SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

This month's update identifies a pair of recent court decisions that illustrate the increasing, although here inconclusive, use of § 504/ADA as an addition or alternative to the IDEA. For related publications and earlier monthly updates, see **perryzirkel.com**.

On February 21, 2023, a federal court in Pennsylvania issued an unofficially published decision in *D.M. v. East Allegheny School District*, addressing the § 504/ADA claims of a student with an IEP. The parents first enrolled the student in the district in 2016, when the district determined that she qualified as having specific learning disabilities (SLD) under the IDEA. In 2018, she allegedly experienced pervasive bullying, resulting in anxiety and depression diagnoses, suicidal ideations, and both attendance and academic problems. Her parents also alleged that they repeatedly reported her struggles to school officials, who failed to reassess whether she needed further services to address her mental health impairments. The bullying culminated in a sexual assault, which she allegedly reported to a school representative, who contacted the police. At a meeting in January 2019, the school officials sought to resolve the matter by transferring her to the district's cyber program. Three weeks later, claiming that the cyber program provided no direct instruction and exacerbated their daughter's downward spiral, the parents disenrolled her. They asserted that the district's action caused the father to take medical leave and the family to relocate to another district. The parents subsequently filed a civil rights suit against the district. Here, in response, the district filed a motion to dismiss the § 504/ADA claims.	
First, the district contended that neither the child's SLD nor her mental health conditions qualified as a disability under § 504/ADA.	Rejecting this argument, the court concluded that the child's IDEA SLD status qualified under § 504/ADA and that her mental health impairments substantially limited her everyday life, including the major life activity of concentration.
Second, the district argued that the parents failed to show the requisite causal connection between her disabilities and any alleged discrimination.	The court concluded that they sufficiently alleged discrimination because of her mental health conditions but not her SLD. The district had provided IEP services targeted to her SLD but not any such services for her other disabilities.
Third, the district contended that the parents had not alleged a viable claim of associational discrimination in relation to their child.	The court agreed with this argument, because a claim of associational discrimination under § 504/ADA requires allegation of a direct injury against the parents separate from the alleged direct injury to their child.
The focus on allegations is because this decision was based on a dismissal motion, which is at the first pretrial stage, and this case did not have the factual findings of any underlying due process hearing. The defendant district did not raise the issue of the IDEA exhaustion provision, perhaps because the parents presumably were solely seeking money damages, which the Supreme Court recently held, in *Perez v. Sturges Public Schools*, to be an exception to exhaustion under the IDEA.	

On April 18, 2023, a federal district court in Texas issued an unofficially published decision in *P.W. v. Leander Independent School District*, addressing claims under Section 504 and the Americans with Disabilities Act (ADA) on behalf of an elementary school child. In kindergarten, the child's teacher noted on the report card that the child had a problem with letter reversals. In the beginning of grade 1, her letter and number reversals continued, and the school initiated response to intervention (RTI) services in reading and math. The child's mother requested a special education evaluation but, after the principal advised her to see whether the RTI services worked, she withdrew her request. The RTI services continued at Tier III in grade 2, when the parents requested a dyslexia evaluation per Texas dyslexia law. The evaluation determined that the child had dyslexia, and the district provided the child with a 504 plan with dyslexia services. During the first semester of grade 3, when the child was still performing below grade level despite the 504 plan and the continued Tier III RTI services, the parents renewed their request for an IDEA evaluation based on ADHD, depression, and dyslexia. The evaluation concluded that the child qualified under the classification of health impaired (OHI), but not emotional disturbance or specific learning disabilities. The resulting IEP, which was in January, included 30 minutes of in-class support, continued dyslexia services, and various accommodations. In February, the parents filed for a due process hearing, claiming child find, evaluation, and IEP violations. Shortly thereafter, the district's instruction moved online due to the COVID-19 pandemic. During the summer before grade 4, the parents obtained an independent educational evaluation (IEE), which contained various recommendations, including placement in a nearby private school for children with dyslexia. At the start of grade 4, the IEP team met, considered the IEE, and added some accommodations to the IEP. A few weeks later, the parents placed the child in the private school. After a delay for more than a year due to the pandemic, the hearing officer ruled in favor of the parents only for their child find claim. The remedy was compensatory education for one year but not, due to the rulings in favor of the district with regard to the evaluation and the IEP, tuition reimbursement. The parents appealed the adverse IDEA rulings, adding the § 504/ADA claims that the hearing officer had dismissed for lack of jurisdiction. The school district filed a motion to dismiss the § 504/ADA claims.	
First, the district argued that the claim that the district violated the § 504/ADA rights of the parents lacked sufficient specificity.	The court agreed that the parents' conclusory allegation that the school district violated their independent right of "parent advocacy" warranted dismissal for not sufficiently amounting to a plausible claim of discrimination under § 504/ADA.
Second, the district argued that the other, child find claim lacked a specific basis for the requisite professional bad faith or gross misjudgment for § 504/ADA discrimination that was predicated on disagreement over compliance with the IDEA.	The court denied dismissal of this second § 504/ADA claim, finding the requisite gross misjudgment in the 2.5 years of RTI to delay or deny an IDEA evaluation in light of (a) the teachers' continued noting of possible signs of dyslexia, (b) the principal's alleged dissuasion against an evaluation, (c) the child's continued struggles despite the 504 plan and RTI, and (d) the staff's repeatedly asserting to the parents that "dyslexia is not under special education … just § 504."
Unless settled by the parties, this case will continue until a final resolution of the § 504/ADA child find claim and the underlying IDEA appeal. The "delay or deny" admonition for RTI is oft-repeated and -overstated, but this case illustrates the potential costly consequences for what may be flagrantly fitting circumstances. Here, as in the first case in this month's update, the defendant-district did not raise the issue of exhaustion, thus leaving unaddressed whether the *Perez* exception applied and, if not, whether a hearing officer's IDEA decision on the merits, with dismissal for the § 504/ADA claims for lack of jurisdiction, was sufficient.	