) protected conduct, (b) adverse employment action, and (c) a causal link between "a" and "b."	The court dismissed this claim, reasoning that even if one assumed for the sake of argument that her union activities were protected under the First Amendment and the alleged employment actions were sufficient to deter such protected conduct, the allegations do not demonstrate the requisite causal connection. Her union presidency ended in 2015, but her noncompliance complaints and the adverse actions did not respectively start until 2019.
For the Section 504/ADA retaliation claim, the same three threshold elements apply, with protected conduct here being advocacy specific to students with disabilities.	The court denied dismissal of this claim, concluding the teacher sufficiently showed that she met with the new superintendent in 2019 and then the principal and board members to raise concerns with de-prioritization of the special education students' federally mandated rights and that the adverse actions were contextually and temporally the result of those concerns.
For the IDEA retaliation claim, an even more threshold perquisite is "standing" as a party in the case.	The court rather easily dismissed this claim, because the exclusive parties under the IDEA are students with disabilities and their parents on one side and public education agencies on the other side, not teachers or other employees.
For the Section 504/ADA direct discrimination claim, the plaintiff must meet the three-part definition of individual with a disability.	The court also dismissed this claim, observing that the diagnoses of ADHD and anxiety, even upon being accepted as accurate at this preliminary stage, only established the first part, which is a physical or mental impairment, but the plaintiff had not established the other two required parts—major life activity and the connecting substantial limitation.
Although limited to the first stage in litigation, this case illustrates the threshold hurdles for special education teachers and other individuals who assert retaliation or direct discrimination under Section 504/ADA or other federal laws. A wider review of the pertinent case law reveals that the subsequent steps for such claims clearly amount to a very steep slope against the plaintiff obtaining a definitively favorable final decision, although information about the specific extent and nature of settlements remains largely out of sight.	

On November 3, 2023, the federal district court in Rhode Island issued an unofficially published decision in *ABL v. Providence Public Schools* addressing the FAPE claims of a student with orthopedic impairment as a result of an in-utero stroke and resulting left-hemiplegic cerebral palsy. For kindergarten through grade 3, he attended a private school, with the parents paying the tuition and the school district providing IEP services. These services included, for example, adaptive physical education (APE) and occupational therapy (OT). In grade 3 (2019–2020), the district did not add math to the IEP despite identifying this need, and for the last three months the child received almost no services upon the COVID-19 shift to distance learning. At the IEP meeting in June 2020, the parents decided to homeschool their child in grade 4, with "walk-in" special education from the school district. Also in June 2020, the parents' private evaluator diagnosed the child as having dyscalculia. However, during the first few months of grade 4, the district did not add math to the IEP or provide any special education services to the child, attributing these failures to "COVID-19 restrictions and Internet access problems." Beginning on December 7, 2020, the district started providing math and writing instruction via Google classroom, but not APE or OT. At a series of IEP meetings in January 2021, the resulting IEP included math instruction, offered compensatory services, and proposed placement in one of the district's elementary schools. The parents disagreed, issuing written notice of their intent to place the child in private school for at public expense for grade 5. In April and May 2021, the parents' specialist conducted another evaluation of the child, diagnosing him with left hemiplegia, dyscalculia, ADHD, and developmental coordination disorder (including dysgraphia). After the district did not revise the IEP further, the parents placed the child in the identified private school for grade 5 (2021–2022). In January 2022, they filed for a due process hearing, seeking tuition reimbursement and, for the prior year, compensatory education. In the following September, the hearing officer issued his decision, concluding that the parents had not met their burden to prove denial of FAPE and reasoning that their failure to allow the child to attend the district's schools precluded the district's provision of FAPE. The parents filed an appeal with the federal district court.	
For January 2020 to January 2021, the first year that the parties agreed to be at issue, the parents claimed that the lack of specialized instruction in math was a denial of FAPE under *Endrew F.*	The court agreed, concluding that hearing officer's reasoning was not entitled to deference and that the district had ample reason to know that the child needed specialized instruction in math based on its own progress data, not just the private expert's evaluations.
For this same year, the parents also claimed that the limited distance learning during the pandemic also constituted a denial of FAPE.	The court readily agreed without specific analysis because the district implicitly admitted the FAPE denial in the subsequent IEP's offer of compensatory services.
For the second year at issue, which was January 2021 to January 2022, the parents challenged the appropriateness of the proposed placement (as the first FAPE step for tuition reimbursement).	Relying on the testimony of the witnesses, who were almost entirely on the district side, the court rather cursorily concluded that the parents "have not shown, by a preponderance of evidence, that the [proposed] placement constituted a FAPE denial."
For the first of the two years, the parents' sought compensatory education for the math-instruction and COVID-19 denial of FAPE.	The court agreed with the entitlement to compensatory education but deferred the calculation of the amount for the parties to resolve or, in the absence of agreement, for determination by the hearing officer.
Based on the rather flagrant facts of this case, the court's analysis was rather disappointing. Perhaps the parties' previous agreements about the district's provision of services during private schooling and homeschooling and the application of the IDEA's statute of limitations contributed to the perfunctory legal conclusions and compensatory relief.	