

## SPECIAL EDUCATION LEGAL UPDATE

Perry A. Zirkel

February 2025

This month's update identifies two recent court decisions that respectively address (a) the overlapping complexities of Section 504 in the school context, and (b) the evolving dimensions of FAPE. For previous monthly updates and related publications, see [perryzirkel.com](http://perryzirkel.com)

**On January 14, 2025, the Eighth Circuit Court of Appeals issued an officially published decision in *F.B. v. Lourdes Parish & School*, illustrating various issues specific to Section 504 liability claims. The child in this case received a diagnosis of ADHD when she was in third grade. After the student's private evaluation midway in grade 5, which identified deficits in memory, attention, and fine motor skills, the parents enrolled her in a parochial school. Treating her as a student with a disability under Section 504, the school provided her with an individual learning plan with various accommodations, including study guides, teacher notes, pre-teaching, homework assistance, and an extra set of textbooks. The student progressed well. However, when a new principal took over at the start of grade 6, the student no longer received the accommodations. Upon the parents' complaint, the new principal told them that the accommodations were outdated and no longer applicable. In the first half of grade 7, the parents notified the principal that their child spent most school days in the hallway making up homework and receiving disparaging treatment from the teachers and administration. The principal professed not knowing about the child's learning plan but said she would locate and review it. When she failed to get back to them, the parents scheduled a meeting with the teachers, the principal, and the parish's chief cleric. The teachers left the meeting after agreeing to implement the accommodations. Then the interaction between the parents and the two administrators became heated, culminating in the chief cleric telling the parents that their three children were no longer welcome at the school effective that day. The parents filed suit in federal court under Section 504 for expelling their child due to her disability, citing various violations of Section 504 regulations, including those requiring a 504 coordinator, a grievance procedure, and various procedural safeguards. They sought declaratory relief, injunctive relief, and compensatory damages (including \$500,000 for emotional pain and suffering) or at least nominal damages. The district court dismissed the case, concluding that violation of the Section 504 regulations does not alone amount to a right to sue. The parents appealed to the Eighth Circuit.**

First, the Eighth Circuit clarified, as an incidental matter that emotional damages are not available under Section 504.

The Supreme Court's *Cummings* decision in 2022 established this limitation for federal antidiscrimination claims, including Section 504.

Second, the Eighth Circuit upheld the dismissal but on different grounds, concluding that the parents lacked the adjudicative prerequisite of "standing."

More specifically, the court concluded that the parents failed to show their child's eligibility under Section 504 and, even so, a causal connection between the cited regulations and the child's expulsion.

Thus, the court found it unnecessary to address the issue of whether violation of the Section 504 regulations alone suffices for a right to sue as well as other unsettled issues.

One of these unsettled issues is the specific standard under Section 504 for money damages, which the Supreme Court recently agreed to decide in *A.J.T. v. Osseo Area Schools*.

This decision, although in the context of a private school, serves as a reminder of some of the liability issues under Section 504.

On January 6, 2025, a federal district court in Pennsylvania issued an unpublished decision in *C.B. v. Nazareth Area School District*, addressing the difference among 3 dimensions of FAPE—procedural, substantive and failure-to-implement (FTI). The child in this case had multiple diagnoses, including autism, apraxia, and ADHD. In the transition from IDEA services in preschool, he received a reevaluation, which included a recommendation for expanded use of augmentative and alternative communications (AAC). In kindergarten (2021–22), his IEP identified his classifications as autism and speech/language impairment. After the parents rejected the proposed placement in a full-time autistic support class, the IEP provided for placement in a regular education class with itinerant special education services and speech/language therapy. The IEP also provided for “services and strategies” to support the child’s use of the AAC device. He made progress academically. However, in response to his learning-impeding behaviors, the IEP team met in March and May, resulting a functional behavioral assessment, behavior intervention plan, and continuation of the inclusionary placement. In grade 1 (2022–23), his problematic behaviors worsened. In mid-year meetings after the child’s extended absence for illness, the team decided to discontinue the use of his AAC device in school. When that did not help with the behavioral issues, the team met in March and reinstituted the IEP provision for use of this device. The parents proposed modifying the content of the instruction, but the district refused unless the placement changed to the full-time autistic support class. Instead, the team revised the IEP to provide partial segregated support. The parents dissented, and on May 10, they changed the child’s enrollment to a cyber charter school. On May 15, the team met, with the parents not opting to attend, and issued a revised IEP for the full-time autism placement. In June the parents filed for a due process hearing. The hearing officer found a two-year denial of FAPE, attributable to the district’s failure to (a) modify the child’s instruction to meet his behavioral and communication needs, and (b) provide support, including consistent modeling, for the child’s use of the AAC device. The remedy was compensatory education amounting to 1 hour/day for most of 2021–22 and full days for most of 2022–23. The school district appealed to federal court.

First, the school district argued that the hearing officer erred by not treating the FAPE claim regarding AAC with an FTI analysis, because the IEP only required “services and strategies,” not the device, for AAC.	Rejecting this claim, in light of the parents’ complaint, the court concluded that the hearing officer properly analyzed this claim as a failure of programming (thus, the <i>Endrew F.</i> standard for substantive FAPE), not a failure of implementation (thus, the materiality standard).
Second, the district argued that the hearing officer erred by treating the FAPE claim regarding modification of instruction as a matter of substantive, rather than procedural, FAPE.	Rejecting this claim too, the court concluded that the two Third Circuit decisions on which the district relied addressed procedural issues of parental participation. In contrast, the issue here was whether the IEP’s failure to modify the content of the instruction was reasonably calculated to result in appropriate progress.
Third, the district alternatively argued that the modification claim was a matter of FTI.	The court summarily rejected this alternative, concluding that the district’s alleged refusal to modify the child’s instruction was a programming issue.
Next, the district contended that its proposed IEPs did meet the substantive standard.	The court disagreed, concluding that the record supported the two failures that the hearing officer identified as being fatal in combination with each other.
Finally, the district challenged the compensatory education award.	The court upheld the award, finding it sufficiently tailored to the extent of the denial of FAPE for each year, which was more severe in the second year.
Although illustrating the fact-based variations in adjudicative decisions and remedies, the primary lesson in this case is its differentiation of the “faces” of FAPE, which continue to evolve and which need to be understood due to their potential outcome effect in IDEA adjudication.	