

**SECTION 504 LITIGATION: A MOVING TARGET**

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**by Laura O’Leary and Amanda Bigbee**

**I. WHY SHOULD SPECIAL EDUCATION PROVIDERS WORRY ABOUT SECTION 504 CLAIMS?**

While not every 504 student is a special education student, every special education student is a 504 student. Every special education student, therefore, is a potential 504 plaintiff. If you ask a family who has been through a special education due process hearing, you may hear them express the view that due process hearing officers are not student-friendly and almost always side with school districts. Some parents are looking to other avenues, such as 504 litigation, to have their voices heard. As this area of the law develops and evolves, all school districts and special education providers should be concerned about Section 504 claims.

**A. What is Section 504?**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against the disabled by entities that receive federal funding.<sup>1</sup> Section 504 provides:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

29 U.S.C. § 794(a).

Section 504 permits two avenues for enforcement. In accordance with the explicit terms of the statute, the federal government is responsible for enforcing its legal protections, including through denial of federal funding and lawsuits.<sup>2</sup> Although the language of the statute does not provide for enforcement through a private lawsuit, the Supreme Court has implied a private cause of action permitting an injured party to bring suit for monetary damages for intentional

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<sup>1</sup> See, e.g., *Barnes v. Gorman*, 536 U.S. 181, 184-185 (2002).

<sup>2</sup> 29 U.S.C. § 794a(a)(2).

violations of Section 504.<sup>3</sup>

## **B. What Circumstances Have Led to Section 504 Claims?**

In recent years, students and their parents have brought private lawsuits alleging, for example, that school personnel: failed to provide students with a safe, non-hostile educational environment; failed to provide modifications and accommodations geared toward the student's disability; failed to provide safe, meaningful access to programs; or failed to prevent or remedy harassment by other students.

These cases often involve highly sympathetic plaintiffs and claims for monetary damages in the range of millions of dollars. Some of these cases involve the accidental or self-inflicted death of a student, while others involve physical or emotional injury to a student allegedly caused by school personnel or by other students. Recent Section 504 cases include allegations: that a teacher or administrator physically or emotionally abused a student; that a student's drowning death in a school pool resulted from failure to accommodate the student's disabilities; that students' self-inflicted deaths resulted from school personnel failing to respond adequately to peer-to-peer harassment; and that a student was injured when school personnel failed to respond appropriately to complaints of peer-to-peer sexual abuse at school.

Not surprisingly, these cases tend to receive significant media coverage critical of the school district and sympathetic to the students and their parents.

## **II. WHAT IS THE CURRENT STATE OF THE LAW?**

In many areas, the current state of the law is murky, in part because many of the claims brought under Section 504 are, at their heart, really personal injury or wrongful death claims which could not otherwise be brought against a school district. Such claims do not fit well in the category of disability discrimination, but because the situations are often so sympathetic,

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<sup>3</sup> *Barnes*, 536 U.S. at 185.

judges and juries have, at times, stretched the law to encompass these claims. Different district courts in Texas have applied different standards for determining liability under Section 504, and the Fifth Circuit Court of Appeals has been reluctant to provide clear definitions of applicable terms and appropriate liability standards. It is clear that a plaintiff must prove intentional discrimination solely on the basis of disability, but the meaning of those terms is still emerging.

**A. Discrimination Must be Based Solely on Disability**

Under Section 504, it is not enough merely to allege that a student is disabled and was harmed or discriminated against at school: the student's injury must have resulted from discrimination based solely on the student's disability. A recent case from a neighboring Circuit Court of Appeals clarified that, in order to demonstrate such causation under Section 504, plaintiffs must prove that, because of their disability, they were deprived of a benefit or opportunity that was provided to non-disabled students.<sup>4</sup> Because Section 504 requires intentional discrimination solely on the basis of disability, evidence of an alternative cause for the allegedly discriminatory conduct is fatal to a 504 claim.<sup>5</sup>

Where conduct is not based on a student's disability, Section 504 does not provide a remedy. For instance, in two recent highly emotional, and highly publicized, cases involving student suicides allegedly linked to bullying at school, two different district court judges found in favor of the school districts because there was no evidence of disability-based conduct.<sup>6</sup> Additionally, in the Southern District of Texas, the court recently dismissed a Section 504 claim brought on behalf of a five year old girl with cerebral palsy who alleged that, although the school district assigned an aide to accompany her on the school bus, the aide failed to ensure her safety

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<sup>4</sup> *CG v. Pennsylvania Dep't of Educ.*, No. 12-3747, 2013 U.S. App. LEXIS 22426 (3rd Cir. Nov. 15, 2013).

<sup>5</sup> *Id.* at \*14.

<sup>6</sup> *Lance v. Kyer*, No. 4:11-CV-32, 2012 U.S. Dist. LEXIS 160580, \*11 (E.D. Tex. Sept. 11, 2012); *Brown v. Ogletree*, No. 11-CV-1491, 2012 U.S. Dist. LEXIS 21968 \*58-60 (S.D. Tex. Feb. 21, 2012).

when she was assaulted on the bus by another student.<sup>7</sup> The court dismissed the suit, finding that the student did not allege either discrimination on the basis of her disability or that she was excluded from or denied benefits because of her disability.<sup>8</sup> In a recent case from the Western District of Texas, the court dismissed a Section 504 suit in which an autistic student accused a principal of emotional abuse due to improper discipline.<sup>9</sup> The court explained that a student cannot be discriminated against due to his disability until the disability has been demonstrated to exist. The student in that case had not been diagnosed with autism at the time that the disciplinary misconduct was alleged to have taken place, and therefore the principal's conduct could not have amounted to discrimination on the basis of disability.

That said, however, some judges seem to skip over this portion of the analysis. For instance, in a recent case from the Western District of Texas, in which a disabled student claimed that the school district failed to provide him with an appropriate environment in which to obtain an education due to repeated incidents of peer harassment and bullying, the magistrate recommended denying the school district's motion for summary judgment even though he engaged in no analysis of how the alleged bullying or harassment was based on the student's disabilities.<sup>10</sup>

## **B. Discrimination Must be Intentional**

In order to recover monetary damages through a private lawsuit under Section 504, a plaintiff must prove intentional discrimination against a student on the basis of his disability, as, for instance, when a school district "refuses" to provide reasonable accommodations to permit a

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<sup>7</sup> *Turner v. Houston Indep. Sch. Dist.*, No. H-13-0867, 2013 U.S. Dist. LEXIS 93152 (S.D. Tex. July 3, 2013).

<sup>8</sup> *Id.*

<sup>9</sup> *Pagan-Negron v. Sequin Indep. Sch. Dist.*, No. SA-12-CV-055-XR, 2013 U.S. Dist. LEXIS 136764 (W.D. Tex. Sept. 24, 2013).

<sup>10</sup> *C.L. v. Leander Indep. Sch. Dist.*, No. A-12-CA-589, 2013 U.S. Dist. LEXIS 102585, W.D. Tex. July 23, 2013).

disabled student to receive the full benefits of the school program.<sup>11</sup> “Intentional discrimination” in this context has been variously described as “discriminatory animus,” “deliberate indifference,” “professional bad faith/gross misjudgment,” or some combination of those categories.

Initially, the Fifth Circuit Court of Appeals seemed to indicate that “discriminatory animus” was synonymous with intentional discrimination.<sup>12</sup> More recently, however, the Court embraced “professional bad faith and gross misjudgment” as a measure of intentional discrimination for certain types of Section 504 claims.<sup>13</sup> Even more recently, the Fifth seemed to indicate that both a “deliberate indifference” standard and a “gross misjudgment” standard might apply with respect to establishing intentional discrimination by a school district in the context of claims of disability-based peer bullying or harassment.<sup>14</sup>

### **1. Discriminatory Animus**

There is some indication that the Fifth Circuit requires a higher standard for proving intentional discrimination than that measured by the term “deliberate indifference.”<sup>15</sup> This standard, “discriminatory animus,” amounts to a specific desire to discriminate against the disabled individual. Section 504 cases in the school context have not elaborated on this standard.

### **2. Deliberate Indifference**

The deliberate indifference standard arises from a U.S. Supreme Court case involving student sexual harassment, in which the Court found that a school district could be held liable for its own failure to remedy third party harassment if district personnel with the authority to address

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<sup>11</sup> *D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 454 (5<sup>th</sup> Cir. 2010); *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 264 (5<sup>th</sup> Cir. 1984); *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5<sup>th</sup> Cir. 1983).

<sup>12</sup> *Carter*, 725 F.2d at 264; *Marvin H.*, 714 F.2d at 1357.

<sup>13</sup> *D.A.*, 629 F.3d at 454-455.

<sup>14</sup> *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513 (5<sup>th</sup> Cir. March 14, 2013) *vacated and withdrawn*, 2013 U.S. App. LEXIS 11102 (5<sup>th</sup> Cir. June 3, 2013).

<sup>15</sup> *S.H. v. Lower Merion Sch. Dist.*, No. 12-3264, 2013 U.S. App. LEXIS 18458, \*39 (3<sup>rd</sup> Cir. Sept. 5, 2013); *Delano-Pyle v. Victoria County, Tx.*, 302 F.3d 567, 575 (5<sup>th</sup> Cir. 2002); *Carter*, 725 F.2d at 264.

the conduct had actual knowledge of third party conduct that was so severe, pervasive, and objectively offensive that it deprived the victim of access to the educational opportunities or benefits provided by the school.<sup>16</sup> Deliberate indifference is found only where the district's response to the harassment is clearly unreasonable in light of the known circumstances.<sup>17</sup>

In the vacated *Stewart* opinion, the Fifth Circuit Court of Appeals indicated that it would be consistent to apply a deliberate indifference standard to claims of disability-based peer harassment given the similarities in the wording of federal statutes prohibiting sexual harassment and prohibiting disability harassment.<sup>18</sup> Indeed, in a Texas district court case released shortly after *Stewart*, the court applied a deliberate indifference standard to such a claim.<sup>19</sup>

Deliberate indifference is a high standard. A school district will not be found deliberately indifferent unless, essentially, school district personnel knew that a student was being seriously mistreated by his peers but decided to do nothing about it or responded in a way that was clearly unreasonable, given what they knew. *M.J.*, however, is a troubling case for school districts because the district court held that the school district might have been deliberately indifferent to disability-based peer harassment due to the intermittent lack of response of one general education teacher to a special education student's complaints of in-class bullying and harassment.<sup>20</sup> The student in that case also claimed to have complained during an ARD meeting of bullying in a general education classroom and complained that his concerns were ignored.<sup>21</sup>

### **3. Professional Bad Faith/Gross Misjudgment**

Section 504 claims are not, however, always based on claims of physical or emotional

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<sup>16</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

<sup>17</sup> *Id.* at 648.

<sup>18</sup> *Stewart*, 713 F.3d at 519.

<sup>19</sup> *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978-DAE, 2013 U.S. Dist. LEXIS 63350 (W.D. Tex. May 3, 2013).

<sup>20</sup> *Id.* at \*26.

<sup>21</sup> *Id.* at \*25.

harm to a disabled student. Some claims involve complaints about placement, accommodations, or services. In the context of Section 504 claims which are premised on alleged violations of the IDEA, a plaintiff must currently demonstrate “gross misjudgment” or “professional bad faith” in order to recover monetary damages.<sup>22</sup> Mere unprofessional conduct by a teacher does not meet this standard. Section 504 does not create a “general tort for educational malpractice” and “something more than a mere failure to provide the ‘free appropriate education’ required by [the IDEA] must be shown.”<sup>23</sup>

This standard arises from a Fifth Circuit Court of Appeals case involving placement of a student, in which the Court declined to impose liability for conduct by school district personnel amounting to negligence or misjudgment, holding instead that “facts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under Section 504...against a school district predicated on a disagreement over compliance with IDEA.”<sup>24</sup> The Court warned that courts should not substitute their own judgment for that of educational professionals.<sup>25</sup>

Plaintiffs have invoked the “professional bad faith/gross misjudgment” standard in cases that clearly go beyond disagreements over compliance with IDEA, and the extent to which the gross misjudgment standard applies is uncertain. The Fifth Circuit Court of Appeals has recently acknowledged, but declined to clarify, this issue.<sup>26</sup>

The district courts in Texas have treated the “professional bad faith/gross misjudgment” standard as a high threshold which was *not* met when, for example: 1) a deaf fourth grade student who was subject to seizures drowned during a summer enrichment program run and staffed by a

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<sup>22</sup> *D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 454 (5th Cir. 2010).

<sup>23</sup> *Id.* (quoting *Monahan v. Nebraska*, 687 F.2d 1164, 1170-1171 (8th Cir. 1982)).

<sup>24</sup> *D.A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 455 (5<sup>th</sup> Cir. 2010).

<sup>25</sup> *Id.*

<sup>26</sup> *Rodriguez v. Muzyka*, No. 13-20091, 2013 U.S. App. LEXIS 20892 (5th Cir. Oct. 16, 2013).

school district, even though the school district had not communicated to the program staff the fact that the student had seizures, and even though the evidence suggested that the student fell into the pool after she had a seizure while sitting on the edge of the pool;<sup>27</sup> 2) a disabled sixth grade student who was left unattended in his wheelchair beside a river during a school field trip, fell from his wheelchair into the river and had to be pulled out of the water by his classmates;<sup>28</sup> 3) a student in a wheelchair was excluded from or injured during field trips, physical education activities, and an off-campus band performance;<sup>29</sup> and 4) a school district violated IDEA with respect to an autistic, deaf student due to improper notice to parents, improper destruction of evaluation materials, and the school's failure to provide sufficient American Sign Language training to the student.<sup>30</sup>

However, in their original opinion in *Stewart*, two Fifth Circuit judges appeared to lower the “professional bad faith/gross misjudgment” standard by equating it with gross negligence, and to broaden the scope of this standard by applying it to a claim that a school district failed to investigate disability-based discrimination and harassment complaints.<sup>31</sup> According to these judges, the “professional bad faith/gross misjudgment” standard amounted to a “species of heightened negligence” which might impose upon a school district an ongoing responsibility to calibrate a student’s IEP to effectively address these behaviors.<sup>32</sup> This would seem to make gross misjudgment a lower standard than deliberate indifference. One Fifth Circuit judge strongly dissented from this opinion, explaining that in his view, “bad faith, gross misjudgment, and deliberate indifference all rest upon substantially identical levels of

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<sup>27</sup> *Id.*

<sup>28</sup> *J.D. v. Georgetown Independent School District*, No. A-10-CA-717 LY, 2011 U.S. Dist. LEXIS 79335 (W.D. Tex. July 21, 2011).

<sup>29</sup> *I.A. v. Seguin Indep. Sch. Dist.*, 881 F. Supp. 2d 770, 782 (W.D. Tex. 2012).

<sup>30</sup> *S.F. v. McKinney Independent School District*, No. 4:10-CV-323-RAS-DDS, 2012 U.S. Dist. LEXIS 29584 (E.D. Tex. March 6, 2012).

<sup>31</sup> *Stewart*, 713 F.3d at 524.

<sup>32</sup> *Id.*

culpability.”<sup>33</sup>

Because the *Stewart* opinion has been vacated and withdrawn by the court, the gross misjudgment standard remains somewhat ill-defined, but the district court cases treating gross misjudgment as a high standard continue to be good law.

### **III. WHAT CAN SCHOOL DISTRICT PERSONNEL DO TO AVOID SECTION 504 LIABILITY?**

#### **A. Train Staff to Recognize Potential Problems**

School employees who work in the trenches must be trained to identify and report any and all alleged inappropriate conduct or neglect. Campus administrators must be trained on best practices for conducting investigations, as well as necessary steps to take in the event an investigation uncovers behavior that is potentially discriminatory and/or harmful to a student. Central administrators must have an awareness of these types of causes of action and the steps necessary to protect the school district from liability. It is imperative that any discriminatory behavior be identified, investigated, and, as appropriate, remediated.

#### **B. Document Carefully and Consistently**

Administrators, especially at the campus level, must have a heightened awareness of concerns regarding students with disabilities. Investigation of a complaint involving a disabled student should take place quickly and be done thoroughly. The investigation and its findings must be documented and preserved, and steps must be taken to ensure any inappropriate behavior, discovered through the investigation, stops. Administrators should follow up on their investigations and should document the success of their interventions, if appropriate, or take additional steps to end any continuing problematic behavior. This may include: (1) documenting increased monitoring, and (2) using growth plan documents that mandate ongoing conversations with administration. If improper conduct has taken place, it is imperative that the school district

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<sup>33</sup> *Id.* at 536 (Higginbotham, dissenting).

take immediate and decisive action in order to avoid liability.

Remember that both general and special education personnel must thoroughly and consistently document reports of disability-based conduct, including alleged abuse, assault, bullying and harassment, investigations of such reports, and their communications with the parents of any students involved in such incidents.

### **C. Communicate With Parents**

School personnel should consistently follow up on phone calls from parents or notes from home claiming that their disabled child was harmed or harassed at school. Documentation of a teacher's or administrator's response to such reports may make the difference between a quick resolution of a difficult situation and protracted litigation. It is also important that school personnel be honest and transparent with parents when investigations take place, especially when the concerns don't initiate with the parent. Honesty and transparency will assist the parent in fully understanding any concerns as well as the steps school district personnel have taken to remedy those concerns. While these are difficult conversations, timely and thorough communication is certainly easier than years of litigation and twenty-twenty hindsight.

As Section 504 claims make their way through the courts we will learn more about the standards that will be applied and the measures by which school personnel will be held accountable. These types of claims are coming more often and with higher stakes. A school district's best defense is a genuine concern for the welfare of the student coupled with swift and appropriate action. Allegations of injury, discrimination, harassment, bullying, abuse, and neglect should be taken seriously and investigated fully and promptly. Investigations and any disciplinary action should be documented thoroughly. Prompt and effective communication among school officials and with the parents of disabled students is vital. While the legal ground may be shifting your focus must always remain on the needs of the students.