SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

This month's update concerns two issues subject to recent court decisions and of practical significance: (a) juvenile justice proceedings for students with disabilities, as illustrated by *Commonwealth v. Geordi G.* (Mass. Ct. App. 2018); and (b) the meaning of "placement" along with the interaction between the IDEA's adjudicative and investigative dispute resolution mechanisms, as illustrated by *Steven R.F. v. Harrison School District No. 2* (D. Colo. 2018).

In *Commonwealth v. Geordi G.* (2018), a state appellate court in Massachusetts reviewed the dismissal of a juvenile delinquency petition for a 12-year-old student with an IEP. The student had lost control in the middle school gym. When the teacher tried to calm him down, he swore loudly, punched the wall, and pushed the teacher out of the doorway as he exited into the hall. Becoming more agitated, he punched lockers and threatened to injure people. The principal issued a "soft lockdown" of the school and managed to persuade the student to enter the office of the adjustment counselor. However, remaining upset, he swore at and hip-bumped the principal upon moving to exit the office. The school filed a delinquency application without any mention of the student's special education status. The judge dismissed the assault-and-battery part of the charges based on lack of probable cause, and the state appealed this ruling.

For the issue of probable cause, the appellate court reversed based on the statements of the teacher, counselor, and principal: "Viewed in the light most favorable to the Commonwealth, these accounts provide a sufficient showing . . . to warrant a prudent person in concluding that the juvenile committed assault and battery when he pushed the teacher and hip-bumped the principal."	The reference to the state-favorable viewpoint is entirely consistent with the judicial posture for issuing or reviewing a dismissal, as contrasted with the ultimate determination of sufficient proof of responsibility. In finding probable cause, the court rejected the student's defense that he was just trying to exit the counselor's office, concluding instead that this reason did not exclude the requisite intentional offensive contact.
Nevertheless, the appeals court issued a strong reminder of the IDEA requirement that when reporting a crime by a student with an IEP the school district "shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the [district] reports the crime."	Although the case law is infrequent and the district was not one of the parties in this litigation, this reminder serves as the basis for not only proactive action at the district level, particularly in light of the larger school-to-prison pipeline that disproportionately affects students with disabilities, but also potential IDEA legal action directly against districts.
First, pointing to the limited case law to date, the court concluded that neither the district's information violation nor the student's special education status served to automatically preclude probable cause.	The court cited its earlier decision in *Commonwealth v. Nathaniel N.* (2002), which provides a fuller picture of the applicable legal boundaries and distinctions in such situations.
Second, the court issued a counterbalancing or at least limiting consideration, emphasizing that school officials need to provide this special education information "to help determine whether a crime has been committed . . . that warrants prosecution and [if so,] what disposition would be appropriate."	In addition to the implicit discretion applicable to school districts as to whether to press charges, the explicit focus here is on the discretion of the prosecution as to whether to move forward with arraignment and, if so, the discretion of the juvenile court to determine both the requisite culpability and the resulting consequences.

In *Steven R.F. v. Harrison School District No. 2* (2018), the federal district court in Colorado addressed the IDEA claims of the parents of a child with autism after they had resorted twice to the state education department's complaint procedures (CP) process. The CP actions were in response to the district's successive attempts to move the child from a private to a public placement. The first time, the CP decision found that the placement procedures violated the IDEA and ordered corrective actions, including an observation by staff members of the proposed placement and an IEP meeting facilitated by an individual who was not a district employee. The second time, which was in response to the district's proposed placement at an out-of-district public school that had two separate programs for students with autism. The second CP decision was that the district's procedures failed to comply with its earlier decision and also violated applicable IDEA requirements, including not being sufficiently specific as to the proposed placement. In turn, the district filed for a due process hearing, and the hearing officer ruled that the district's procedural violations did not result in loss to the child or parents. The parents filed for judicial review.	
First, the court ruled that the district failed to make a specific offer of placement, concluding that the two school's two autism programs were, in terms of clientele, staff-student ratios, and focus (here, academic v. behavior), distinctively different educational placements. As such, this violation effectively resulted in the requisite significant infringement on the parents' opportunity for participation in the IEP process.	Wading into the muddy waters of "program" and "location," including the brick-and-mortar manifestation of classrooms and schools, the court adopted the basic element test for "placement"—whether the proposal was for a fundamental change in or elimination of a basic element of the child's education program. The court found that the cited differences, such as staff-student ratios, constituted such basic elements.
Second, the court roundly rejected the district's arguments that the particular remedies (and, implicitly, general procedures) of the first CP decision were beyond the requirements of the IDEA, concluding instead that (1) the state education agency had fulfilled the IDEA's CP-specific regulations and (2) the violation was particularly serious here because the remedies were tailored to the individual child and his parents rather than being broad-based protections, such as policy revisions and personnel training. The court treated this noncompliance as compounding the district's placement-offer violation.	First, this case illustrates the increasing, although still infrequent issue, of districts filing for due process hearings beyond the limited area of IEEs at public expense, including in the wake of parent CP filings. Second, the court did not make clear whether this violation alone, without the placement-offer failure, amounted to denial of FAPE. Third, the court did not specifically address the district's challenge to the CP investigations, which are distinctly different from the IDEA adjudications. For further information on CP, see the "Other Dispute Resolution" section of the "Publications" list at **perryzirkel.com**
Third, the court ducked addressing the parents' third claim, which alleged that the district had engaged in predetermination in the placement process. Finding the first ruling to suffice for denial of FAPE and the second ruling to reinforce it, the court found it unnecessary to address this third claim. However, the court did address the parents' alternative basis under Section 504. Specifically, the court concluded that although the parents failed to fulfill the ultimate element for Section 504 discrimination—deliberate indifference. "Instead," the court concluded, "this seems to be a case of negligent failure to stay apprised of and apply the required placement procedures."	Although parents of students with IEPs, not just those with 504 plans, are increasingly asserting Section 504 and ADA litigation claims, "deliberate indifference" or n alternative proxy for intentional discrimination, such as "bad faith" or "gross misjudgment," poses a largely but not entirely pervasive hurdle for plaintiffs. In the many cases where it applies, this hurdle is a high one, affecting outcomes not only at the trial and verdict stages but also at the pretrial phases of dismissal and summary judgment. For further information, see the various items in the Publications section of **perryzirkel.com** under the "Section 504 and the ADA" subheading, including the 2018 article about the "heightened, intent standard."