

SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

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This month’s update concerns issues that were subject to recent court decisions of general significance: (a) child find, evaluation, eligibility, and remedies for a child with excessive absenteeism, and (b) transfer of rights upon reaching the age of majority.

In an officially published decision in *Independent School District v. E.M.D.H. (2020)*, the Eighth Circuit Court of Appeals addressed various eligibility-related issues for a gifted secondary school student with an array of diagnoses including school phobia, generalized anxiety disorder, severe depression, and panic disorder. In grade 8, her absences became increasingly more frequent until her parents placed her in a psychiatric treatment facility. Aware of her mental health issues, her teachers marked her final grades as Inc. rather than F. The attendance pattern recurred in grades 9 and 10, with increasing absenteeism leading to disenrollment for psychiatric treatment. The parents did not request an evaluation for special education until her readmission to a psychiatric facility in April of grade 10, because school personnel informed her that her placement would change from honors classes. The district did not complete the evaluation until November of grade 11, concluding that she was not IDEA-eligible. The parents responded by arranging for an IEE, which confirmed her diagnoses and recommended that she receive special education that would allow her to complete honors coursework. The district rejected the recommendations, and the parents filed for a due process hearing. The hearing officer ruled in their favor and ordered reimbursement for the IEE and tutoring expenses, quarterly IEP meetings, and future compensatory services. The district court affirmed with the exception of the future services. Both parties appealed to the Eighth Circuit.

First, the court rather easily upheld the child find violation, concluding that the district had the requisite reasonable suspicion as early as the end of grade 8.	The district raised a statute of limitations defense, but the court concluded that even if the end of grade 8 was beyond the statutory two-year period, the child find violation “was not a single event ... [but] was repeated well into the limitations period”
Second, the court ruled that the district’s eligibility evaluation fatally failed to comply with the Minnesota state law requirements for an FBA and systematic observations upon evaluating for ED or OHI.	Observing that the district had made no effort at all to comply, the court rejected the district’s defense in emphatic terms: “We acknowledge that while the Student’s absences might have made a comprehensive evaluation more difficult, the evidence does not support the conclusion that task was impossible to undertake.”
Third, the court upheld the eligibility violation, finding fault with the district’s rationales about both the student’s high absenteeism, which was linked to her disability, and her high intellect, which did not foreclose being IDEA eligible.	The court concluded that student’s absenteeism was not “as a result of ‘bad choices’ ... , but rather as a consequence of compromised mental health” and that it put her behind her peers in credits for graduation, thus having an adverse effect on her educational performance. Similarly, the court observed that the evidence was that this child needed special education to progress academically despite her giftedness.
Finally, the court not only upheld all of the other remedies, but also reinstated the compensatory education award of private tutoring until the student no longer has the credit deficiency from the FAPE denial.	The court concluded that in light of the district’s continued and cumulative denial of FAPE, these equitable remedies were within the hearing officer’s remedial discretion, and that none of this relief would have been necessary if the district had met its IDEA obligations to this student in the first place.
The bottom line is obvious: make careful determinations rather than kneejerk reactions in response to student’s absenteeism or giftedness.	

Two recent decisions illustrate various issues that may arise when a student with disabilities reaches the age of majority:

- In *Butte School District No. 1 v. C.S.* (2020), the Ninth Circuit addressed the several claims that a 24-year-old with multiple disabilities, including autism and ED, and his caregiver originally brought in a due process hearing specific to his IEPs in grades 11 and 12. In March of his 11th grade, C.S. reached the age of 18 and moved to live with his caregiver. At that time, because C.S. lacked the capacity for informed consent, the caregiver sought appointment as his educational representative; however, the district appointed a surrogate parent. At the end of grade 12, C.S. refused the district's offer of ESY and compensatory education, insisting instead on graduation. A year after graduation, C.S. and his caregiver filed for a due process hearing. The hearing officer ruled that the district provided FAPE in C.S.'s senior, but not his junior, year, and awarded him compensatory education for that denial. Upon both sides' appeal, the federal district court concluded that it lacked authority to order C.S. to participate in the compensatory education or appoint his caregiver as decision maker but nevertheless proceeded to address the various claims. The court ruled that the district had not denied him FAPE for either year. C.S. and his caregiver then appealed to the Ninth Circuit.

- In *Doe v. Westport Board of Education* (2020), the parents filed for a due process hearing for tuition reimbursement for a unilateral placement for the senior year of a student with disabilities. He reached age 18 in May of that year, and his parents filed for the due process hearing two months later. The hearing officer granted the district's motion for dismissal, and the parents appealed to the federal court in Connecticut.

In the first of its <i>Butte</i> rulings, the Ninth Circuit rejected their claim that the district failed to evaluate C.S. for SLD despite having reasonable suspicion of areas of this additional disability classification during the first part of grade 11.	The reasons were that (1) C.A.'s parent, who was still representing him at that time because he had not yet reached age 18, refused consent for that additional evaluation, and, in any event (2) his grade 11 and 12 IEPs included services in the suspected areas of SLD.
Second in <i>Butte</i> , the Ninth Circuit rejected their claim the two successive IEPs were inappropriate due to the lack of an FBA and effective behavioral interventions.	The court reasoned that the IDEA only requires an FBA for a disciplinary change in placement and that the BIP and other behavioral provisions of the IEPs met the <i>Andrew F.</i> standard.
Third in <i>Butte</i> , the Ninth Circuit rejected their claim that the two IEPs were inappropriate in terms of sufficient assessments and goals for transition services.	Assuming without deciding that the district committed these procedural violations, the court concluded that they were harmless because C.S. benefited from a host of transition services during both years.
Finally in the <i>Butte</i> case, the Ninth Circuit addressed their claim that the district should have appointed the caregiver, not a surrogate, to represent C.S. because the Montana Supreme Court had ruled that his caregiver qualified as his foster parent.	The court agreed that the lower court erred by not requiring the caregiver to be his decision maker in light of the relevant provisions of the IDEA and the state law ruling of the state supreme court. However, the court concluded that this procedural violation was harmless because the caregiver had continued to represent C.S. at the IEP meetings after he reached age 18.
In the <i>Westport</i> case, the court upheld the dismissal of the parents' claim based on the plain and unambiguous meaning of the IDEA transfer of rights provision.	The court disagreed with and distinguished the opposite outcome in the District of Columbia's <i>Latynsky-Rossiter v. D.C.</i> (2013). One of the differences was the clear operation of Connecticut's corollary state law.

The bottom line is that when the student with disabilities reaches age 18, pay careful attention to the relevant provisions of the IDEA and any pertinent corresponding provisions of the law in your state.