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Monetary Liability of Public School Employees under the IDEA and Section 504/ADA

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MONETARY LIABILITY OF PUBLIC SCHOOL EMPLOYEES UNDER THE IDEA AND SECTION 504/ADA

Perry A. Zirkel[*]

Consider this hypothetical case in terms of the likely resulting federal court ruling as to whether the individual school defendants were personally liable for money damages.

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K.G. moved with her mother to the Rural School District when she finished grade six and her parents obtained a divorce. K.G.'s transition from her former residence in a large city was not an easy one. She did not previously have any private diagnoses or special education services. When K.G.'s grade seven homeroom teacher promptly noticed her problems with attendance and anxiety, he arranged for K.G.'s participation in the school's response to intervention (RTI) program. Her attendance improved, and she appeared to be overcoming her anxiety at school, but she still had too many absences. According to the parent's complaint to the principal, K.G. continued to "melt down" at home, and, the teacher was not sufficiently empathetic about her plight as a single parent in a new community. The principal arranged for increased RTI services and added special attention from the school counselor. During the school's next regularly scheduled parent-teacher conference, which was in late April of grade seven, the homeroom teacher conveyed suggestions from the counselor and the RTI team for continuity of their interventions in the home envi-

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ronment. K.G.'s mother perceived these recommendations as implying that K.G.'s problems were attributable to her parenting. Soon thereafter, K.G stopped coming to school. In June, the district attendance officer initiated truancy proceedings, and K.G.'s mother responded by withdrawing K.G. from the district and placing her for grade eight in a cyber program operated by a private school located in a district in a neighboring state. During the first part of grade eight, the school district where the private school was located evaluated K.G., finding that she was eligible under the IDEA and, as a result, provided her with a "services plan" (per the equitable participation provisions of the IDEA regulations). K.G.'s mother sent an angry e-mail to K.G.'s former homeroom teacher, with copies to the principal and district's central office administration. The e-mail notified them of K.G.'s IDEA eligibility and remonstrated them for initiating truancy proceedings rather than providing a special education evaluation and special education services. Midway during K.G.'s grade nine year, K.G.'s mother filed for a due process hearing, seeking tuition reimbursement and/or compensatory education for two alleged violations: (1) "child find," or the district's failure to evaluate K.G., during grade seven, and (2) the district's failure to offer the evaluation/IEP process for grade nine. A few months later, she separately filed suit in federal court against the teacher, the principal, the special education director, and the superintendent in their personal capacities (i.e., not in their official capacities, which would be merely as proxies for the school district). Explaining in her complaint that the IDEA does not authorize hearing officers to award money damages, she specifically sought this remedy from the court for alternative counts under (a) the IDEA, (b) Section 504 and the ADA, (c) Section 1983 for violations of the IDEA, and (d) Section 1983 for violations of Section 504 and/or the ADA. The defendants filed a motion of dismissal, which would end the litigation before moving to the pretrial phase of deposi-

tions and interrogatories.

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The underlying broader question is whether school district personnel, such as the teacher and special education director, may be liable for money damages in suits under the Individuals with Disabilities Education Act (IDEA)[1] or Section 504 of the Rehabilitation Act (§ 504)[2] and its sister statute, the Americans with Disabilities Act (ADA)[3] either directly or in connection with Section 1983 of the Civil Rights Act (§ 1983)?[4] It is not uncommon for special education personnel, as well as their general education colleagues who serve students with disabilities, to have a career-affecting fear of being sued under these federal laws for monetary liability.[5] The sources of this fear are multiple, including (1) the professional literature's failure to unpack this complex legal issue; (2) school insurance companies and the organizations, such as teacher unions, that offer this benefit; (3) school administrators who share this legal misconception; (4) school attorneys and school leaders who foster, rather than correct, this misconception based on a preventive rationale; and (5) advocacy organizations and parent attorneys who view fear of liability as beneficial for their clients.[6]

1. 20 U.S.C. §§ 1400 –1482 (2016).
2. 20 U.S.C. §§ 1400 –1482 (2016).
3. U.S.C. §§ 12131–12134 (2016).
4. 42 U.S.C. § 1983 (2016).
5. *See, e.g.*, Michele Wilson Kamens, Susan J. Loprete, & Francis A. Slostad, *Classroom Teachers' Perceptions about Inclusion and Preservice Teacher Education*, 11 TEACHING EDUC. 147, 153 (2000) (reporting incidental survey finding of concern with personal liability of general education teachers for students with disabilities in their classes); Joy Williams & Catherine Dikes, *The Implications of Demographic Variables as Related to Burnout Among a Sample of Special Education Teachers*, 135 EDUC. 337, 338 (2001) (observing that the "liability potentialities" of special education laws contribute to burnout of special education teachers).
6. These sources are based largely on my four decades of experience in the field. The woefully limited literature contributes to the misconceptions. *E.g.*, Barbara L. Pazey & Heather A. Cole, *The Role of Special Education Training in the Development of Socially Just Leaders*, 49 EDUC. ADMIN. Q. 243, 244 (2012) (asserting, directly in connection with the IDEA, that "[s]ignificant liability exists for administrators and instructional personnel who fall short of performing their duties and responsibilities with respect to students with disabilities"). Even though their cited support did not at all address such purportedly significant liability,

Identifying the pertinent court decisions in response to the dismissal motion in not only the opening scenario but also other such federal cases depends on successive sources of information, starting with a working knowledge of the relevant meaning of legal bases, such as the IDEA, § 504, and § 1983. Part I of this article provides an overview of these avenues of litigation. Part II synthesizes the case law that demarcates the availability and applicability of the IDEA and § 504/ADA avenues as the direct basis for money damages claims. Part III synthesizes the corresponding case law rulings for money damages claims that combine these alternate IDEA and § 504/ADA avenues with the special role of § 1983. The final part provides a discussion of the practical implications of this legal analysis, including a revisiting of the opening case scenario to illustrate the answer to the personal liability question as specifically applied to school personnel.

I. OVERVIEW OF THE IDENTIFIED STATUTORY AVENUES

The IDEA is the primary legislation for students with disabilities in P–12 schools,[7] who accounted for 12.5% of the public school population in 2015–16.[8] Providing an individual right to adjudicative relief, starting with a due process hearing and extending to litigation in federal and state courts, the IDEA

their assertion has become part of the foundation of subsequent scholarship. *E.g.,* Benjamin H. Dotger & April Coughlin, *Examining School Leaders' Simulated Interactions in Support of Students with Autism*, 31 J. SPECIAL EDUC. LEADERSHIP 27, 28 (2018); Heather Glowacki & Donald G. Hackman, *The Effectiveness of Special Education Teacher Evaluation Processes*, 47 PLANNING & CHANGING 191, 204 (2016) (citing Pazey & Cole to show that special education poses significant liability).

7. *E.g.*, Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 EDUC. L. REP. 886 (2017) (showing the primacy of the IDEA by systematically comparing it with § 504 and the ADA).

8. Perry A. Zirkel & Tiedan Huang, *State Rates of 504-Only Students in K-12 Public Schools: An Update*, 354 EDUC. L. REP. 621, 624 (2018) (reporting the results for the most recent available school year in the U.S. Department of Education's Civil Rights Data Collection).

accounts for an extensive body of case law.[9] The wide range of issues under the IDEA and its regulations start with child find and eligibility and center on the IDEA's core obligation to provide each eligible child with a free appropriate public education (FAPE), as documented in an individualized education program (IEP).[10]

Serving in a secondary, yet broader role, § 504 and the ADA, cover not only the students entitled to IEPs under the IDEA but also those—approximating an additional 2.3% of the school population—who have 504 plans.[11] The § 504 regulations also provide the right to a due process hearing and a parallel but much less detailed range of requirements, including eligibility and FAPE.[12] Due to their close relationship, akin to being fraternal twins in relation to public schools, § 504 and the ADA typically serve as a joint avenue in the applicable case law as an addition or alternative to the IDEA.

Finally, § 1983 first became law in 1871 and was originally known as the Ku Klux Klan Act because it served as a protection for the newly freed slaves. However, based on its broad-based language,[13] § 1983 is a generic civil rights act that provides for liability of school employees or anyone else acting

9. *E.g.*, Tessie Rose Bailey & Perry A. Zirkel, *Frequency Trends of Court Decisions Under the Individuals with Disabilities Education Act*, 28 J. SPECIAL EDUC. LEADERSHIP 3 (2015) (analyzing the frequency of IDEA litigation on a state-by-state basis); Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law*, 27 J. SPECIAL EDUC. LEADERSHIP 55 (2014) (tracking the frequency and outcomes of IDEA court decisions from 1998 to 2012).

10. *E.g.*, Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 TCHR. EDUC. & SPECIAL EDUC. 263 (2015) (explaining child find, eligibility, and FAPE under the IDEA).

11. Zirkel & Huang, *supra* note 8, at 625. Referred to as "504-only" in such sources, these students typically have a designated document often referred to as a 504 plan, although § 504 does not specifically require these forms. *E.g.,* Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*, 40 J.L. & EDUC. 407 (2011).

12. 34 C.F.R. §§ 104.31–.39 (2017).

13. 42 U.S.C. § 1983 (2016) ("Every person who, under color of [law] . . . subjects, or causes to be subjected, any . . . other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

with apparent governmental authority upon violating the Constitution or other federal laws. However, § 1983 does not serve as an independent basis for suit; without the prerequisite of violation of a federal substantive right, § 1983 does not provide a remedy. Instead, analogous to an all-purpose "handle" for civil rights suits, it requires connection to an otherwise freestanding federal law, whether it is a provision in the U.S. Constitution or in federal legislation.[14] Moreover, the Supreme Court has gradually developed various requirements for connecting § 1983 to federal statutes,[15] with the result that its application in the context of the IDEA and § 504/ADA is far from automatic.[16]

The lurking question beyond the usual IDEA and § 504/ADA school district remedies, which primarily consist of orders for tuition reimbursement or compensatory education services,[17] is whether individual school employees are subject to personal liability for money damages upon violation of these statutes? An answer to this question lies in the case law concerning two overlapping avenues—Are money damages available under the IDEA and/or § 504/ADA either (1) directly or (2) via the generic, connector federal civil rights act, § 1983? A complete answer warrants a two-step, flowchart-like analysis for each of these alternative routes. More specifically, for each of these direct and indirect routes, the analysis starts with the

14. This "handle" analogy is only for the limited purpose of showing the role and scope of this generic civil rights law, as compared with the substantively specific civil rights laws, such as Title VI of the Civil Rights Act of 1964 and § 504 of the Rehabilitation Act.

15. *E.g.*, City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) (holding that § 1983 may not be used to enforce federal statutory limitations on local zoning authority).

16. *E.g.*, Rebecca L. Bouchard, *The Relationship between the Individuals with Disabilities Education Act and Section 1983*, 25 W. NEW ENG. L. REV. 301 (2003) (explaining the contours of § 1983 and the IDEA and interpreting the intersection as not authorizing compensatory damages).

17. *E.g.*, Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2015) (analyzing a broad sample of IDEA FAPE cases to find that tuition reimbursement and compensatory education are the two most frequent remedies).

availability of money damages for school defendants generally, including the districts, and culminates in the application of these alternatives specifically for individual school employees, such as general education or special education teachers.

II. THE CASE LAW FOR THE TWO DIRECT ROUTES
IDEA

The conclusion is quite clear that individual school employees are not liable for money damages under the IDEA itself, that is, without the § 1983 handle.[18] The reasons are the answers to the successive issues of whether this particular remedy is available under the IDEA and, if so, whether it applies to individual school personnel.

Availability. The threshold reason concerns whether the IDEA provides money damages as a remedy. Although sometimes addressing it only indirectly or incidentally, the published decisions of various high federal courts have long and uniformly ruled that the money damages are not available under the IDEA. For example, in *Burlington School Committee v. Massachusetts Department of Education*,[19] the Supreme Court ruled that tuition reimbursement is available under the IDEA, because this remedy, in contrast with "damages," is "merely requir[ing] the [school district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[20] Various published federal appellate court cases reached the same conclusion in the context of applying the IDEA's "exhaustion" provision, which requires, with limited exceptions, completion of the Act's administrative hearing process as a prerequisite to fil-

18. *See supra* note 14 and accompanying text (explaining "handle" in this context).
19. 471 U.S. 359 (1985).
20. *Id.* at 370–71.

ing for court action.[21] More specifically, these appellate courts have observed that money damages are not available directly under the IDEA.[22] Addressing the matter more directly, the following courts of appeal, in chronological order, have held that money damages, in contrast with equitable remedies such as tuition reimbursement and compensatory education services, are not available under IDEA: Sixth Circuit,[23] Eighth Circuit,[24] Fourth Circuit,[25] Second Circuit,[26] First Circuit,[27] Eleventh Circuit,[28] Ninth Circuit,[29] and Third Circuit.[30]

Applicability. The second reason why employees are not liable for damages under the IDEA is simpler. Even if the courts had interpreted the IDEA as directly allowing for the remedy of money damages, the parties under this Act, are limited to the parents and the education agencies, not the individual employees. The courts have interpreted (a) the parents' side to include not only the child but also, on an independent basis, the parents[31] and (b) the agency side to extend in similarly limited circumstances to the state level.[32] They have made

21. 20 U.S.C. § 1415(*l*) (2016).

22. *E.g.*, Witte v. Clark Cty. Sch. Dist., 197 F.3d 1271 (9th Cir. 1997); Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989 (7th Cir. 1996); W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995).

23. Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992).

24. Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996).

25. Sellers v. Sch. Bd. of Manassas, 141 F.3d 524 (4th Cir. 1998).

26. Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478 (2d Cir. 2002).

27. Nieves-Marquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003).

28. Ortega v. Bibb Cty. Sch. Dist., 397 F.3d 1321 (11th Cir. 2005).

29. C.O. v. Portland Pub. Sch., 679 F.3d 1162 (9th Cir. 2009). In recent unpublished rulings, a federal district court in the Ninth Circuit corrected its earlier denial of dismissal of an IDEA claim against individual school employees in their personal capacities. Crofts v. Issaquah Sch. Dist., No. C17-1365RAJ, 2017 U.S. Dist. LEXIS 186407 (W.D. Wash. Nov. 9, 2017), *further proceedings*, No. C17-1365RAJ, 2018 U.S. Dist. LEXIS 54868 (W.D. Wash. March 30, 2018).

30. Chambers v. Sch. Dist. of Phila., 587 F.3d 176 (3d Cir. 2009).

31. *E.g.*, Winkelman v. Parma City Sch., 550 U.S. 515 (2007).

32. *E.g.*, Perry A. Zirkel, *State Education Agencies as Defendants under the IDEA and Related Federal Laws*, 336 EDUC. L. REP. 667 (2016) (identifying the case law that extends the IDEA on a limited basis to state agency defendants).

equally clear that individual employees are neither plaintiffs nor defendants under the IDEA.[33]

§ 504 and the ADA

The analysis is much shorter than under the IDEA, and the answer is the same for claims under § 504. Although money damages are available under § 504 and its sister civil rights statute, the ADA, they apply to the institution, not the individual. Thus, although courts have varied as to the scope of school issues subject to the damages remedy under § 504 and the ADA,[34] they have uniformly agreed that neither of these federal laws, without § 1983, provides for liability of school employees in their individual capacity.[35]

III. THE CASE LAW FOR THE INDIRECT ROUTES OF THE § 1983 CONNECTION

In the face of the solid barrier against money damage claims against individual school employees directly under the IDEA and § 504/ADA, parents of students with disabilities have sought to establish such liability by filing claims under § 1983 in connection with the IDEA or § 504/ADA. Per the Part I overview, § 1983 includes this remedy against persons with governmental authority in connection with violations of the Constitution or other federal laws, but the Supreme Court has gradually developed limits in this approach to money damages

33. *E.g.*, Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006) (ruling that the IDEA does not provide for any monetary relief against individual school officials named in their personal capacities).

34. *E.g., C.O.*, 679 F.3d at 1169 (concluding that the "murky parameters" of the scope of liability under § 504 and the ADA do not extend to the admissions policies of a magnet school).

35. *E.g.*, A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660 (S.D.N.Y. 2012); Ebonie v. Pueblo Sch. Dist., 819 F. Supp. 2d 1179 (D. Colo. 2011); D.A. v. Hous. Indep. Sch. Dist., 716 F. Supp. 2d 603 (S.D. Tex. 2009), *aff'd on other grounds*, 629 F.3d 450 (5th Cir. 2010); Taylor v. Altoona Area Sch. Dist., 513 F. Supp. 2d 540 (W.D. Pa. 2007). Some jurisdictions provide a limited exception for retaliation claims. *E.g.*, P.N. v. Greco, 282 F. Supp. 2d 221 (D.N.J. 2003).

depending on the nature of the federal statute.

A. IDEA

The answer to the monetary liability issue for school employees under the IDEA via a § 1983 suit is more complicated, but ultimately, almost as clearly the same. The reasons are again successive, starting the threshold issue of availability of this remedy under this indirect, or connected, approach and culminating, to the extent available, with its attempted application to school employees.

Availability. The threshold issue of whether § 1983 is available for IDEA claims, thus providing the potential for monetary liability of individual school district employees, has been the subject of substantial litigation, with the clear trend in favor of a negative answer.[36] The following table provides an overview of the pertinent case law, with the entries largely in chronological order and with those by the federal circuit courts of appeals in larger font to represent their higher precedential weight. The cross-outs represent lower court cases that were superseded by subsequent court decisions covering that jurisdiction but at the same or a higher judicial level.

36. The limited education literature pre-dated the crystallization of this clear trend. *E.g.,* Antonis Katsiyannis & John W. Maag, *Ensuring Appropriate Education: Emerging Remedies, Litigation, Compensation, and Other Considerations*, 63 EXCEPTIONAL CHILD. 451, 457–59 (1997) (canvassing the case law in this § 1983 route without distinction between defendant districts and defendant employees in their individual capacities).

Chronological Overview of § 1983-IDEA Case Law for Threshold, Availability Step

Is § 1983 Availing for IDEA Violations?	
YES	**NO**
	Crocker (6th Cir. 1992)
	Heidemann (8th Cir. 1996)
~~*Doe v. Withers* (W.V. Cir. Ct. 1993)~~	*Sellers* (4th Cir. 1998)
	Padilla (10th Cir. 2000)
	Diaz-Fonseca (1st Cir. 2006)
~~*W.B.* (3d Cir. 1995)~~	*A.W.* (3d Cir. 2007)
Marie O. (7th Cir. 1997)	
R.B. (S.D.N.Y. 2000)	
~~*Goleta* (C.D. Cal. 2002); *Roe* (D. Nev. 2004)~~	*Blanchard* (9th Cir. 2007)
	L.M.P. (lower federal ct. in FL 2015)
Stanek (7th Cir. 2015)?	

These specific entries and their overall trend become clearer via a sequential summary of this gradually crystallizing case law.

The earliest § 1983-IDEA court decision was *Doe v. Withers*,[37] which held a teacher liable for $5,000 in compensatory damages and an additional $10,000 in punitive damages for refusing to follow the IEP of a student with disabilities. Seemingly indicating that money damages are available against individual school employees under the IDEA when connected to § 1983, this decision was relatively well publicized in the educa-

37. Order and Jury Order, Doe v. Withers, Civil Action No. 92-C-92, 20 IDELR 422 (Taylor Cty. W. Va. Cir. Ct. 1993) (LRP Special Ed Connection, Caselaw Database).

tion literature.[38] However, a more careful and current consideration reveals that the decision is of relatively negligible legal significance for several reasons. First, it was a state trial court decision in West Virginia, not appearing either officially or in the two major databases for court decisions, thus having negligible precedential value. Second, the facts in this case went beyond noncompliance or insubordination; the teacher in this case not only refused to implement the testing accommodations in the child's IEP but also did so by insulting and belittling the child in front of his general education classmates. Third, the connected legal basis was not specifically the IDEA, instead seeming to extend as much or more to the Constitution. More specifically, although starting with § 1983, the court's opinion merely recited the requisite connection as the parents' claim for "[damages] as a result of these constitutional deprivations," vaguely identified as "[the student's] statutorily protected civil right to a FAPE as guaranteed by federal and state laws for the education of handicapped children and as protected by the Fourteenth Amendment. . . ."[39] Finally and most significantly, the much more weighty court decisions since then in the same and other jurisdictions have ultimately had a net superseding effect in the opposite direction.

The shift in the prevailing view started with a split of judicial authority during the immediately subsequent decade, which included a Fourth Circuit decision that effectively preempted this West Virginia ruling to whatever extent that it applied to the IDEA. More specifically, in the early published

38. *E.g.*, Antonis Katsiyannis, Jennifer S. Ellenburg, & Olivia M. Acton, *Address Individual Needs: The Role of General Educators*, 36 INTERVENTION & SCH. CLINIC 116 (2000); Monica Conrad & Todd Whitaker, *Inclusion and the Law*, 70 CLEARING HOUSE 207 (1997); Monica K. Weishaar, *The Regular Educator's Role in the Individual Education Plan Process*, 75 CLEARING HOUSE 96 (2001); Perry A. Zirkel, *A Costly Lack of Accommodations*, 75 PHI DELTA KAPPAN, 652 (1994).

39. Amended Complaint, Doe v. Withers, Civil Action No. 92-C-92, 20 IDELR 422 ¶¶ 32, 33 (Taylor Cty. W. Va. Cir. Ct. 1993) (LRP Special Ed Connection, Caselaw Database).

decisions that extended their rulings under the IDEA directly to the § 1983 connection, the Fourth Circuit,[40] along with the Sixth Circuit[41] and the Eighth Circuit,[42] summarily ruled that money damages are not available under the IDEA via § 1983. Subsequently, in a more detailed analysis, the Tenth Circuit Court of Appeals reached the same conclusion.[43]

However, in a similarly detailed analysis on the other side of the ledger, the Third Circuit Court of Appeals in *W.B. v. Matula* held that money damages were available under the IDEA via § 1983.[44] Although expressly cautioning in favor of awarding compensatory education or tuition reimbursement, the three-judge panel refused to "preclude the awarding of monetary damages."[45] Next, a federal district court decision in the Third Circuit predictably followed this precedent.[46] Meanwhile, the Seventh Circuit came to the same conclusion with its own detailed analysis.[47] Additional published lower court decisions arose in the early 2000s within the Second Circuit[48] and the Ninth Circuit,[49] but they relied instead on the absence of contrary appellate authority in their respective jurisdictions.

Subsequent federal appeals court decisions not only add-

40. Sellers v. Sch. Bd. of City of Manassas, 141 F.3d 524 (4th Cir. 1998).

41. Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 980 F.2d 382 (6th Cir. 1992).

42. Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996). Effectively superseding its earlier decision in *Digre v. Roseville Schools Independent District No. 623*, 841 F.2d 245 (8th Cir. 1988) at least for monetary liability, the court "[held] that plaintiffs' claims based upon defendants' alleged violations of the IDEA may not be pursued in this § 1983 action because general and punitive damages for the types of injuries alleged by plaintiffs are not available under the IDEA." *Id.* at 1033.

43. Padilla v. Sch. Dist. No. 1 of Denver, 233 F.3d 1268 (10th Cir. 2000).

44. 67 F.3d 484 (3d Cir. 1995).

45. *Id.* at 495.

46. P.N. v. Greco, 282 F. Supp. 2d 221 (D.N.J. 2003).

47. Marie O. v. Edgar, 131 F.3d 610 (7th Cir. 1997).

48. R.B. v. Bd. of Educ. of N.Y., 99 F. Supp. 2d 411 (S.D.N.Y. 2000).

49. Roe v. Nevada, 332 F. Supp. 2d 1331 (D. Nev. 2004); Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp. 2d 1287 (C.D. Cal. 2001), *further proceedings*, 248 F. Supp. 2d 936 (C.D. Cal. 2002).

ed the First Circuit to the majority,[50] but also negated the earlier rulings in the Third and Ninth Circuit. Specifically, in *A.W. v. Jersey City Public Schools*[51] the full membership of the Third Circuit reversed the aforementioned[52] panel in *W.B. v Matula*. Expressly relying on an intervening Supreme Court decision regarding the availability of § 1983 to remedy federal statutory violations[53] and the cogent opinions of the aforementioned[54] Fourth and Tenth Circuit decisions in *Seller*s and *Padilla*, respectively, the Third Circuit concluded, "Congress did not intend § 1983 to be available to remedy violations of the IDEA."[55] Subsequently, the Ninth Circuit Court of Appeals agreed with the Third Circuit's "well-reasoned opinion."[56]

More recently, the Seventh Circuit acknowledged that its earlier view warranted re-visitation in light of intervening Supreme Court decision, which the Third Circuit had relied on in *A.W.* to reverse its view.[57] However, in ordering that the lower court hold further proceedings in this case, the Seventh Circuit declined to address the § 1983 issue because, depending on the lower court's subsequent disposition, "[i]t is not clear that resolution of this question will make any practical difference in this case."[58]

The corresponding more recent decisions in or at the Second Circuit have not re-visited the aforementioned[59] ruling in *R.B. v. Board of Education of the City of New York*. However, *R.B.* is a decision of the lower federal court of the South-

50. Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006).
51. 486 F.3d 791 (3d Cir. 2007).
52. *See supra* notes 44–45 and accompanying text.
53. *See supra* note 15.
54. *See* cases cited *supra* notes 40 and 43.
55. *A.W.*, 486 F.3d at 803.
56. Blanchard v. Morton Sch. Dist., 509 F.3d 934, 937 (9th Cir. 2007).
57. Stanek v. St. Charles Cmty. Unit Sch. Dist., 783 F.3d 634 (7th Cir. 2015).
58. *Id.* at 644.
59. *See supra* note 48 and accompanying text.

ern District of New York, thus only applying to a limited segment of a state. Moreover, the subsequent Third and Ninth Circuit decisions, in combination with the other uniform authority that also extends to lower court jurisdictions in the remaining jurisdictions,[60] cast the status of *R.B.* in doubt.

Thus, with the limited possible exceptions of this federal district court ruling in New York and the uncertainty in the Seventh Circuit, the indirect route of connecting § 1983 to the IDEA seems to reach the same dead end as the direct route under the IDEA for the threshold availability of money damages under the IDEA. More specifically, using the § 1983 handle in most jurisdictions does not change the unavailability of the IDEA for suing teachers and other school personnel for money damages.

Application. To the limited extent of jurisdictions, if any, in which § 1983 is available for IDEA violations, the defendant may be the individual school district employee, but a few additional potentially high hurdles apply. First, the employee must be directly involved. Supervisory liability is not vicarious, instead requiring a direct culpable conduct or a close causal connection.[61] Second, the doctrine of qualified immunity applies, precluding liability where the employee's IDEA violation is not, in terms of applicable precedents, clearly settled. More specifically, the employee is not liable unless a reasonable school employee in the same shoes would have understood at the time that he was violating the IDEA.[62]

60. *E.g.*, L.M.P. v. Sch. Bd. of Broward Cty., 516 F. Supp. 2d 1305 (S.D. Fla. 2007).

61. *E.g.*, Muskrat v. Deer Creek Pub. Sch., 715 F.3d 775, 788 (10th Cir. 2013) (concluding that without showing the requisite causal connection the plaintiffs forfeited their supervisory liability claim under § 1983, which here was connected to Fourteenth Amendment substantive due process); Goleta Union Elementary Sch. Dist. v. Ordway, 166 F. Supp. 2d 1287, 1300–01 (C.D. Cal. 2001), *further proceedings*, 248 F. Supp. 2d 936 (C.D. Cal. 2002) (rejecting supervisory liability under § 1983-IDEA due to lack of the requisite connection).

62. *E.g.*, *Ordway,* 166 F. Supp. 2d at 1302 (concluding that the individual defendant's action amounted to a clearly established violation of the IDEA). However, Ninth Circuit precedent subsequently negated the threshold availability of damages under IDEA. *See supra* note

B. § 504 and the ADA

Some jurisdictions do not allow § 504 claims via § 1983. For example, in a relatively thorough analysis in *A.W. v. Jersey City Public Schools*, the Third Circuit ruled that § 1983 is not available to remedy violations of § 504.[63] In other relatively recent decisions, the First Circuit,[64] Fifth Circuit,[65] and Seventh Circuit[66] followed the lead of *A.W.* For the remaining circuits, the case law on point is relatively limited, probably because (1) the aforementioned § 504/ADA direct route has a restricted scope in some jurisdictions[67]; (2) the also aforementioned[68] IDEA exhaustion provision has a dampening effect in the many cases of overlap with § 504 and the ADA in light of the Supreme Court's recent decision in *Fry v. Napoleon Community Schools*[69]; (3) the standard for liability for money damages under § 504 and the ADA poses a high hurdle[70]; and (4) for liability cases under all of these attempted avenues, the real target of plaintiff-parents, on behalf of their children with disabilities, ul-

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63. A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 805–06 (3d Cir. 2007).

64. M.M.R.-Z. *ex rel.* Ramirez-Senda v. Puerto Rico, 528 F.3d 9, 13 n.3 (1st Cir. 2008).

65. D.A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 457 (5th Cir. 2010).

66. Stanek v. St. Charles Cmty. Unit Sch. Dist., 783 F.3d 634, 644 (7th Cir. 2015).

67. *See supra* note 34.

68. *See supra* note 21 and accompanying text.

69. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743 (2017) (requiring completion of the IDEA administrative hearing process for Section 504, ADA, and other such claims that are based on the IDEA's central obligation of providing FAPE). The *Fry* decision found it unnecessary to address the overlapping but separable issue of whether the IDEA's exhaustion provision applies to Section 504, ADA, and other suits seeking money damages. *Id.* A majority of the lower courts have required exhaustion of such suits. *E.g.*, Soto v. Clark Cty. Sch. Dist., 744 F. App'x 529 (9th Cir. 2018); Nelson v. Charles City Sch. Dist., 900 F.3d 587 (8th Cir. 2018); Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182 (11th Cir. 2018); Wellman v. Butler Area Sch. Dist., 877 F.3d 125 (3d Cir. 2017); J.M. v. Francis Howell Sch. Dist., 850 F.3d 944 (8th Cir. 2017).

70. *E.g.*, Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students' Section 504 and the ADA Claims Against School Districts?*, 47 J.L. & EDUC. 109 (2018) (canvassing the various circuits to conclude that courts uniformly require deliberate indifference or gross misjudgment/ bad faith for money damage claims under § 504/ADA).

timately is the "deep pocket" of the school district budget as compared with the limited resources of individual school personnel.[71]

IV. DISCUSSION OF THE PRACTICAL IMPLICATIONS

In sum, a careful, comprehensive, and current analysis of the case law reveals that school personnel are generally not subject to liability for money damages under the IDEA or § 504, either directly or via § 1983. The exceptions are very limited and not practically significant. Indeed, the author's search of the Westlaw and LRP Special Ed Connection® caselaw databases failed to yield any monetary verdicts against a school district teacher or administrator under these overlapping federal statutory frameworks.

Yet, various sources contribute to concerns among not only special education teachers and supervisors but also related school personnel being subject under the IDEA or § 504/ADA to personal liability[72]—what the courts refer to as "individual capacity," as contrasted with their official capacity as proxies for the district's ultimate liability.[73] Given the limited salaries of school employees, such fears can serve as a major factor affecting not only their career direction but also, for those who remain in public education, their professional innovation, creativity, and dedication. Why follow the credo of ethical best practice and the focus on effective outcomes rather than rote

71. *Cf.* Schultzen v. Woodbury Cent. Cmty. Sch. Dist., 187 F. Supp. 2d 1099, 1127 (N.D. Iowa 2002). The opinion recognizes "the fears associated with assessing punitive damages against the 'deep pockets' of local government."

72. *See supra* notes 5–6 and accompanying text. For a more general discussion of this factor, *see* Perry A. Zirkel, *Paralyzing Fear? Avoiding Distorted Assessments of the Effect of Law on Education*, 35 J.L. & EDUC. 461 (2006).

73. *E.g.*, Tristan v. Socorro Indep. Sch. Dist., 902 F. Supp. 2d 870, 875 (W.D. Tex. 2012) (distinguishing IDEA claims against public school administrators in individual capacity with those in official capacity).

compliance if doing so puts one's house, car, and savings at risk?

Professional school employees are entitled to objectively accurate legal information, particularly concerning such high stakes issues, so that they may make informed choices about the direction and implementation of their career. For those who are committed to student learning, the ultimate motivator would seem to be the psychological satisfaction of fulfilling this goal, which is all the more special when the client is a student with disabilities. To the extent that external sources of motivation are warranted, the role of ethical codes in combination with employment advancement and accountability, which includes the downside of termination and other levels of discipline,[74] amply suffice.[75] Finally, to the extent of clear abuses of the rights of students with disabilities, both state common law, such as negligence and assault/battery, and § 1983 constitutional torts, provide for potential liability for money damages.[76] As observed more generally,[77] paralysis and paranoia in this IDEA

74. In some cases, an added consequence may be suspension or revocation of the educator's license. *E.g.*, Perry A. Zirkel, *Revocation or Suspension of Educator Certification: A Systematic Analysis of the Case Law*, 44 J.L. & EDUC. 539 (2015).

75. *E.g.*, Montgomery Cty. Bd. of Educ. v. Moon-Williams, 107 So. 3d 205 (Ala. Ct. App. 2012) (ruling that hearing officer's reversal of suspension of special education teacher for improper compliance with IDEA was arbitrary and capricious); Sylvester v. Cancienne, 664 So. 2d 1259 (La. Ct. App. 1995) (upholding demotion of principal for inappropriate restraint of student with disabilities); Griffith v. Seattle Sch. Dist. No. 1, 266 P.3d 932 (Wash. Ct. App. 2011) (upholding suspension of two special education teachers for refusing to administer federally mandated academic assessments to their students); Weems v. N. Franklin Sch. Dist., 37 P.3d 354 (Wash. Ct. App. 2002) (upholding termination of special education director for altering student files to feign compliance with the IDEA).

76. However, rulings of personal liability are the exception in these cases, because (1) the standards for the federal claims pose a steep uphill slope, (2) for the state claims, many jurisdictions retain some form of governmental immunity, and (3) claims against school employees in their individual capacity are relatively infrequent. *E.g.*, Susan C. Bon & Perry A. Zirkel, The *Time-Out and Seclusion Continuum: A Systematic Analysis of Case Law*, 27 J. SPEC. EDUC. LEADERSHIP 1 (2014); Perry A. Zirkel & Caitlyn A. Lyons, *Restraining the Use of Restraints with Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INTEREST L.J. 323 (2011) (providing respective empirical analyses of the frequency and outcomes of federal and state claim categories).

77. *See* Zirkel, *supra* note 72.

and § 504/ADA context stem from confusing the "lore" with the "law."[78]

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As a result, the court in the opening case scenario is highly likely to grant the motion for dismissal of K.G.'s claims against all of the individual defendants. The first two counts, the IDEA and § 504/ADA, are clearly not viable in any jurisdiction. The IDEA does not provide the remedy of money damages, and in any event does not apply to individual defendants. Although § 504 and the ADA do provide for money damages, they do not apply to individual defendants.

The § 1983 claims warrant at least a bit more attention. First, the court will dismiss the § 1983 claim that is premised on § 504/ADA in light of the prevailing judicial authority that appears to be without any notable case law exception. Second, for the remaining § 1983-IDEA claim, the court will grant the superintendent's motion for dismissal due to the inapplicability of vicarious liability and the absence of any showing of direct involvement in the alleged violations.

For the other defendants, the court will likely conclude that, as a matter of law, § 1983 does not provide liability of individuals in their personal capacity for money damages for violations of the IDEA. Alternatively, dismissal is likely due to (a) lack of sufficient involvement (e.g., the teacher's responsibility for the alleged grade 9 FAPE violation) or (b) qualified immunity, which serves as a shield at this pretrial stage because the two claimed violations are not clearly settled. More specifically, child find is a well-established IDEA obligation that merits proactive attention.[79] However, its violation in grade 7 in this

78. *See generally* Perry A. Zirkel, *Lore v. Law*, 13 PRINCIPAL LEADERSHIP 50 (Oct. 2012) (distinguishing prevailing beliefs and practices from objective knowledge of legal requirements).

79. *E.g.*, Robin Parks Ennis, Kimberly Blanton & Antonis Katsiyannis, *Child Find Cases under the Individuals with Disabilities Education Act: Recent Case Law*, 49 TEACHING

case is not at all clear. The standard for the requisite reasonable suspicion is multi-factored rather than being a matter of one or more "red flags,"[80] and it is not difficult to find court decisions for which absenteeism or RTI was a notable factor in child find rulings against the parents.[81] Similarly, qualified immunity likely applies. The reason is that the IDEA obligation of the district of residence to offer evaluation and, depending on its defensible result, FAPE for a private school child is not within the actual or constructive knowledge of the reasonable principal or special education director at this time; the applicable case law is not clearly settled as to whether the parent needs to trigger this obligation and whether it extends to out-of-state placements.[82]

The bottom line is that there are many good and positive reasons for the teacher and his administrative colleagues to have been more effective in communication and collaboration with K.G.'s parent and in proactively addressing the individual needs of K.G. However, fear of personal liability should not be a guiding factor in this or other such special situations. Instead, their focus should be on educational expertise and efficacy, with prudent professional discretion rather than undue legal distraction.

EXCEPTIONAL CHILD. 301 (2017).

80. E.g., Perry A. Zirkel, *The "Red Flags" of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015).

81. *E.g.*, M.G. v. Williamson Cty. Sch., 720 F. App'x 280 (6th Cir. 2018) (RTI); Karrissa G. v. Pocono Mountain Sch. Dist., No. 3:16-CV-01130, 2017 WL 6311851 (M.D. Pa. Dec. 11, 2017) (absenteeism).

82. *E.g.*, Perry A. Zirkel, *Legal Obligations to Students with Disabilities in Private Schools*, 351 EDUC. L. REP. 688 (2018) (canvassing the split caselaw concerning these and related issues).