

EDUCATION LAW INTO PRACTICE

THE FIFTH CIRCUIT'S LATEST CHILD FIND RULING: FUSION AND CONFUSION*

by

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“Child find” is one of the ongoing obligations of school districts under the Individuals with Disabilities Education Act (IDEA).¹ Although the Act and its regulations identify this obligation on a broad basis,² the courts have developed its operational meaning. More specifically, in a long line of cases³ the courts have demarcated and applied two overlapping but separable components of child find: (1) reasonable suspicion, which triggers this obligation to initiate an eligibility evaluation of the child,⁴ and (2) reasonable time,⁵ which marks the outer limit for initiating this evaluation.⁶ The case law

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1. 20 U.S.C. §§ 1400–19 (2017).
2. 20 U.S.C. § 1412(a)(3) (2017) (referring to the functions of “identif[y]ing], locat[ing], and evaluat[ing]”); 34 C.F.R. § 300.111 (2018) (repeating these functions and clarifying their applicability to students advancing from grade to grade and highly mobile children “who are suspected of [meeting the eligibility criteria of the Act]”).
3. See, e.g., Perry A. Zirkel, *Child Find under the IDEA: An Updated Analysis of the Judicial Case Law*, 48 COMMUNIQUÉ 14 (June 2020) (finding 31 pertinent court decisions from 2017 through 2019); Perry A. Zirkel, *Child Find under the IDEA: An Empirical Analysis of the Judicial Case Law*, 45 COMMUNIQUÉ 4 (May 2017) (finding 91 pertinent court decisions from 1994 through 2016). Some of these court decisions included rulings on both components of child find, thus leading to a total of 146 rulings for the 122 decisions. For more recent rulings, see *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073 (8th Cir. 2020); *Northfield City*

Bd. of Educ. v. K.S., 76 IDELR ¶ ___ (D.N.J. 2020); *D.C. v. Klein Indep. Sch. Dist.*, 76 IDELR ¶ 208 (S.D. Tex. 2020); *Dougall v. Copley–Fairlawn Sch. Dist.*, 74 IDELR ¶ (N.D. Ohio 2020).

4. See, e.g., Perry A. Zirkel, *The “Red Flags” of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015) (identifying the various signs that may indicate or mitigate the reasonable suspicion determination). For a leading standard of the reasonable suspicion component, see *Bd. of Educ. of Fayette v. L.M.*, 478 F.3d 307, 313, 216 Ed.Law 354 (6th Cir. 2007) (citing *Clay T. v. Walton Cty. Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997)) for preponderant proof that “the school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate”).
5. On occasion, “reasonable period” is used herein, as it is in the case law, as a synonym for “reasonable time,” referring to the amount of time demarcated at each end by the date of the district’s reasonably suspecting the child’s eligibility and the date of its initiating the evaluation via parental consent. E.g., *M.P. v. Campus Cmty. Sch.*, 73 IDELR ¶ 38, at *7 (D. Del. 2018); *Panama-Buena Vista Union Sch. Dist. v. A.V.*, 71 IDELR ¶ 57, at *6 (E.D. Cal. 2017); *Cent. Sch. Dist. v. K.C.*, 96 IDELR ¶ 125, at *8 (E.D. Pa. 2013). Other variations, as seen *infra*, are reasonable “delay” or “interval.”

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concerning the second component has been less extensive and well-established,⁷ warranting more clear and consistent judicial guidance.⁸

The purpose of this short case note is to analyze the Fifth Circuit's recent child find ruling to show that it provides confusion rather than clarification for the reasonable-time component. The successive parts of this analysis are (1) a summary of the court's child find ruling in its initial and superseding decisions, and (2) an assessment that explains the asserted errors in the court's reasonable-time interpretation.

Two prefatory points are necessary and appropriate. First, reasonable suspicion and reasonable time are, like height and weight or, more specific to the IDEA, child find and eligibility, overlapping but separable concepts.⁹ Second, Texas is a fitting context for the Fifth Circuit's decision because (1) it accounts for a disproportionately high segment of the child find case law to date,¹⁰ and (2) it is also the scene of a statewide corrective action plan that has child find as a major feature as the result of a federal agency order.¹¹

6. See, e.g., Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 Ed. Law Rep. 576 (2015) (canvassing the pertinent court rulings to date to identify an approximate range for the outer limit of this reasonable amount of time, starting seven weeks after reasonable suspicion and ending dependent on the specific circumstances of the case). In contrast the next stage, which is the evaluation, is a fixed period of time starting with notification to and consent from the parent. 34 C.F.R. § 300.301(c)(10) (2018) (60 days from receipt of parental consent unless state law specifies a different time frame).
7. See Zirkel 2020, *supra* note 3, at 51 (finding 15 rulings for reasonable time compared with 26 for reasonable suspicion); Zirkel 2017 *supra* note 3, at 6 (finding 35 rulings for reasonable time compared with 70 for reasonable suspicion).
8. As the courts established at the outset, this component, like its reasonable suspicion counterpart, is understandably ad hoc. E.g., *W.B. v. Matula*, 67 F.3d 484, 501, 104 Ed. Law Rep. 28 (3d Cir. 1995) ("We are not unmindful of the budgetary and staffing pressures facing school officials, and we fix no bright-line rule as to what constitutes a reasonable time in light of the information and resources possessed by a given official at a given point in time"). However, the subsequent rulings have not been clear as to what the relevant indicators or circumstances are for establishing the length of the reasonable period, and they have not been consistent as to whether the measuring point for the end of this period is the date that the district requested parental consent or the date the district obtained this requisite consent for the evaluation. See Zirkel, *supra* note 5, at 577 (identifying the limitations in subsequent case law).
9. The typical first step in a medical examination, height and weight, correlate but are obviously not at all identical, requiring separate measurement. Similarly, child find ultimately targets eligibility because it starts with the date that the district reasonably suspected that the child may be eligible. However, as a lengthening line of case law makes clear, child find is an ongoing procedural obligation, and if the child is not—as a result of the requisite evaluation or in the absence thereof—proven to be eligible, the violation may be adjudicated as harmless. E.g., *Burnett v. San Mateo Foster Cty. Sch. Dist.*, 739 Fed.Appx. 870, 872, 359 Ed.Law Rep. 69 (9th Cir. 2018); *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 578, 356 Ed.Law Rep. 977 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1307 (2019); *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196, 353 Ed.Law Rep. 33 (11th Cir. 2018); *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed. Appx. 887, 893–94, 286 Ed.Law Rep. 131 (5th Cir. 2012). *But cf.* Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance of Adjudication under the IDEA*, 39 J. NAT'L ADMIN. L. JUDICIARY 1, 13 (2019) (advocating Congressionally authorized and equitably tailored prospective injunctive relief in such cases); *J.P. v. Anchorage Sch. Dist.*, 260 P.3d 285, 293–95, 271 Ed.Law Rep. 1077 (Alaska 2011) (ordering reimbursement for the private evaluation, although not for the private tutoring).
10. E.g., *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 357 Ed.Law Rep. 875 (5th Cir. 2018); *Dallas Indep. Sch. Dist. v.*

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The Fifth Circuit's Ruling

For its latest ruling specific to the reasonable time find context, the Fifth Circuit issued an initial decision and, almost nine months later after a panel rehearing, a substituted decision in *Spring Branch Independent School District v. O.W.*¹² The case addresses several IDEA issues, but the scope here is limited to the child find ruling.

The pertinent facts of this ruling do not require detailed recounting because the parties did not dispute the date of reasonable suspicion, which was October 8, 2014, and the date for the end of the reasonable-period inquiry, which was January 15, 2015, when the child was in fifth grade.¹³ For the limited interval between the child's recent enrollment in the district, which was the start of fifth grade and October 8, relevant facts within the district's attributable knowledge were that (a) the child was transitioning from a therapeutic school, (b) his diagnoses included attention deficit hyperactivity disorder and oppositional defiant disorder, (c) he exhibited continuing disruptive behaviors from his first day at school despite school personnel's informal affirmative efforts, and (d) his parents provided consent and the requested background information, along with a private educational evaluation, for a Section 504 eligibility evaluation.¹⁴ On October 8, the school's Section 504 team, including the parents, met and determined that he was eligible for Section 504 accommodations, which included a behavior intervention plan (BIP), and noted that he was at Tier 2 of the district's

Woody, 865 F.3d 303, 345 Ed.Law Rep. 666 (5th Cir. 2017); *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 Fed.Appx. 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); *D.C. v. Klein Indep. Sch. Dist.*, 76 IDELR ¶ 208 (S.D. Tex. 2020); *D.H.H. v. Kirbyville Indep. Sch. Dist.*, 75 IDELR ¶ 4 (E.D. Tex. 2019); *T.W. v. Leander Indep. Sch. Dist.*, 74 IDELR ¶ 12 (W.D. Tex. 2019); *A.L. v. Alamo Heights Indep. Sch. Dist.*, 73 IDELR ¶ 71 (W.D. Tex. 2018); *T.C. v. Lewisville Indep. Sch. Dist.*, 67 IDELR ¶ 215 (E.D. Tex. 2016); *D.L. v. Clear Creek Indep. Sch. Dist.*, 68 IDELR ¶ 166 (S.D. Tex. 2016), *aff'd on other grounds*, 695 Fed.Appx. 733, 347 Ed.Law Rep. 751 (5th Cir. 2017); *C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR ¶ 109 (S.D. Tex. 2015); *D.A. v. Houston Indep. Sch. Dist.*, 716 F. Supp. 2d 603 (N.D. Tex. 2009), *aff'd on other grounds*, 629 F.3d 450, 264 Ed.Law Rep. 50 (5th Cir. 2010); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 236 Ed.Law Rep. 679 (W.D. Tex. 2008).

11. *E.g.*, Texas Educ. Agency, Special Education Strategic Plan (2018), <https://tea.texas.gov/academics/special-student->

populations/special-education (latest version of the corrective action plan); Letter to Morath (USDE Mar. 26, 2018), <https://www2.ed.gov/admins/lead/account/stateplan17/txapprovalstateplanltr318.html> (approving corrective action plan); Letter to Morath (USDE Jan. 11, 2018), www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-tx-b-2017-let-ter.pdf (ordering corrective action plan); Letter to Morath, 68 IDELR ¶ 231 (OSERS Oct. 3, 2016) (providing initial findings and ordering a written response). For a discussion of the controversy, see Raj Salhotra, *Lessons Learned from Texas' Special Education Cap*, 20 MARQUETTE BENEFITS & SOC. WELFARE REV. 70 (2018).

12. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d 695, 369 Ed.Law Rep. 639 (5th Cir. 2019), *withdrawn and superseded*, 961 F.3d 781 (5th Cir. 2020).

13. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d at 793.

14. *Id.* at 785–86. The child had been enrolled in the district for kindergarten before attending private schools during the intervening four years. *Id.* at 785.

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response to intervention (RTI) system and “may need to go to Tier 3.”¹⁵ During the interval starting on October 8, the BIP had a limited positive effect for the first few weeks, when the child’s discipline problems and academic decline resumed, and on January 15 the district initiated an IDEA eligibility evaluation.¹⁶

The Initial Decision

The Fifth Circuit’s initial decision quite correctly set forth the applicable focus for its child find ruling, which was the reasonable-time issue after the undisputed reasonable-suspicion date.¹⁷ Specifically, the court defined this issue as “whether the delay between October 8, 2014, and January 15, 2015 (99 days, or 3 months and 7 days), was reasonable.”¹⁸ As guideposts, the Fifth Circuit identified its two previous reasonable-time decisions: (1) its ruling in *Dallas Independent School District v. Woody* that a three-month period, which included more than a month wait for requested parental information, was reasonable;¹⁹ and (2) its ruling in *Krawietz v. Galveston Independent School District* that a four-month period, in which the district failed to take proactive steps, was not reasonable.²⁰

Combining these two previous guideposts, the *O.W.* court formulated the following reasonable-time standard:

The reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant period. A delay is reasonable when, throughout the period between notice and referral, a

15. *Id.* RTI is usually a three-tier arrangement, with the second tier being after the universal interventions are not sufficiently successful. *See, e.g.*, Texas Education Agency, Brief Overview of 3-Tier Model, <https://buildingrti.utexas.org/videos/brief-overview-of-3-tier-model>.

16. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d at 787.

17. The court characterized October 8 as “the date the child find requirement triggered due to notice of a likely disability” (*id.* at 793), having already explained that it refers to “[when] the district is on notice of facts or behavior likely to indicate [eligibility]” (*id.* at 791).

18. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d at 706.

19. *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 319, 345 Ed.Law Rep. 666 (5th Cir. 2017). After explaining that “reasonable time” in this context refers to the period between the triggering notice date and the initiation of the eligibility evaluation (*id.* at 319), the *Woody* court characterized the relevant conduct as follows:

[D]uring this period, the District was requesting and gathering information on [the child] in an effort to classify her and

determine its obligations. For example, . . . [on] October 4, [the District] request[ed] further information. It took [the parents] until November 5 to respond. . . . Finally, the District referred [the child] for an evaluation and sought parental consent to evaluate her at that meeting. These facts suggest reasonableness, with neither the District nor the parent reacting with urgency or with unreasonable delay.

Id. at 320.

20. *Krawietz v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 677, 357 Ed.Law Rep. 875 (5th Cir. 2018). The *Krawietz* court characterized the relevant conduct as follows:

During those four months, [the District] failed to take any appreciable steps toward complying with its Child Find obligation. Indeed, it was only after [the] family requested a due process hearing that [the district] sought consent to conduct the evaluation. [The District] alleges that [the child’s] family failed to “act with any urgency” until [that request], but the IDEA imposes the Child Find obligation upon school districts, not the parents of disabled students.

Id.

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district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps.²¹

Applying this new standard, the initial *O.W.* decision rejected the district's claim that its aforementioned²² RTI efforts fulfilled this proactive steps standard, concluding that the proscription against using RTI to delay an evaluation limited the state law prescription to consider general education interventions prior to evaluation.²³ More specifically, the court concluded that by the October 8 Section 504 meeting, it was obvious that the attempts at behavioral interventions had "utterly failed," thus not qualifying as the requisite proactive steps and resulting in a child find violation.²⁴

The Superseding Decision

Apparently apprehending a problem with the child find analysis in its initial decision, the Fifth Circuit issued a superseding decision that had limited revisions.²⁵ First, removing the above-mentioned references,²⁶ the court extended the scope of its analysis of the district's "intermediate accommodations" to include Section 504, not just RTI.²⁷ More specifically, while confirming its rejection of the district's Section 504 and RTI efforts as qualifying as the requisite proactive steps, the court clarified that "[w]e in no way suggest that a school district necessarily commits a child-find violation if it pursues RTI or § 504 accommodations before pursuing a special education evaluation."²⁸

Second, in explaining this clarified distinction that "there may be cases where intermediate measures are reasonably implemented before resorting to evaluation," the superseding version addressed a Third Circuit child find ruling in 2012 that had accepted such intermediate measures as "militat[ing] against a Child Find violation."²⁹ Distinguishing the facts of the Third Circuit decision, the revised *O.W.* opinion concluded that in the instant case the severity of the child's behaviors and the ineffectiveness of the district's

21. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d at 707.

22. *Supra* note 15 and accompanying text.

23. *Spring Branch Indep. Sch. Dist. v. O.W.*, 938 F.3d at 707 (citing *Lisa M. v. Leander Indep. Sch. Dist.*, 924 F.3d 205, 209 n.4, 365 Ed.Law Rep. 769 (5th Cir. 2019) and 19 TEX. ADMIN. CODE § 89.1011(a) (2018)).

24. *Id.* In a footnote, the initial decision similarly rejected the district's attempt to identify the parents as a contributing factor to the delay. *Id.* at 707 n.12 ("While a proactive step may include waiting for a reasonable time for a parent to respond to a request for information or approval [citing *Woody*], the IDEA imposes the Child Find obligation upon school districts, not parents [citing *Krawietz*].").

25. The scope of this critique is limited to the Fifth Circuit's child find ruling, which

appeared to be the primary and perhaps exclusive focus of the superseding decision. In a relatively minor additional child find revision, the court added a final footnote confirming—in line with prior authority (*supra* note 9)—that child find violations are subject to the IDEA's codified two-part test for procedural FAPE. *Id.* at 11 n.19.

26. *Supra* note 23.

27. *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d at 794.

28. *Id.* In a new footnote, the court added that its concern in this case was with district's use of the 504 plan as "preliminary rather than concurrent step pursuing an evaluation." *Id.* at 794 n.12.

29. *Id.* at 794 (citing *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 252, 285 Ed.Law Rep. 730 (3d Cir. 2012)).

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intermediate efforts caused the district to have been “more than reasonably” on notice that extending these efforts would constitute a delay or denial of the duty to initiate an evaluation.³⁰

The Errors in the *O.W. Child Find Ruling*

The interrelated errors in the court’s analysis cumulatively amounted to conflating, or fusing, the reasonable-suspicion and reasonable-time components of child find, thus causing confusion as to the meaning and application of the second component, which is whether the time between reasonable suspicion and evaluation initiation is reasonable.

The first error in the court’s analysis was the initial and unchanged reasonable-time standard that relies exclusively on steps, thus eliminating length as a relevant factor.³¹ How can an interval, or in the court’s inadvertently slanted language, “delay,”³² whether it is three days, three weeks, or three months be evaluated for “reasonable time” without any consideration of its length? The compounding error is that by concluding that on the October 8 date of reasonable suspicion the district had not only notice of facts or behavior likely to indicate a disability,³³ but also reason to know that its intermediate steps were ineffective,³⁴ the proactive steps measure became moot. Somehow upon the relatively short-term exhaustion of the informal steps, the move to more intensive interventions, whether in the form of RTI or Section 504, was automatically a nullity. Thus, the second component merged into reasonable suspicion, meaning that at least in this case that on October 8 nothing was left for reasonable time.

In its attempt to clarify the effect of its reasonable-time standard upon other cases, the superseding decision did nothing to correct the effective elimination of the reasonable-time component, instead adding that in some cases more intensive intermediary measures may not be fatal in the child find context.³⁵ In this attempted clarification, the Fifth Circuit singled out a Third Circuit decision in 2012³⁶ from the well more than 100 judicial rulings specific to child find.³⁷ However, a careful reading of the Third Circuit’s ruling, which is echoed in various other child find rulings,³⁸ is that the courts consider proactive intermediary steps as part of reasonable-suspicion, not generally the reasonable-time, analysis. More specifically, although in the Third Circuit case the parents separately alleged a reasonable-time claim the events before

30. *Id.*

31. *Supra* note 21.

32. *Supra* text accompanying note 18.

33. *Supra* note 17.

34. *Supra* text accompanying note 24.

35. *Supra* notes 25–28 and accompanying text.

36. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Ed.Law Rep. 730 (3d Cir. 2012).

37. *Supra* note 3.

38. *E.g., Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1196, 353 Ed.Law Rep. 33 (11th

Cir. 2018); *M.G. v. Williamson Cty. Sch.*, 720 Fed.Appx. 280, 285, 353 Ed.Law Rep. 673 (6th Cir. 2018); *Bd. of Educ. of Fayette Cty. v L.M.*, 478 F.3d 307, 313, 216 Ed.Law 354 (6th Cir. 2007); *Doe v. Cape Elizabeth Sch. Dep’t*, 382 F.Supp.3d 83, 102–03, 367 Ed. Law Rep. 767 (D. Me. 2019); *R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp 3d 262, 269–70, 337 Ed.Law Rep. 62 (S.D.N.Y. 2016); *Hupp v. Switzerland of Oh. Sch. Dist.*, 912 F. Supp. 2d 572, 591, 293 Ed.Law Rep. 352 (S.D. Ohio 2012).

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the first evaluation and a reasonable-suspicion claim for the events thereafter,³⁹ the court addressed both the pre-April 2006 situation⁴⁰ and the post-April 2006 situation,⁴¹ including the consideration of the district's continuing proactive steps,⁴² as part of reasonable-suspicion analysis.⁴³

In contrast, as the Fifth Circuit's preceding decision in *Krawietz* made relatively clear, the proactive steps to be considered as part of reasonable-time analysis are those appreciable measures to arrange for the initiation of the evaluation,⁴⁴ which are distinguishable from the remediating measures in general education that obviate the need for special education.⁴⁵ Due to confusion in its formulation and application of its solely "proactive steps" standard, the Fifth Circuit's effective fusion of reasonable-time into reasonable-suspicion in its original and revised *O.W.* decisions appears to at least arguably apply more generally to other child find cases. Regardless of whether the school took effective, much less any, intermediary measures before the triggering date of reasonable suspicion,⁴⁶ any such "proactive steps" do not count for the reasonable time of effectuating the evaluation.⁴⁷ Similarly, the additions of "utterly"⁴⁸ and "more than reasonably"⁴⁹ amount to mere hyperbole, not meaningful differentiation, to the analysis.

39. *D.K. v. Abington Sch. Dist.*, 696 F.3d at 249–50 ("Plaintiffs claim that the School District violated the Child Find duties . . . by failing to evaluate [the child] within a reasonable time after it should reasonably have suspected a disability [before the April 2006 evaluation] . . . and . . . by failing to suspect disability when [the child's] struggles continued after April 2006").

40. *Id.* at 251 (concluding that this young child's behavioral, social, and academic indicators did not signal likely IDEA eligibility, citing reasonable-suspicion rulings in *Bd. of Educ. of Fayette Cty. v. L.M.*, 478 F.3d 307, 314, 216 Ed.Law 354 (6th Cir. 2007) and *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 662–63, 279 Ed.Law Rep. 229 (S.D.N.Y. 2011)).

41. *Id.* at 251 ("We are also unpersuaded that the School District violated its Child Find obligations by failing to suspect [the child] of a disability after the April 2006 evaluation based on further misconduct and additional opinions by his parents and private therapist").

42. *Id.* at 252.

43. The only exception is limited to the special and distinguishable situation of the second of the two separate child find claims, which was for the period between initial evaluation, which found that the child was not eligible under the IDEA, and the re-evaluation. For this period, the Third Circuit cited its previous ruling that "when a school district has conducted a comprehen-

sive evaluation and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required." *Id.* at 251–52 (citing *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 273, 280 Ed.Law 37 (3d Cir. 2012)). This special use of "reasonable time," which effectively encompasses both components for the limited situation between the initial evaluation and a reevaluation, can contribute to imprecision or inconsistency in the case law when not carefully distinguished.

44. *Supra* notes 19 and 20.

45. The line between general and special education for the overlapping purposes of child find and eligibility is far from a bright one. *See, e.g.*, Perry A. Zirkel, *Through a Glass Darkly: Eligibility under the IDEA—The Blurry Boundary of the Special Education Need Prong*, 49 J.L. & EDUC. 149 (2020). Similarly, whether RTI and other such intermediary measures are proactive is an ad hoc determination that includes their effectiveness and efficiency. *See, e.g.*, Perry A. Zirkel, *Response to Intervention and Child Find: A Legally Problematic Intersection*, 84 EXCEPT. CHILD. 368 (2018).

46. *Supra* note 17.

47. *Supra* text accompanying notes 38–45.

48. *Supra* text accompanying note 24.

49. *Supra* text accompanying note 30.

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Conclusion

Given the comprehensive and congested nature of its docket, the Fifth Circuit understandably may have found these specialized nuances difficult to demarcate, especially in light of the imprecise and ad hoc nature of the cryptic codification⁵⁰ and the extensive⁵¹ but not entirely clear and consistent jurisprudence⁵² for the IDEA's child find obligation. For example, in responding to the parents' request for a determination of the triggering date for reasonable suspicion, a federal judge in Maine asserted:

The "trigger" concept is not unheard of in this area of law and searching that term will yield a collection of cases that contemplate what set of circumstances, in a given case, "trigger" educational referrals. However, suggesting that the child-find factors provide a calculus for calendaring one specific trigger date to the exclusion of all others is unwarranted. School staff considering a student's need for either an accommodation or special education services are not charting planetary motion with astronomical instruments, but are instead deciding how best to facilitate educational objectives for a unique child with particular issues in a particular school setting. In this sense, the child-find factors, in my view, should not be regarded as a clockwork armillary sphere.⁵³

Nevertheless, in my relatively impartial view,⁵⁴ the Fifth Circuit and other courts should establish in child find cases that (1) the multiple factors for the reasonable-suspicion component include proactive intermediary interventions, and (2) the corresponding considerations for reasonable-time include the length of the intervening period and the diligence of the district's steps to initiate the evaluation.⁵⁵ Under this proposed analysis, the judicial outcome for the *O.W.* case may or may not be the same. Of much greater concern, the various stakeholders in the Fifth and other circuits merit a more predictable and logical framework to promote judicious decision making in both schools and courts.

50. *Supra* note 2.

51. *Supra* note 3.

52. *Supra* notes 8 and 43. For other examples of imprecision, see *supra* 18 ("likely to indicate disability") and the inherently individualized interpretive nature of the IDEA child find terminology of "reasonable," "suspicion," and "time."

53. *Doe v. Cape Elizabeth Sch. Dep't*, 382 F.Supp.3d 83, 99, 367 Ed.Law Rep. 767 (D. Me. 2019). Nevertheless, the court concluded that the district did not have the requisite reasonable suspicion upon referring the child for a Section 504 plan, "especially as general education interventions had enabled [the child] to successfully overcome her educational struggles in the previous school-year." *Id.* at 102–03.

54. As my website (perryzirkel.com) shows, my long career has not included legal repre-

sentation of parents and districts, with my role in IDEA proceedings limited to serving as a review officer.

55. Although the meaning of "proactive steps" differs between these two overlapping components, efficacy and efficiency are key considerations for these steps throughout the child find analysis. Moreover, although the obligation applies solely to the district, the parents' conduct serves as an equitable adjudicative consideration, as it does for the remedial stage. See, e.g., Perry A. Zirkel, *Compensatory Education under the IDEA: The Latest Annotated Update of the Law*, 376 Ed.Law Rep. 850, 858 (2020); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785, 787, 792 (2012).