SPECIAL EDUCATION LEGAL UPDATE

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This month's update identifies a pair of recent court decisions that illustrate key Section 504 or Americans with Disabilities Act (ADA) differences from the IDEA, here for child find and FAPE. For previous monthly updates and related publications, see **perryzirkel.com**.

On June 4, 2024, the Third Circuit Court of Appeals issued an officially published decision in *B.S.M. v. Upper Darby School District*, addressing child find claims under Section 504. In kindergarten, the school district conducted an IDEA evaluation limited to speech/language and determined that the child was eligible for an IEP for speech/language impairment (SLI). End-of-year testing revealed reading and math scores below grade level. In grades 1 and 2, her regular assessments revealed math and reading scores that continued to be below the benchmarks. A private psychologist diagnosed the child in grade 2 with "Other Specified Depressive Disorder," but the parents did not share this information with the district as part of the IDEA reevaluation, which determined that she was no longer eligible as SLI. In grades 3 and 4, her academic and emotional struggles continued. Based on another private evaluation, which yielded a diagnosis of "Disruptive Mood Regulation Disorder," the district conducted a comprehensive evaluation and determined that the student did not qualify under the IDEA. Instead, the district provided her with a 504 plan for her social-emotional needs and math weaknesses. Near the end of grade 4, after increased emotional difficulties and a third private evaluation, which concluded that the student was eligible under the IDEA category of specific learning disability but not emotional disturbance, the parents filed for a due process hearing. The hearing officer ruled that (a) the district did not violate child find; (b) the child was not eligible under the IDEA; and (c) the 504 plan was too general, resulting in an award of 1 hour per week until the district's development of an appropriate plan. The parents appealed to the federal district court, which affirmed the hearing officer's rulings. The parents appealed to the Third Circuit, contending that the hearing officer and district court erroneously conflated the child find claims under the IDEA and Section 504. The district counter-argued that fulfilling the requirements of IDEA meets the parallel and generally shallower requirements of Section 504.	
Do IDEA hearing officers have jurisdiction for Section 504 claims?	Not in most states, in which a Section 504 hearing is a school district obligation, but Pennsylvania (which is where this case arose) is one of the few exceptions.
Is the district's two-for-one counter-argument legally correct?	No. This assertion correctly applies to several issues, such as FAPE, but not for the limited differences from the IDEA, such as the broader definition of disability under Section 504.
What did the Third Circuit rule with regard to the parents' child find claim under Section 504?	Without deciding this factual question, the Third Circuit sent the case back to decide whether the district had reasonable suspicion of the child's eligibility under Section 504 prior to the end of grade 4.
It is regrettable that the adjudication process has taken three years without a definitive decision, but this case serves as a weighty reminder of the need for both parents and districts to be aware of the significant differences as well as substantial commonalities in scope and depth between the IDEA and Section 504. For a comprehensive comparison, see https://perryzirkel.com/wp-content/uploads/2024/01/zirkel_idea-504-ada-comparison-12.15.23.pdf	

Also on June 4, 2024, the Third Circuit Court of Appeals issued another officially published decision, *Le Pape v. Lower Merion School District*, which concerned the ADA in relation to K–12 students. In this case, a 23-year-old former student in the defendant district had an IEP based on the eligibility categories of autism, intellectual disabilities, and SLI. Based on his nonverbal status, the IEP provided for communication via a Bluetooth keyboard and an iPad, visual scripts, and picture-exchange protocol. The student had the ability to type dictation but not his own thoughts. At the start of grade 10, his parents requested revision of the IEP to incorporate a technique known as "Spelling to Communicate" (S2C), in which a non-speaker points at letters on a laminated alphabet board ("letter board") held by a communication support person. The district declined based on the lack of published research support. After the parents repeated their request, district representatives conducted two outside observations of the student using SC2, interviewed its inventor, tried it out with the student and his special education teacher, and—despite finding the procedure to be questionable—revised the student's IEP for training of its staff in SC2. At the start of grade 11, 5 staff members, including 2 of the student's teachers, participated in the training. They concluded that SC2 was not a communications tool but instead the support person indirectly providing the answers. At the same time, the student exhibited increased aggressive and self-injurious behaviors, which his treating psychiatrist attributed to the lack of access to the letterboard at school. In October, the parents stopped sending him to school. After 6 weeks of non-attendance, the district reluctantly agreed to revise the IEP to allow the student to bring his own letterboard and communication partner to school. His parents rejected this provision; continued his education at home with private tutors who used SC2; and filed for a due process hearing. The hearing officer ruled that the district did not deny FAPE under the IDEA, Section 504, or the ADA. The parents then filed an appeal in federal district court, adding a claim for a jury trial and money damages for intentional discrimination under Section 504 and the ADA. After complicated proceedings, the court (a) affirmed the hearing officer's IDEA FAPE rulings, and (b) rejected the Section 504/ADA intentional discrimination claim based on lack of preponderant proof of SC2's effectiveness in the record of the due process hearing, despite the court's subsequent admission of additional relevant evidence. The parents' appeal to the Third Circuit included the ADA effective-communications regulation, which requires giving "primary consideration" to the preference of the individual with disabilities.	
Did the parents' fulfillment of the IDEA's exhaustion provision extinguish or subsume their Section 504 or ADA claims that are different from those under the IDEA?	No. The Third Circuit explained that the parents' intentional discrimination claims in this case were independent of their FAPE claim and thus were not subject to being extinguished by the hearing officer's adverse FAPE rulings.
Did the lower court err as a matter of law by not considering the evidence admitted during the appeal of the hearing officer's decision as to the comparative efficacy of SC2 and the district's communications methods?	Yes. Because the parties sought summary judgment, the Third Circuit reversed for a jury determination of the open factual issue of whether, based on the *entire record*, the district provided an effective method of communications after giving primary consideration to the student's preference.
This decision, like the one on the first page of this monthly update, is belated and inconclusive, but also a reminder of the need for careful consideration of the nuanced differences between Section 504 or the ADA and the IDEA. SC2, like earlier case law concerning the controversial technique of Facilitated Communication, requires due care for not only professional norms but also requirements beyond FAPE under the IDEA that, in this case, were for effective communications under the ADA.	