SPECIAL EDUCATION LEGAL ALERT

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This month's update highlights two recent federal court decisions that are of general significance: (a) one with multiple issues that extend to evaluation and FAPE under Section 504, and (b) another that illustrates the employee "whistleblower" side of special education. Both decisions are not officially published and are at the trial court level, thus of limited precedential weight, but their issues contribute to practitioners' legal currency. More detailed analyses of these various issues and related caselaw are available on the Publications page of **perryzirkel.com**.

In *H.D. v. Kennett Consolidated School District* (2019), a federal district court in Pennsylvania addressed claims under both the IDEA (child find) and Section 504 (evaluation and FAPE) of the parents of a middle schooler who unilaterally placed him in a private school and sought reimbursement from the district. In grade 6, he was on the honor roll. In grade 7, his grades, attendance, and behavior began to decline. Early in grade 9, based on parental reports, the district conducted a 504 evaluation based on the more extensive parental input, the medical diagnosis of anxiety that they provided, the recommendation of the student's therapist, and teacher ratings of the student's work habits. The district provided him with a 504 plan that included accommodations for homework, class presentations, and preferential seating. After 10, rather than its usual 14–16 weeks, the district determined the 504 plan was not working and initiated an IDEA evaluation, but the parents removed him for an out-of-state wilderness program before its completion. Per an IEE at the wilderness program, they then placed him in an out-of-state residential treatment program. The court denied reimbursement both for the private placements and the IEE.	
In response to the parents' IDEA child find claim, the court concluded that the district did not have reasonable suspicion of a need for special education until the interventions were unsuccessful in grade 8 and that the district initiated the evaluation within a reasonable period of time thereafter.	The court rejected the parent's claim for grade 7 based primarily on (a) the teachers' testimony that his problems were not so atypical for students of his age to suggest a need for special education and (b) case law in the jurisdiction reflecting a standard of a more flagrant pattern of unique need.
In response to the parents' IDEA claim for IEE reimbursement, the court ruled that the parents' unilateral out-of-state placement cut off their entitlement for evaluation.	It is not clear what the court's ruling would have been if the unilateral placement was to a more convenient location, especially for completion of the district's evaluation.
In response to the parents' challenge to the 504 evaluation, the court ruled that the IDEA evaluation standards do not apply and that the district's 504 evaluation, although not including any formal testing, met the less exacting standards of the § 504 regulations.	One of the contributing factors was the parents' consent to the scope of the evaluation. Another was the use of multiple sources to determine the student's impairment and its effect on suspected major life activities, such as concentration and sleeping.
In response to the parents' challenge to the appropriateness of the 504 plan, the court concluded that the plan met the reasonable accommodation standard, along with the jurisdiction's addition of meaningful participation and access.	In reaching this conclusion, the court; applied the "snapshot standard"; viewed the accommodations as not distinct from interventions; and commented that the purpose was to mitigate, not erase, the effect of the identified disability.
The bottom line to avoid kneejerk reactions to purported "red flags" for child find and similarly to avoid overdoing 504 as a consolation prize, instead focusing (a) on reasonable suspicion and reasonable period for child find, and (b) reasonable evaluations and reasonable plans under § 504.	

In *Molloy v. Acero Charter Schools* (2019), a federal district court in Illinois addressed a reading teacher's claims that the defendants fired her for voicing concerns about violations of disability-related laws. Based on arrangements by a staffing agency, a charter school operator hired her as a full-time reading specialist in March 2018. During the next few weeks, she expressed her belief to various teachers and administrators of the charter school and the supervisor of the staffing agency that the school was violating the IDEA and the corollary Illinois law, which mandates RTI/MTSS for SLD identification. For example, she objected to the principal's refusal to implement RTI/MTSS in response to her student referrals and to allow her to provide Tier 3 interventions. After various reprimands and other adverse actions during the month after hiring her, the charter school company fired her. She sued, claiming that her termination was a violation of (a) First Amendment freedom of expression, (b) § 504 and the ADA, and/or (c) Illinois statutory and common law protections for whistleblowers. The defendants filed a motion for dismissal, which is the first pretrial screening stage, eliminating claims that lack legal basis even upon accepting the allegations as facts.	
For the First Amendment claim, the court denied dismissal because her criticism was indisputably a matter of public concern and it was not limited to internal school personnel. The court reasoned that complaints of public concern "to an outside staffing agency that must determine whether to continue its ongoing relationship with the [complained-about public] employer" were not clearly pursuant to the plaintiff's official duties.	The Supreme Court established the First Amendment does not protect public employee expression pursuant to one's official duties. The court's application of this standard at this preliminary screening stage of the litigation only means that this claim would be subject to further proceedings, where the facts become successively clearer, and the outcome may be different via ultimate judicial decision-making or the alternatives of settlement or abandonment/withdrawal.
For the § 504/ADA claim, the court denied dismissal because the plaintiff had sufficiently alleged the initially required elements: (a) statutorily protected activity, (b) adverse employment action, and (c) causal connection between a and b.	The key to this preliminary determination was that the plaintiff's advocacy against disability discrimination was based on reasonable and good faith belief, even if she was wrong about the alleged violations. Again, the court limited its ruling to "the lens applicable at the pleading stage."
For the state law claims, the court denied dismissal under (1) the Illinois Whistleblower Act (IWA), and (2) Illinois' common law for retaliatory firing.	The keys to these respective rulings were (1) the IWA only requires reporting to the public employer, not an outside governmental agency; and (2) the initial requirements parallel those of the § 504/ADA claim.
Although serving as a reminder of the alternative legal protections against disability-based retaliation, two tempering caveats are warranted: (1) This decision was at the first stage of litigation, which only requires sufficient allegations for the initial, or "prima facie," elements of the alternative claims under the First Amendment, § 504/ADA, and varying state laws. (2) For employees, the case law reveals that plaintiffs generally face a rather steep uphill slope. E.g., Gina K. DePietro & Perry A. Zirkel, *Employee Special Education Advocacy*, 257 EDUC. L. REP. 823 (2010), available at https://perryzirkel.com/whistleblower/	