SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns two issues that were subject to recent court decisions and are of practical significance: (a) child find and eligibility under Section 504 v. the IDEA; and, as a variation and extension of last month's legal alert, (b) the district of residence's obligations to a student with disabilities during the student's placement at a residential treatment facility, which was via a juvenile court order for mental health.

In *Culley v. Cumberland Valley School District* (2018), the Third Circuit Court of Appeals addressed the issues of a tenth grader with Crohn's disease in the wake of his expulsion for attempting to leave campus with a few other students during the school day. The parents had informed the school upon his initial diagnosis in grade 1. He did not have any academic or disciplinary difficulties until grade 7. By the end of grade 9, he had accumulated mounting disciplinary incidents, low grades, and high absenteeism. At that time, the school received and complied with a physician's request for limited accommodations in the wake of surgery. In grade 10, the sequence was: (a) the aforementioned disciplinary incident; (b) a doctor's note 10 days later with a fuller diagnosis and accommodations request, (c) the parents' due process complaint 2 days thereafter; (d) a 504 plan about a month later, (e) during the following month, the board's expulsion decision and the IDEA evaluation report, which concluded that he did not need special education; and (f) a subsequent independent educational evaluation (IEE) that reached the opposite conclusion. The hearing officer's resulting decision agreed with the district's IDEA's eligibility determination. The parents filed for judicial review.

First, the federal district court ruled, and the Third Circuit affirmed, that the district violated child find under both Sec. 504 and the IDEA. The district had the requisite reasonable suspicion under Sec. 504 upon receiving the diagnosis of Crohn's disease in grade 1 and under IDEA upon his academic and disciplinary turnaround in grade 7.	Both court decisions were not officially published and, thus, of limited legal weight. Nevertheless, the Sec. 504 child find/eligibility analysis based on Crohn's disease, regardless of educational impact, serves as a solid warning for districts.[1] In contrast, the IDEA child find analysis is much less generalizable, being specific to the particular facts and court.
Second, the district court ruled, and the Third Circuit agreed, that the IEE provided a fuller and more accurate picture than the district's evaluation, including his need for special education. The Third Circuit diagnosed the district's fatal eligibility error as follows: "In seeing Crohn's as something requiring only a Section 504 accommodation, not IDEA special education, [the district] treated the disease as something discrete and isolated rather than the defining condition of [this student's] life."	This particular judicial analysis of IDEA eligibility also contains a generalizable lesson and a contrasting limitation. The lesson is that physical diseases, although often an issue of Sec. 504 eligibility, may also be an issue of overlapping IDEA eligibility, with the murky matter being the need for special education. The limitation is that the court's rather easy acceptance of the IEE, including its exclusion of IDEA eligibility from deference to district expertise and its broad-brushed treatment of Crohn's disease and special education need are atypical.
For articles on Sec. 504 child find/eligibility and IDEA child/find eligibility, see the "Publications" section of **perryzirkel.com**	

[1] The latent Sec. 504 issues, which the court did not address, are (a) FAPE, (b) manifestation determination, and (c) compensatory education.

In *M.S. v. Los Angeles Unified School District* (2019), the Ninth Circuit Court of Appeals addressed the district of residence's obligations under the IDEA for a student with disabilities whom the state's children and family services agency had residentially placed for mental health treatment pursuant to a juvenile court order under state law. The student in this case had been a ward of the state since age 11 due to physical abuse and caretaker incapacity. Here first few years in this status included various episodes of violence to others, five mental health hospitalizations, and eight different placements, including foster homes and residential placements. Her last pertinent placement was at a locked, residential mental health facility by the order of a juvenile court. During this period, the district's February 2014 and October 2014 IEPs provided for placement at a nonpublic school affiliated with the residential treatment facility (RTF).	
In a brief but officially published decision, the Ninth Circuit agreed with the district court's "thorough and well-reasoned opinion" that the district of residence has an independent obligation to ensure that the full least restrictive environment (LRE) continuum was available to this student, including consideration of whether she needed a residential placement for educational purposes.[2] More specifically, the affirmed lower court analysis consisted of the two steps for procedural FAPE rulings.	Amounting to a summary affirmance, the Ninth Circuit decision is not quite as weighty as a full opinion, but its officially published wholesale adoption of the lower court's analysis is still of considerable precedential heft as a matter of binding effect in the nine states of this circuit and persuasive effect in other jurisdictions. Moreover, this ruling is similar to but different from the Pennsylvania case in last month's alert, because this case arose during, not upon impending discharge from, an RTF, and this RTF was the result of juvenile court/children services agency action, not Medicaid coverage.
First, the lower court concluded that the district's refusal to discuss the possibility of the student's residential placement for educational purposes was a procedural violation—specifically, predetermination.	Although most courts have been stingy in response to parents' predetermination claims, here the court's disagreement with the legal position underlying is refusal made this conclusion inevitable.
Second, the court concluded the predetermination resulted in a substantive denial of FAPE based on the "strong likelihood" that discussion at the two successive IEP meetings as to whether this student needed a residential placement for educational reasons would have better led to an appropriate placement.	This rather stretched conclusion avoided determining whether this student was entitled under the IDEA to a residential placement at district expense. Thus, the court effectively adopted a middle ground requiring the IEP team consider but not necessarily adopt the residential or a less restrictive end of the LRE continuum.
Finally, the court found it unnecessary to decide definitively whether the two successive IEPs met the *Endrew F.* standard or to address at all whether the student was entitled under the IDEA to a residential placement.	For the first issue, the court came close, commenting that because the IEP team failed to even consider whether a residential placement for educational purposes might be appropriate, "the District cannot establish that [the] IEPs met this standard."
The bottom line is that a student's placement outside the district by another agency or funding organization for mental or physical health does not necessarily excuse the school district of residence from fulfilling its fiscal obligations to the child, including FAPE in the LRE.	

[2] The federal circuits have various overlapping tests for hybrid residential placements under the IDEA. The Ninth and Second Circuits base the determination on whether such a placement is necessary for the child's education needs. *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004 (9th Cir. 2009); *M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 296 F. App'x 126 (2d Cir. 2008). For examples of other variations, see *Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E.*, 702 F.3d 1227 (10th Cir. 2012) (whether it fits "straightforward application" of IDEA for accredited education facility plus mental health—not medical—support as related services); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009) (whether it is essential for the child to receive meaningful educational benefit and primarily oriented toward enabling the child to obtain an education); *Mary T. v. Sch. Dist.*, 575 F.3d 235 (3d Cir. 2009) (whether it is necessary for educational purposes or instead a response to medical, social or emotional problems that are segregable from the learning process).