SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns issues that were subject to recent officially-published court decisions and are of practical significance: (a) FAPE variations, including ABA methodology and transition services, and (b) child find and eligibility complications, including the IDEA statute of limitations, in the case of a gifted child with school attendance and mental health problems.

In *Renee v. Houston Independent School District* (2019), the Fifth Circuit Court of Appeals addressed the various FAPE claims of the parents of a teenager with autism, intellectual disabilities, and ADHD. Citing his emotional difficulties and his first-grade levels in reading and math, they challenged his eighth and nine grade IEPs. He had major attendance problems during both years, which the parents and district personnel did not resolve promptly. After the hearing officer and federal district court ruled in the district's favor, the parents raised four claims on appeal to the Fifth Circuit—ABA predetermination, ESY notice, school refusal, and transition services.	
The parents' first claim was that the school district engaged in predetermination not to provide the student with applied behavior analysis (ABA). Based on the finding that the parents had not specifically requested ABA, the Fifth Circuit concluded that they "cannot meaningfully claim that his IEP was predetermined."	In this officially published decision that is binding in its three states (LA, MS, and TX) and of potentially persuasive precedential weight elsewhere, the Fifth Circuit reinforced this ruling with the dicta from *Rowley* and *Endrew F.* that warned courts to be deferential to school district determinations of educational methodology.
Second, the parents claimed that the district had not provided sufficiently specific and timely notice of their child's extended school year (ESY) program. Again, the appeals court found that the parents had not provided the requisite factual foundation for their claim, here observing that "the record shows that school administrators made several successful attempts by email and telephone to contact [the student's] parents and confirm final details of his ESY."	This ruling revealed (a) the importance of making and documenting extra efforts for school communication with parents; (b) the deferential standard on appeal to the factual findings of the lower level(s); and (c) the court's added reminder that even if the parents had proven the procedural violation, they still faced the second step for denial of FAPE—a resulting loss in terms of either student progress or parental participation.
Third, the parents claimed that the district failed to timely convene an IEP meeting to address the bullying that allegedly caused his refusal to attend school. In response, the Fifth Circuit deferred to the credibility assessments of the hearing officer and lower court, which favored the school representatives' testimony of extensive outreach efforts, accommodation offers, and belated parental cooperation.	After citing its earlier decision in *E.R. v. Spring Branch Independent School District* (2018), which concluded that "*Endrew F*. represents no major departure from [this Circuit's interpretation of] *Rowley*," the Fifth Circuit reinforced its ruling for this claim by reciting the *Endrew F.* reasonableness standard. In doing so, the court arguably extended the applicable criterion for substantive FAPE to what appears to be a procedural FAPE claim.
Finally, the parents claimed that the transition plan, which focused on the unrealistic goal of preparing their child with severe multiple disabilities for a career as a police officer, was not appropriate. However, pointing to the addition in ninth grade of more basic goals while honoring his particular employment interest, the Fifth Circuit gave the district the benefit of the doubt.	Repeating its emphasis on judicial deference to school authorities, the Fifth Circuit reinforced its ruling with this comment: "This court is mindful of its obligation not to stray into the field of education policymaking and is reluctant to say, as a matter of law, that [the school district] was required to communicate a nuanced transition plan in a different way." For transition services, this judicial posture largely prevails in the case law to date.
The bottom line is that the Fifth Circuit tends to be deferential to school districts; yet, overgeneralization is not advisable in light of factual and jurisdictional differences and the overriding individualized nature of the IDEA.	

In *Independent School District v. E.M.D.H.* (2019), the federal district court in Minnesota addressed the parents' child find and eligibility claims on behalf of a gifted eleventh grader who did well academically but had had increasingly severe attendance problems and successive IEEs that yielded a complex and confusing array of mental health diagnoses, including generalized anxiety, school phobia, and recurrent major depressive disorder. In the wake of disenrollments for in-patient and day treatment, the school district had successively responded with its school-based intervention team, school counseling, a 504 plan, a mental health consultant, alternative (e.g., online) learning options, and finally a special education evaluation that determined that she was ineligible under the classifications of emotionally disturbance (ED) and other health impairment (OHI). The hearing officer ruled in favor of the parents, and the district appealed.	
For the child find claim, the district's threshold defense was the two-year statute of limitations under the IDEA. Missing the nuance of the applicable KOSHK approach, the court concluded that the district's failure to provide the parents with the procedural safeguards notice upon having reason to suspect IDEA eligibility when the student stopped attending school due to her anxiety triggered the information-withholding exception for the two-year period.	This ruling would seem to have the exception swallow the rule for the IDEA statute of limitations in child find cases, because districts typically do not provide the procedural safeguards notice for general education students until the time for obtaining consent for the initial evaluation. In any event, this ruling serves as a reminder of the practical significance and legal complexity of the IDEA statute of limitations for filing for a due process hearing, including the missed nuance of the triggering date of when the parent "knew or should have known" (KOSHK) of the alleged district violating action.
Next for the child find claim, the court based its determination of the reasonable-suspicion on the imprecise combination of non-attendance and the IEE diagnoses, concluding that this trigger was "no later than spring [of her eighth grade when she] . . . stopped attending school because of her anxiety."	Posing a catch-22, the court turned the district's efforts upside down: "The District admirably and appropriately engaged with the Parents concerning the student's absences in eighth grade. . . . This involvement, however, is precisely what gave the District reason to [evaluate] the Student as a possible child with a disability."
For eligibility, the court ruled that (a) the district's evaluation failed to meet the state law requirements, which were additional to those under the IDEA, for observations and an FBA, and (b) her mental health-related attendance problems met the disputed adverse effect element for ED and OHI eligibility.	Illustrating the critical but blurry eligibility boundary for the need for special education, the court's cryptic conclusion was that "[n]o one disputes that the Student excelled on standardized tests; neither can anyone dispute that her absenteeism inhibited her progress in the general curriculum." The student's gifted abilities and the reasons for non-attendance were complicating factors.
For the remedies, the court upheld the hearing officer's award of reimbursement for the successive IEEs but vacated the hearing officer's order for compensatory education "in the form of payment for private service providers." This quoted characterization may have been at least partly attributable to the hearing officer's imprecise specification of the compensatory education award.	The court's rationale was that "there was no evidence as to whether the District can provide the type of specially designed instruction that Student is entitled to moving forward." In light of the lack of FAPE since the evaluation (if not the child find violation), this analysis is questionable and reflects the confusion between the retrospective and prospective dimensions of compensatory education.
The bottom line is that the IDEA issues of statute of limitations, child find, eligibility, IEEs at public expense, and compensatory education are—along with the respective responsibilities of districts and parents—subject to varying interpretations among impartial adjudicators. For these issues, reasonableness under the individual circumstances is not mathematically or scientifically predictable.	