SPECIAL EDUCATION LEGAL ALERT

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This monthly legal alert focuses on two recent cases with costly consequences, one arising from a student's concussion and the other the failure to have the IEP ready at the start of the school year. For automatic e-mailing of future legal alerts, sign up at **perryzirkel.com**; this website also provides free downloads of various related articles, including those specific to the complaint procedures avenue under the IDEA.

In *Lincoln-Sudbury Regional School District v. Mr. and Mrs. W.* (2018), a federal district court addressed the IDEA and Section 504 claims of the parents of a high school student who had a concussion. As a result of the concussion, their daughter missed two weeks of school and, also based on doctor's orders, had reduced school activities for another two weeks. She was a good student before and, with rather routine accommodations arranged by the guidance counselor, after this limited period. However, after the parents became upset with the math teacher's recommendation for an advanced but less rigorous math class for the next year, they unilaterally placed their daughter in a local prep school and filed for a due process hearing, seeking tuition reimbursement. They lost the hearing and filed for judicial review for their claims of child find, eligibility, and denial of FAPE. The defendant district counter-claimed attorneys' fees for alleged frivolous litigation for improper purpose.	
The court rejected the parents' IDEA claims, concluding that the relatively brief effects of the concussion did not come close to the requisite reasonable suspicion for child find or special education need for eligibility.	Avoid over-generalizing this conclusion to all concussion cases, but it illustrates that proactive but prudent attention to the severity and duration of the concussion under the individual circumstances of the child is warranted. In some cases, for example, an individual health plan may suffice.
The court similarly rejected the parents' alternative Section 504 claims, concluding that the temporary impairment fell far short of substantially limiting learning or any other major activity.	The lessons for Section 504 are that "substantial" includes duration and its frame of reference is the average person in the general population, not the individual's potential. See, e.g., the Publications item under Section 504/ADA in 2015 re concussions and 504 plans.
The court ruled in the district's favor for attorneys' fees, concluding that the parents' legal action in this case was frivolous and for an improper purpose. The court reserved determination of the specific amount, which the district claimed was more than $150K, for a subsequent proceeding.	This case is a relative exception. In most such cases under the limited avenue for "reverse" attorneys' fees under the IDEA and civil rights legislation, what districts perceive as frivolous and for improper purpose, the court views instead as merely part of the litigation process. See, e.g., the Publications item under Remedies in 2015 re "reverse" attorneys' fees.

In *School District of Philadelphia v. Kirsch* (2018) the Third Circuit Court of Appeals addressed the failure to have the IEPs for two twins with autism in effect at the start of their initial, kindergarten year. The IEP team met during the prior June but, despite the parents' repeated inquiries, did not complete the process during the summer. The parents unilaterally placed the twins in a private program after providing timely notice to the district. The district finalized the IEPs in December. The hearing officer ruled in the parents' favor for reimbursement for the basic tuition and transportation but not the extras, such as a 1:1 aide, from September to December, but concluded that the final IEPs were appropriate. On appeal, the district court affirmed the hearing officer's decision, but (a) extended the reimbursement to the intervening, lengthy stay-put period, and awarded the parents $185K for their attorneys' fees. Both sides filed appeals to the Third Circuit.	
First, the Third Circuit upheld the denial of FAPE for the September to December period. The district argued that the procedural violation did not harm the twins because the parents had enrolled them in a private program. However, the court concluded that the violation in this case significantly impeded the parents' opportunity for participation because the district failed to timely provide them with important details regarding the proposed placement.	The IDEA requires the IEP to be in effect "at the beginning of each school year." The significant addition here is that the court found the requisite second step loss to be in terms of parental participation. However, this determination was based on the particular facts of this case, with generalization in terms of either student or parental loss at the second step of procedural FAPE analysis to other cases depend on the circumstances of each one.
Second, the Third Circuit not only upheld the extension for the now four-year stay-put period but also the parents' out-of-pocket costs for the 1:1 aide, which the district had recognized as part of FAPE in its December IEPs. The resulting total was approximately $420K minus any scholarships the twins received for the private school. The court also rejected the district's request to reduce the award based on the equities, concluding that the parents acted reasonably.	This costly consequence (here to the district, where the first case conversely represented the costly consequence to the parents) largely reflects—as did the Second Circuit case in the February 2018 monthly alert—the expansive effects of the stay-put provision due to the ponderous adjudicative process under the IDEA, particularly on cases that move to the judicial levels. However, the determination of the "extra" out-of-pocket costs and the equities of the parties' conduct was the other contributing factor.
Third, the Third Circuit rejected the parents' counterclaim for more complete reimbursement under Section 504 and the ADA, concluding that the deliberate indifference standard applied to their claim and that they failed to prove that the district's actions reached that high level of wrongdoing.	As my website Publications item under "Section 504 and the ADA" (article entitled "Do the Courts Require a Heightened, Intent Standard for Student Section 504 and ADA Claims Against School Districts?"), more and more courts are using this heightened standard for alternative or additional claims under these civil rights laws.
Finally, the Third Circuit upheld the attorneys' fees award of approximately $185K, finding that the district court's modest reduction of the requested amount and overall calculation was not an abuse of discretion.	Again, the transaction costs of the litigation process are regrettably high, giving pause to both school districts and parents, especially given the specific IDEA provisions for attorneys' fees. These costs are one, but not the only factor, to consider for settlements.