

SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions respectively illustrating (a) the statute of limitations and substantive FAPE standard under the IDEA, and (b) the alternative of Fourteenth Amendment and Section 504/ADA claims for students with disabilities. For related information about these various issues, see perryzirkel.com

In *Alexander G. v. Downingtown Area School District* (2021), a federal district court in Pennsylvania addressed the parents' challenges to three successive IEPs and their resulting request for compensatory education and tuition/related services reimbursement. The IEPs were for grades 5, 6, and 7 for their child with SLD in reading. The 5th grade IEP, which was for the 2016-17 school year, included Wilson's "Just Words" reading program. The 6th grade IEP included a goal, which the district representatives regarded as unrealistic but for which the parents were adamant, for reaching grade level in reading fluency. The proposed IEP for grade 7 changed to the Wilson Reading System, but the parents unilaterally placed the child in a private school after providing the requisite timely notice to the district. The parents filed for due process in March 2019. The hearing officer ruled that (a) the IDEA statute of limitations barred the period in grade 5 before March 2017 and (b) the IEPs from that time forward provided FAPE, thus not entitling the parents to the requested relief. The parents sought reversal of these rulings in court.

For the limitations period, the court upheld the hearing officer's determination that the parents had reason to know of the basis for their denial of FAPE claim in March 2017.

The court concluded that the parents had reason to know of the alleged denial of FAPE as early as the start of the grade 5, when they requested a reevaluation based on their concern with the child's progress under the child's first IEP, which started in the middle of grade 4.

For FAPE, the parents' various arguments included (a) the child's erratic progress; (b) the belated change to a more intensive reading program; (c) the grade-level fluency goal was the district's responsibility; and (d) the child's lower reading scores from the end of grade 5 to the start of grade 6.

The court held that (a) the substantive standard for FAPE did not require consistent or across-the-board progress; (b) the district's judgment to change to a more restrictive reading program was entitled to judicial deference; (c) the district's obligation included parental collaboration, and FAPE did not require grade level performance; and (d) the lower scores could be reasonably attributed to the summer break rather than necessarily indicating district error.

This decision is another illustration of the generally low impact of *Endrew F.* on the pro-district outcomes skew of substantive FAPE cases. Despite occasional exceptions, the courts remain largely deferential to both school district and hearing officer substantive decisions. Yet, there is every reason for district personnel to follow rigorous professional standards based on nuanced, research-based analysis and prophylactic practices for effective collaboration focused on individual and collective success.

<p>In <i>Lartigue v. Northside Independent School District</i> (2021), a federal district court in Texas addressed the constitutional and statutory civil rights claims of a high school student with hearing impairment. The parents had lost and did not appeal a due process hearing officer decision under the IDEA. Instead, their claims in court were based on (a) Fourteenth Amendment equal protection and due process clauses and (b) Section 504 and the Americans with Disabilities Act (ADA). Their claims were based on allegations of unequal access to academic and non-academic activities by denials of various requests, including for Communication Access Realtime Translation (CART) services and closed captioning of videos and other audio-visual (A-V) materials, two interpreters at all times, and private counseling. They further alleged that the lack of these accommodations caused her to have panic attacks and to drop out of school.</p>	
<p>The parents' equal protection claim was that the district did not provide equal access to classroom and debate activities via CART services and closed captioning of A-V materials.</p>	<p>The court dismissed the claim for lack of (a) sufficient facts for an appropriate comparison to hearing students and (b) a showing that the district lacked a rational basis for any difference.</p>
<p>Their due process claim was that the district had not provided them with a fair hearing process and decision for her educational access issues.</p>	<p>The court dismissed this claim pointing to (a) their unimpeded opportunity to speak at the school board meetings and (b) their unappealed due process hearing decision.</p>
<p>Additionally, to reach the deep pockets of the school district, the court pointed out the additional hurdle for constitutional claims.</p>	<p>The court concluded that the parents failed to show a policy or custom that established the requisite deliberate indifference of the school district's policymaking agents.</p>
<p>The parents' Section 504 claim was that the district's actions amounted to a hostile environment in relation to the student's disability.</p>	<p>The court dismissed this claim, concluding that her allegations failed to show conduct so pervasive as to cause her severe stress and withdrawal from school.</p>
<p>Their ADA claim was that the district failed to accommodate her disability.</p>	<p>The court denied the district's motion to dismiss this claim, concluding that they sufficiently alleged lack of meaningful access.</p>
<p>This relatively brief decision illustrates (a) the alternatives of constitutional and Section 504/ADA claims for IDEA-eligible students; (b) the steep uphill slope for constitutional claims, with an added hurdle for liability of the school district; (c) the not clearly settled standards for the various discrimination claims under Section 504 and the ADA; and (d) the ponderous multi-stage process of court proceedings, with this case only reaching at this point the threshold stage of dismissal, which is before the formal "discovery process" that ends with possible summary judgment and, if not, proceeds to a trial on the merits. This case is likely to lead to a nondramatic settlement based on the ADA claim. If not, the parents face increasingly high hurdles, including the need to prove gross misjudgment, bad faith, or deliberate indifference if they seek the remedy of money damages. Yet, also illustrating the intervening factor of the particular attorneys and the individual judge, upon further proceedings the ADA claim may extend to the ADA Title II regulation for effective communications.</p>	