

SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent, appeals court decisions illustrating the remedial consequences of child find violations under the IDEA and the liability consequences of bullying claims under Section 504. For automatic e-mailing of future legal alerts, sign up at perryzirkel.com; this website also provides free downloads of various related articles and special supplements.

In its September 10, 2021 officially published decision in *J.N. v. Jefferson County Board of Education*, the Eleventh Circuit Court of Appeals addressed the IDEA issue of whether a child find violation results in a compensatory remedy and attorneys' fees. The student in this case received a diagnosis of ADHD at an early age. In approximately grade 5 or 6, the parent discontinued the student's ADHD medication. The student's report card in grade 6 consisted mostly of As and Bs, with a C in math. However, in grades 7 and 8 (a) her academic performance dropped significantly, especially in math; (b) her problematic behaviors escalated notably; and (c) her mother asked about special education. Meanwhile, the math teacher gave the student extra help in class. In early October of grade 8 the school activated its problem-solving team. Two months later, the school initiated a referral for an eligibility evaluation. A week later, the parent filed for a due process hearing, seeking compensatory education. In mid-March, after completing the evaluation, the team determined that the student was eligible for an IEP under the IDEA. The hearing officer ultimately ruled that the district violated child find by not evaluating the student more promptly after having reasonably clear suspicion of eligibility but, based on the parent's failure to provide requisite proof, declined to award any compensatory education. Both sides appealed. The federal district court affirmed the hearing officer's decision and rejected the parent's request for attorneys' fees. The parent appealed to the Eleventh Circuit.

Did the Eleventh Circuit agree with the school district's argument that it did not violate child find?	The court concluded that it was not necessary to address this argument in light of its ruling about the remedy.
Did the Eleventh Circuit agree with the parent's claim that she was entitled to compensatory education to remedy the child find violation for her eligible child?	No, for this substantive remedy the court ruled that the parent failed to meet her burden to prove substantive harm resulting from this procedural violation.
More specifically, what was the requisite substantive harm that the parent fail to prove?	"[T]he services that the school provided were worse than what [the child] would have received from a more timely IEP."
Did the Eleventh Circuit affirm the denial of prevailing party status that would qualify the parent for attorney's fees?	Yes, because the district set in motion the evaluation leading to the IEP before she filed for a hearing, and she did not receive the remedy.
Although raising questions about the consequences of child find violations, especially for a child determined eligible under the IDEA, and the difference between general education interventions and special education, the otherwise high potential precedential weight of this decision is limited by not only the three-state (AL, GA, and FL) boundary of the Eleventh Circuit but also the court's repeated reliance on the broad discretionary latitude for (a) hearing officers for remedies and (b) lower court decisions upon appellate review.	

In its unpublished decision in *Csutoras v. Paradise High School* on September 7, 2021, the Ninth Circuit Court of Appeals addressed the issue of school district liability for alleged bullying of a student with disabilities. The student in this case was a ninth grader with a 504 plan for ADHD. The agreed-upon accommodations were limited to extra time when needed to complete work and assisted review of his notes to help keep him organized. At a high school football game, when he was talking with a female classmate, a male student suddenly approached and punched him in the face several times, causing serious injury. The reason for the assault was jealousy, which was not connected at all with his ADHD. The school’s investigation revealed that the other student had hit him on the shoulder during the lunch period a few days earlier but that school personnel had no knowledge of it or any other harassment or bullying prior to the punching incident. His parents filed suit for money damages in federal court, citing Office for Civil Rights (OCR) guidance that interpreted Section 504 as requiring districts to engage in anti-bullying actions based on what amounts to a negligence standard starting with reason to know (i.e., constructive knowledge) of harassment of students with disabilities. The district court granted the defendant’s pretrial motion for summary judgment, and the parents appealed to the Ninth Circuit.

First, the parents argued that the court should adopt the four-factor test set forth in OCR’s 2014 Dear Colleague Letter for peer harassment under Section 504: 1-disability-based; 2-sufficient for hostile environment; 3-constructive or actual knowledge; and 4-lack of appropriate response.

Affirming the lower court, the Ninth Circuit roundly rejected the proposed adoption because (1) the Letter makes clear that it does not apply to suits for liability, and (2) the Letter lacks any force as the authoritative or official position of the U.S. Department of Education via its OCR.

Alternatively, the parents argued that the four successive OCR letters, starting in 2000, put districts on notice that students with disabilities need social accommodations, even if never requested, to prevent bullying and other harassment.

“[S]uch an expansive interpretation is foreclosed by the law governing private suits for damages, which requires that plaintiffs meet the high bar of deliberate indifference—i.e., where ‘the school’s response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances.’”

If these Dear Colleague Letters are not applicable, what are the standards that are the essential elements in Section 504 suits for money damages arising from peer harassment?

Starting with the Supreme Court’s *Davis v. Monroe Cnty. Bd. of Educ.* (1999) decision, the key standards are disability-based, actual knowledge, and deliberate indifference—all missing in this case.

Although reminding interested individuals that U.S. Department of Education guidance is sometimes distinctly different from case law, the Ninth Circuit noted that “we need not decide whether all Dear Colleague Letters, or similar documents, are or are not eligible for deference or can or cannot create legal obligations.” This issue poses particular significance in relation to the various Departmental guidance documents that continue to come forth as a result of the COVID-19 pandemic. Remember too that the channels of administrative enforcement, such as the IDEA state complaint procedures and OCR’s corresponding complaint investigation process, may not answer this issue the same as hearing officers or courts.