379 Ed. Law Rep. 1

West's Education Law Reporter
September 17, 2020

Education Law into Practice
Perry A. Zirkel, Ph.D., J.D., LL.M.[aa1]

SCHOOL ATTENDANCE ISSUES IN SPECIAL EDUCATION CASE LAW[a1]

School attendance has been an increasingly frequent subject in special education litigation in recent years, and it promises to continue its upward trajectory in the foreseeable future. The contributing factors for the recent ascendance include (1) the attendance accountability in the No Child Left Behind Act,[1] which continued at least in part in the Every Student Succeeds Act,[2] and (2) the simultaneous growth of state laws requiring local district policies to curb student absenteeism.[3] A corresponding major contributing factor for the near future is the likely impact of COVID-19 on K-12 students, including increased dependence on the home environment and accentuated anxiety about resuming in-school attendance.[4]

This brief article provides a representative sample of court decisions illustrating the role of student absenteeism under the Individuals with Disabilities Education Act (IDEA)[5] and Section 504.[6] Although the extent of ***2** the linkage between attendance and disability extends more widely,[7] the scope here is specific to the core obligations of identification[8] and free appropriate education (FAPE)[9] under the IDEA and Section 504, particularly during recent years.

Identification: Child Find and Eligibility

Individuals with Disabilities Education Act

As the gateway issue prior to the various procedural and substantive requirements for FAPE, the IDEA requires districts to conduct a comprehensive initial evaluation for students reasonably suspected of qualifying under the specified eligibility criteria.[10] Thus, IDEA identification consists of the successive obligations of child find and eligibility determination, with evaluation being at the overlapping juncture.[11] Examined more closely, child find consists of two similarly overlapping components--reasonable suspicion of eligibility and reasonable time to initiate the evaluation.[12] Similarly, eligibility consists of two causally connected components--meeting the criteria for one or more of the specifically identified classifications, such as autism or specific learning disability, and having a resulting need for special education.[13]

***3** In recent years, courts are increasingly recognizing excessive absenteeism as a factor for both child find and eligibility under the IDEA. As this case law shows, the most directly applicable classifications are emotional disturbance (ED) and other health impairment (OHI).[14] The key appears to be the extent that courts examine the underlying linkages of attendance (a) within these and the other less obviously pertinent classifications and (b) with the requisite need for special education.

A leading example is the Eighth Circuit's recent officially published decision in *Independent School District No. 283 v. E.M.D.H.*[15] In this case, the parents of a gifted high school student with a panoply of diagnoses, including school phobia, generalized anxiety disorder, severe depression, ADHD and panic disorder with agoraphobia, challenged the district's

determination that she was not eligible under the IDEA. The student had increasing absenteeism since the elementary grades, including treatment in psychiatric facilities in grades 8 and 9. In grade 11, upon the parents' request, the district conducted an evaluation, concluding that she was not eligible because, despite her mental health problems, she excelled academically when she attended school. The Eighth Circuit ruled, in upholding the lower court, that the district violated both its child find and eligibility evaluation obligations under the IDEA. The child find violation was based on the finding that the district had continuing reasonable suspicion since the child's known psychiatric treatment at the end of grade 8. The eligibility evaluation obligation was based on the court's conclusions that (1) she met the criteria of both ED and OHI; (2) her absenteeism wad not attributable to "'bad choices' causing her to 'fail in school' TTT but rather [was] a consequence of her compromised mental health;"[16] (3) her resulting need for special education was evident in her falling behind in graduation credits despite her high intellect and "the positive results of the private tutoring and online learning indicate that the nearly three years where the Student foundered were not inevitable but the direct result of insufficient individualized attention under an appropriate IEP."[17] The resulting remedies consisted of reimbursement for the parents' independent educational evaluation and compensatory education in the form of "a private tutor TTT until the Student earns the credits expected of her same-age peers."[18]

Conversely, the traditional case law largely lays attendance issues at the feet of parents (or older students) rather than doing a manifestation-determination type of analysis[19] for more rigorously applying districts' child find and eligibility obligations. For example, in another recent case arising at the high school level, the Fourth Circuit affirmed the lower court's rulings that (a) the district violated child find, which was based on the lack of the ***4** requisite response to repeated parental referrals rather than the child's absenteeism,[20] and (b) the result of this procedural violation was harmless because even though the district belatedly determined that the child was eligible as ED, his culminating complete absenteeism after the IEP--along with his previous failure to do his homework for class, pay attention in class, and come to school regularly-- countered the requisite denial of FAPE. The two judges in the panel majority placed the blame explicitly on the student (and, arguably, implicitly on the parents), not the school,[21] albeit based on partially conflicting rationales.[22] The concurring judge agreed with the result, but his reasoning was different in the allocation of fault[23] and at least potentially more penetrating in terms of potential attendance linkages.[24]

Overall, the split line of other relatively recent child find and eligibility court decisions similarly appears to show an uneven but gradual recognition of the disability hypotheses that may amount, depending on the evidence of the individual case,[25] to the requisite linkage to the need for evaluation or a determination of eligibility. Whether viewed under the lens of child find or eligibility,[26] the various factors in determining the role of attendance include not only the level of scrutiny the court accords to the disability-absenteeism ***5** link,[27] but also whether the court regards the scope of educational performance and special education need as academic or more broadly encompassing the child's social-emotional dimension and, sometimes simultaneously, whether the child's attendance problems amounted to inability or unwillingness to attend school.[28] Finally, absenteeism standing alone is generally not sufficient for reasonable suspicion, much less a definitive determination, of eligibility.[29]

Section 504

School attendance is also a potential factor in child find and eligibility under Section 504. The difference is that, although child find is at least as strong under the Section 504 regulations,[30] the overlapping and ultimate issue of eligibility is based on a broader scope than under the IDEA.[31] The major attendance issue that Section 504 added to the aforementioned factors under ***6** the IDEA is the breadth of other major life activities beyond the specified examples.[32]

The major court decision specific to Section 504 identification and school attendance is *Weixel v. Board of Education of the City of New York*.[33] The child in this case was a seventh grader who was absent for two months starting in the middle of the school year after falling ill with various symptoms, including muscle and joint pains, headaches, nausea, abdominal pains, and exhaustion. The principal then threatened the parents with filing child neglect charges with the child welfare agency if they did

not return the child to school. The parents complied, relying on the principal's agreement to allow their daughter rest breaks in the classroom and in climbing the school stairs when she felt tired or sick. When her mother visited the school, she found the child crying, reporting severe abdominal pain and the lack of the agreed-upon accommodations. She took her home and followed up with a pediatrician's diagnosis of chronic fatigue syndrome (CFS) and fibromyalgia. The principal responded by fulfilling her threat to initiate child neglect proceedings, which subjected the family to an investigation.

The child completed the seventh grade at home, receiving outstanding grades from the home school instructor whom the district belatedly provided during the summer. However, the school resisted promoting her to grade 8 due to her absences, relenting months later only on the condition that she forfeit her right to be in advanced classes. She finished grade 8 at home, earning excellent scores in the state's proficiency exams for promotion to high school.

After receiving no resolution of their formal complaint to the district, the parents filed suit pro se in federal court under Section 504 and the ADA. The court dismissed the case, concluding that the parents had not shown their daughter met the eligibility criteria under this pair of statutes. After obtaining the pro bono services of a large New York City law firm, they filed an appeal with the Second Circuit. The appellate court reversed the dismissal, concluding that the lower court had failed to provide the more liberal standards afforded to pro se litigants to withstand dismissal. For the eligibility-specific element of the prima facie case, the court concluded that that the lower court erred by focusing on the major life activity of learning: "In requiring plaintiffs to show that [the child] was 'learning disabled,' the district court erroneously ignored the numerous allegations in the amended complaint which demonstrated that [her] CFS substantially limited TTT the major life activities of walking, exerting herself, and *attending classes at school*."[34] ***7** The Second Circuit's various other rulings were not specific to Section 504 eligibility directly connecting to school attendance.[35]

Subsequent Section 504 child find or eligibility court rulings have only peripherally addressed attendance or were subsumed within corresponding IDEA rulings. For example, in an unpublished decision, the Third Circuit upheld a child find violation under both the IDEA and Section 504 for a tenth grader with Crohn's Disease that clearly accounted for his academic decline, with absences being only one of the contributing factors.[36] The reasons for the thinness of case law on point likely include the effects of the exhaustion doctrine and the deliberate indifference or similar heightened standard for Section 504 claims.[37] Moreover, specific to the arguable interpretation that *Weixel* established "attending school" as a major life activity under Section 504 rather than serving merely serving as dicta,[38] the subsequent case law has been negligible in both number and strength.[39]

FAPE

Individuals with Disabilities Education Act

FAPE, as duly developed and documented in the eligible child's individualized education program (IEP), is the core obligation under the IDEA.[40] ***8** Its primary dimensions are procedural and substantive.[41] The procedural dimension, as codified in the 2004 amendments of the IDEA generally requires a second step if the district has engaged in one or more procedural violations, which amounts to a substantive loss to the child or the parents.[42] More recently, the Supreme Court refined its original formulation of the substantive dimension,[43] resulting in the following standard: "Is the IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances?"[44]

For the increasing frequency of attendance-related FAPE cases in recent years, the focus appears to be shifting from the traditional view that emphasizes the parents' responsibility to the extent and effectiveness of the district's attendance-related efforts via the IEP.[45] As an example of the residual effect of the traditional view, the Fifth Circuit recently ruled in favor of the defendant district for the parents' "school refusal" FAPE claim, attributing the bullying-related absenteeism of the child, an eighth grader with autism, more to the parents than the district.[46] The court did so by (1) ***9** citing the various district efforts

to ease the student back to the school environment;[47] (2) pointing to the parents' delay in providing more detailed medical documentation of the student's mental health diagnoses;[48] and (3) the relatively relaxed substantive standard for FAPE.[49]

Subsequently, a series of federal court decisions in the District of Columbia reflect the gradual, albeit uneven, shift from the traditional view. In 2014, the court concluded, in reliance on the hearing officer's findings, that the student's lack of progress "was due to his frequent absences and not bullying or school avoidance."[50] In 2016, the court ruled that the IEP's functional behavioral assessment (FBA) and behavior intervention plan (BIP) sufficiently addressed the student's truancy problems, although not reaching the sexual assault that triggered these problems.[51] In a more recent decision, observing that the "disability-related truancy cannot be viewed in isolation," the court ruled that the child's attendance problems were primarily attributable to his inappropriate placement and that although the district had taken some proactive steps, including an FBA and BIP, "[its] behavioral interventions were insufficient under the circumstances."[52]

A final illustration of the increasingly applicable approach is a Rhode Island case in which a high school student with a complex array of mental health issues had a record of therapeutic hospitalizations and other absenteeism.[53] In relevant part, the parents challenged two successive IEPs. The court concluded that the first of these two IEPs contained substantively fatal procedural deficiencies, such as vague goals about her need for coping and problem-solving skills without a reasonably defined path to improved school attendance,[54] whereas the subsequent IEP sufficiently corrected these deficiencies with more specific goals and more extensive services, including a multi-stepped "reintegration plan."[55]

Yet, attendance may play various roles in FAPE cases, defying a simplistic or limited characterization of its IEP-linkage or of the parents' corollary partnering responsibilities.[56] Parent-plaintiffs continue to face an ***10** uphill slope for attendance-based claims, as they do in FAPE cases generally,[57] with the variance attributable not only to the court's level of recognition and scrutiny of the disability connection but also the factual contours of the case.

For example, in an unpublished FAPE ruling in favor of the defendant district, the Ninth Circuit observed that (a) the student's erratic attendance during the family's limited period of residency impeded the district's ability to assess and refine its initial IEP for him, and (b) the parent rejected the district's attempts to include mental health services in his IEP.[58] More recently, although acknowledging that "[a]t some point the failure to address consistent absences TTT *would* constitute denial of a FAPE," a federal court in Alabama rejected the parents' attendance-based FAPE claim based on their insufficient evidence of a disability-absenteeism connection.[59] Similarly engaging in a rather cursory analysis, the Third Circuit recently rejected a substantive FAPE claim of a high school student with specific learning disabilities, concluding that "[he] kept pace with his grade level, went from failing several of his classes to passing all of them, and increased his GPA .... despite missing dozens if not hundreds of classes each year."[60]

Conversely, in an earlier decision a federal court in Massachusetts ruled that a school district denied FAPE to an eighth grade student with cognitive impairment and behavioral problems upon failing to take any timely steps in response to the student's chronic absenteeism during his single semester before moving out of the district.[61] However, the court did not address the appropriateness of his IEP likely due to the parties' narrow framing of the issues. Moreover, the court avoided a nuanced analysis to formulate the requisite affirmative steps and the specific corresponding relief. The several reasons, included the following: (1) "neither [Massachusetts] nor federal regulations directly address a school's duty to examine a student's chronic absenteeism in the context of his or her IEP;"[62] (2) the relevant period before the child's move outside the district was narrowly limited,[63] and (3) compensatory education was no longer at issue.[64] Instead, the court only ruled that ***11** the district had an affirmative duty to respond to the student's truancy.[65] Finally, although reciting that the student had 33 absences during the limited period in question, the court added this caveat:

> [T]he court is not suggesting that there is a specific number of days TTT which triggers a school district's obligation to determine whether and how an absent student is to continue receiving a FAPE. Until there is more specific statutory or regulatory guidance, each student's case must turn on its own facts.[66]

Finally, in a more recent IDEA FAPE ruling in favor of the parents, the federal district court in New Mexico upheld the hearing officer's finding of insufficient evidence to support the district's contention that the student's lack of progress was attributable to her absences rather than to her IEP.[67]

Section 504

The procedural and substantive requirements for FAPE under Section 504 are more relaxed than under the IDEA. Although subject to some variance,[68] the prevailing substantive standard that courts use in FAPE cases is reasonable accommodation.[69]

In the aforementioned *Weixel* decision, the Second Circuit seemed to suggest the possibility of denial of FAPE upon broadly interpreting, at the pro se dismissal stage, the discrimination, or denial of benefit, element, as follows: "Read liberally, plaintiffs' amended complaint also alleges that they refused to make reasonable accommodation of [the child's] disability by providing her any meaningful public education for much of the seventh grade, and refused to provide [her] with the home instruction necessitated by her disability."[70]

However, the attendance-related FAPE claims have been infrequent and largely unsuccessful in recent years.[71] In addition to the relatively relaxed ***12** substantive standard, the reasons, paralleling the aforementioned identification cases,[72] include the threshold application of the exhaustion doctrine[73] and the increasing culminating use of an intent-based proxy, such as deliberate indifference.[74]

Conclusions and Recommendations

School districts need to be especially attuned to students' excessive absenteeism in relation to the identification and FAPE obligations under the IDEA and Section 504 in light of changes in societal conditions and legal responses. These responses include not only federal and state legislation but also and ultimately litigation. The attendance-related litigation under the IDEA and Section 504 is increasing in quantity and shifting in scrutiny.

The school districts' enhanced attunement warrants carefully considered and customized action at two levels. First, the minimum level of legal requirements suggests the need to adopt refined child find and eligibility practices and, for IDEA-or Section 504--eligible students FAPE compliance with special attention to the following:

- the role of state laws[75]

- avoidance of knee-jerk reactions of truancy or child neglect proceedings[76]

• corresponding avoidance of either under-or over-responsiveness to attendance issues in the context of the IDEA and Section 504[77]

Similarly, applying legal lenses to the recent litigation trends shows the customary factors that contribute to judicial outcomes, including the particularly significant roles of the attorneys and expert witnesses in influencing the judge's receptivity and sensitivity to the nuanced issues in examining the extent of disability linkages to absenteeism.

***13** Second, extending beyond the minimum legal requirements, districts should give careful consideration to proactive strategies that focus on evidence-based best practices and extensive collaboration with parents and social service agencies.[78] These practices include effective FBAs and BIPs[79] that carefully examine and address not only direct disability-attendance linkages but also intervening variables, such as bullying.[80] In addition, school districts should not overlook the need to consider parent training as a related service within an IEP to address student attendance issues. Providing training to parents on effective home-based strategies to support attendance may increase the likelihood of improved attendance, and, at the very least, will demonstrate districts' attempts to provide a comprehensive response to attendance concerns. The normative frame of reference is the shared goal of optimal, not just reasonable, education that extends beyond academic progress to social-emotional well-being.

In most cases, after paying more careful attention to these issues, many districts will likely manage to select a level between the legal "shall" and the professional "should" levels. In any event, more fully "attending" is a matter for schools, not just students.

Footnotes

a1 *Education Law Into Practice* is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 379 Ed.Law Rep. [1] (September 17, 2020).

aa1 Perry A. Zirkel is University Professor Emeritus of education and law at Lehigh University, Bethlehem, P.A. He is a Past President of the Education Law Association. While responsible for the contents of the article, he acknowledges with appreciation Peter J. Maher, attorney with the Connecticut law firm of Shipman & Goodwin, for his review and suggestions.

1 20 U.S.C. § 6311(b)(2)(C)(vii) (2001).

2 20 U.S.C. §§ 6311(c)(4)(B)(v)(VII) and 6311(h)(1)(C)(viii)(I) ("chronic absenteeism") (2017).

3 *E.g.,* Conn. Gen. Stat. § 10-198c (2019) (requiring attendance review teams for schools or districts with a specific chronic absenteeism rate); Neb. Rev. Stat. § 79-209 (2018) (requiring school districts to have an attendance policy that includes specified features, including a team meeting and collaborative plan); N.J. Rev. Stat. § 18A:38-25.1 (2018) (requiring corrective action plan for chronically absent students); N.M. Stat. Ann. § 22-12A-6 (2018) (specifying various requirements for district attendance policies, including early warning system and positive intervention strategies); W.Va. Code § 18-8-11(c) (2017) (providing for suspension of driver's license upon dropping out of school).

4 *E.g.,* Valerie J. Calderon, U.S. Parents Say COVID-19 Harming Children's Health, Gallup News (June 16, 2020), https://news.gallup.com/poll/312605/parents-say-covid-harming-child-mental-health.aspx (reporting national survey of parents); Carolyn Jones, Student Anxiety, Depression Increasing During School Closures, Survey Finds, Education Source (May 18, 2020), https://edsource.org/2020/student-anxiety-depression-increasing-during-school-closures-survey-finds/631224 (reporting survey of students in southern California).

5 20 U.S.C. §§ 1401-1439 (2017).

6 29 U.S.C. § 794 (2017). "Section 504" herein refers generically to extend to its "sister statute," the Americans with Disabilities Act (ADA). 42 U.S.C §§ 12101-12110 (2017). For the close interrelationship between these two statutes, see, Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 Ed. Law Rep. 886 (2017).

7 *E.g., In re C.M.T.*, 861 A.2d 348, 355-56, 193 Ed.Law Rep. 805 (Pa. Super. Ct. 2004) (recognizing the overlap with the IDEA, ruling that "evidence concerning the relationship between [the child's] disabilities and her absenteeism, including evidence as to the availability of services that would facilitate her ability to attend school, are not only relevant but necessary to any determination of dependency" under the state's truancy law).

8 "Identification" here refers to the two overlapping components of child find and eligibility, which apply under the IDEA and Section 504. *E.g.*, Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 Ed. Law Rep. 30 (2018); Perry A. Zirkel, *Avoiding Under-and Over--Identification of 504--Only Students*, 359 Ed. Law Rep. 715 (2018).

9 For the respective regulatory definitions of FAPE under the IDEA and Section 504, see 34 C.F.R. §§ 300.17 and 104.33 (2018).

10 *E.g., id.* §§ 300.8 (eligibility), 300.111 (child find), and 300.301 (initial evaluation).

11 *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) (focusing on IDEA eligibility); Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 368 Ed. Law Rep. 594 (2019) (focusing on IDEA evaluation); Perry A. Zirkel, *"Child Find:" The Lore v. the Law*, 307 Ed. Law Rep. 574 (2014) (focusing on child find).

12 For the latest case law specific to the two components of this ongoing affirmative obligation of school districts under the IDEA, see Perry A. Zirkel, *Child Find under the IDEA: An Updated Analysis of the Judicial Case Law*, 48 Communiquie 14 (June 2020).

13 Some courts and commentators add the intervening causal connector of "affecting educational performance" which is actually part of the classification step, being expressly specified in the regulatory definition of each non-combined one except specific learning disability, which implicitly incorporates it. For the split of judicial interpretations of the scope of "educational performance, *compare, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2015) (broadly extending to social skills), *with C.B. v. Dep't of Educ.*, 322 F. App'x 20, 246 Ed.Law Rep. 58 (2d Cir. 2009) (academics only).

14 For the definitional criteria of these and the other IDEA classifications, see 34 C.F.R. § 300.8(c) (2018).

15 *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 377 Ed.Law Rep. 539 (2020).

16 *Id.* at 1081.

17 *Id.* at 1082.

18 *Id.* at 1085.

19 As a prerequisite for disciplinary changes in placement, the IDEA expressly mandates a determination whether the "conduct at issue was caused by, or had a direct and substantial relationship to, the child's disability." 34 C.F.R. § 300.530(e) (2018). As an extension of this logic, the IDEA implicitly allows such a linking consideration for other issues, including the threshold steps of child find and eligibility.

20 The IDEA requires the district to respond to a parental request for evaluation by either moving forward to obtain the requisite informed consent or to provide prior written notice explaining the basis for not proceeding with an evaluation. *See, e.g.,* 71 Fed. Reg. 46,636 (Aug. 14, 2006); Letter to Anonymous, 20 IDELR 998 (OSEP 1998).

21 *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 578, 356 Ed.Law Rep. 977 (4th Cir. 2019).

22 *Compare id.* at 577 ("[the student] had no disability that special education would have remedied; he was simply unwilling to take his education seriously"), *with id.* at 578 ("the record is devoid of any credible evidence that an unaddressed disability caused [his] educational difficulties and replete with credible evidence that [he] himself was the cause").

23 *Id.* at 579 ("While I am constrained to conclude that the plaintiffs have failed to demonstrate that the school division's egregious child find violations actually interfered with the provision of FAPE, I cannot agree that the blame lies with [the student] and his parents, and that [the district] should bear little or no responsibility for a student in its care").

24 The concurring judge relied on burden of proof, while pointing in the direction of underlying linkages:
The unfortunate reality of this case, however, is that the evidence presented at the due process hearing fails to answer the obvious question: "Why?" In the special education context, the answer is rarely that a student "simply does not want to go to school." TTT While one could certainly argue that the ALJ's conclusion that [the student] would not have come to school even with an appropriate IEP was speculative, the plaintiffs' evidence offered nothing to counter it .... Educational experts who could have supported the IEE's finding that [he] had a previously undiagnosed learning disability, and established a link between the long-term denial of special education services and T.B.'s failure to attend school due to frustration and anxiety, either failed to provide helpful testimony or did not testify at all.
Id. at 581.

25 *E.g., Loch v. Edwardsville Sch. Dist. No. 7,* 327 F. App'x 647, 651, 247 Ed.Law Rep. 642 (7th Cir. 2010) (ruling that the student did not qualify as OHI based on failure to prove the resultant need for special education, including any relationship between her medical conditions and her non-attendance).

26 Although generally regarded as overlapping but separable, with eligibility being the ultimate consideration such that a child find violation for a child determined not to be eligible may be without a remedy, in an occasional case, the court has conflated the two by addressing a child find claim as an eligibility issue. *E.g., M.S. v. Randolph Bd. of Educ.,* 75 IDELR ¶ 103 (D.N.J. 2019)

27 *Compare Doe v. Cape Elizabeth Sch. Dist.*, 382 F. Supp. 3d 83, 101, 367 Ed.Law Rep. 767 (D. Me. 2019) (finding no violation of child find for student eventually determined to be eligible as OHI, concluding that under Maine's rather unusual specific standard for absenteeism triggering child find "while the sheer number of absences certainly set off alarm bells, I am not persuaded by Plaintiffs' position that [this state regulation] compelled a different conclusion") and *Nguyen v. D.C.,* 681 F. Supp. 2d 49, 52, 255 Ed.Law Rep. 233 (D.D.C. 2020) (rejected ED eligibility based on attribution of academic failure to non-attendance rather than disability), with *Bd. of Educ. of Montgomery Cty. f. S.G.,* 230 F. App'x 330, 334-35, 222 Ed.Law Rep. 119 (4th Cir. 2007) (ruling that the student was eligible as ED based in part on her absenteeism) and *A.W. v. Middletown Area Sch. Dist.*, 65 IDELR ¶ 16 (E.D. Pa. 2015) (finding child find violation for student eventually determined to be eligible as ED based on school phobia, concluding that the district unreasonably delayed obtaining the requisite consent for evaluation pending a psychiatric report despite increasing school avoidance).

28 *Compare M.S. v. Randolph Bd. of Educ.,* 75 IDELR ¶ 103 (D.N.J. 2019) (ruling that teenager diagnosed with generalized anxiety disorder and with excessive absenteeism was not eligible as ED based on findings that his absenteeism was voluntary and that his grades and standardized test scores showed that he did not need special education) and *J.S. v. Scarsdale Union Free Sch Dist.*, 826 F. Supp. 2d 635, 663-64, 279 Ed.Law Rep. 229 (S.D.N.Y. 2011) (finding no child find violation for student eventually determined to be eligible as ED, concluding that her renewed attendance problems were gradual, she had bounced back after a similar bout with absenteeism the prior year, and she continued to do relatively well academically), *with M.M. v. N.Y.C. Dep't of Educ.*, 26 F. Supp. 3d 249, 256, 311 Ed.Law Rep. 792 (S.D.N.Y. 2014) (reversing the review officer's ruling of non-eligibility as ED based on grades without giving proper consideration to the student's related absenteeism, concluding instead that "[f]ew things could be more indicative of an emotional problem that 'adversely affected' a student's education than one that prevented her from attending school.").

29 *E.g., Karissa G. v. Pocono Mountain Sch. Dist.*, 71 IDELR ¶ 90 (E.D. Pa. 2017).

30 34 C.F.R. § 104.35 (2018) (requiring an evaluation for "any person, who because of [disability] needs or *is believed to need*, special education or related services). In comparison, the corresponding IDEA regulation only makes the reasonable-suspicion element explicit for limited groups of students. *Id.* § 300.151(c) (clarifying that child find extends to students "suspected of being a child with a disability under [the IDEA eligibility definition]" even though they are advancing from grade to grade or highly mobile).

31 The IDEA definition of eligibility, to which its child find component of reasonable suspicion is keyed, consists of meeting the criteria for at least one of the enumerated classifications and having a resulting need for special education. *See supra* note 13 and accompanying text. In contrast, the applicable Section 504 definition of eligibility extends to any physical or mental impairment that substantially limits at least one of a similarly broad range of major life activities that go far beyond learning. 34 C.F.R. § 104.3(j) (2018).

32 The examples identified in the original regulations largely overlapped with IDEA eligibility although extending to employment and other non-student coverage: learning, performing manual tasks, seeing, hearing, speaking, walking, breathing, caring for one's self, and working. *Id.* § 104.3(j)(2)(ii). However, the 2008 ADA amendments and the resulting 2016 ADA regulations extended the list considerably, including various health conditions such as bowel functions and immune system functions. 42 U.S.C §§ 12101-12102 (2017); 28 C.F.R. § 35.108 (2018).

33 *Weixel v. Bd. of Educ. of N.Y.C.*, 287 F.3d 138, 163 Ed.Law Rep. 640 (2d Cir. 2002).

34 *Id.* at 147 (emphasis added). The court's elaboration provides a similar but slightly broader variation of this attendance-specific major life activity: "Because, read liberally, the amended complaint pleads that [the child] was substantially [limited in] the major life activities of walking, exerting herself, *and attending school*, we find that plaintiffs have [sufficiently] alleged that she was 'disabled' within the meaning of the Section 504/ADA." *Id.* at 147-48 (emphasis added).

35 These other rulings included reversing dismissal of the Section 504 retaliation claim (*id.* at 148) and the related Section 1983 damages claim (*id.* at 151) and affirming dismissal of the FERPA and equal protection claims (*id.*). The Second Circuit also addressed the following attendance-related IDEA claim, which the preceding section of this article does not address due to relatively extensive more recent case law: the court reversed dismissal in light of possible IDEA eligibility under the classification of other health impairment arguably needing special education in the form of "instruction TTT in the home." *Id.* at 150 (citing 20 U.S.C. § 1401(25)(A)).

36 *Culley v. Cumberland Valley Sch. Dist.*, 758 F. App'x 301, 364 Ed.Law Rep. 83 (3d Cir 2018).

37 *See, e.g., Pocono Mountain Sch. Dist. v. T.D.*, 790 F. App'x 387, 373 Ed.Law Rep. 510 (2019) (upholding compensatory education award in attendance-related case under Section 504 based on district's waiver of the deliberate indifference defense); *L.G. v. Bd. of Educ. of Educ. of Fayette Cty.,* 774 F. App'x 227, 369 Ed.Law Rep. 128 (6th Cir. 2019); *S.D. v. Haddon Heights Sch. Dist.*, 722 F. App'x 119, 354 Ed.Law Rep. 658 (3d Cir. 2018) (affirming dismissal of Section 504 claims in attendance related claims, which at least peripherally encompassed child find, for failure to exhaust IDEA impartial hearing process).

38 *Supra* note 34 and accompanying text. The interpretation of its independent status as a major life activity is based on its express inclusion in the Second Circuit's analysis. However, the alternative interpretation that it is merely dicta is attributable to the unusually relaxed pro se dismissal standard and the accompanying identification of two other activities that included one expressly included in the examples under Section 504. *Supra* note 32 (walking).

39 *E.g., C.B. v. Bd. of Sch. Comm'rs of Mobile Cty.*, 24 IDELR 350 (S.D. Ala. 2008) ("assuming attending school is a major life activity, plaintiff fails to present sufficient evidence from which a jury could find that plaintiff is substantially limited from attending school due to his impairment"), *aff'd on other grounds*, 261 F. App'x 192 (11th Cir. 2008)

40 *E.g., Sytsema v. Acad. Sch. Dist.*, 538 F.3d 1306, 1312, 236 Ed.Law Rep. 94 (10th Cir. 2008) (characterizing FAPE as the "central pillar of the IDEA"); *Murray v. Montrose Cty. Sch. Dist. RE-1J*, 51 F.3d 921, 923 n.3, 99 Ed.Law Rep. 126 (10th Cir. 1995) (referring to the IEP as the "cornerstone" of this central pillar).

41 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982) (formulating the foundational twofold inquiry as "has the State complied with the procedures set forth in the Act?" and "is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits"). More recently, in addition to refining these two basic dimensions, the courts have developed implementation-related dimensions concerning whether the district fully delivered the IEP previously and whether it is capable of doing so prospectively. *See, e.g.,* Perry A. Zirkel, *An Adjudicative Checklist of the Four Dimensions of FAPE under the IDEA*, 346 Ed. Law Rep. 18, 20 (2017). For one of the rare attendance-related cases to date based on the implementation dimension of FAPE, see *L.J. v. Sch. Bd. of Broward Cty.*, 927 F.3d 1203, 1218-20, 367 Ed. Law Rep. 103 (11th Cir. 2019) (distinguishing denial of FAPE in cases where the implementation failure was a causal factor to the absenteeism from the non-connection in this case).

42 20 U.S.C. § 1415(f)(3)(E)(ii) (2017). As a limited exception in the absence of such loss, the adjudicator still has authority to order prospective procedural relief. *E.g.*, *Dawn G. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (citing 20 U.S.C. § 1415(f)(3)(E)(iii)); *see generally* Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 29 J. Nat'l Ass'n Admin. L. Judiciary 1 (2020).

43 *Supra* note 41.

44 *Endrew F. v. Douglas Cty. Sch. Dist. RE*-1, 137 S. Ct. 988 (2017). The impact of this refined standard on the outcomes of substantive FAPE cases has been limited. *See, e.g.*, Perry A. Zirkel, *The Aftermath of* Endrew F.*: An Outcomes Analysis Two Years Later*, 364 Ed. Law Rep. 1 (2019); William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation after* Endrew F., 22 N.Y.U. J. Legal & Pub. Pol'y 495 (2020).

45 For the occasional earlier recognition of the overall issue and emerging approach, see, e.g., *Lamoine Sch. Comm. v. Mrs. Z.*, 353 F. Supp. 2d 18, 195 Ed.Law Rep. 161 (D. Me. 2004):
[The child's] tardiness and attendance failures are clearly not the sole responsibility of [the district]. The [IEP team] cannot rouse [him] out of bed or escort him to school on time. But, this Court is not called upon to decide the fruitless and unanswerable question of fault. In this case, [his] absence was linked to his disability, and it is unarguable if [he] was not in school, he could not be said to be receiving "a [FAPE]." Recognizing the inherent limitations of [the district] TTT, the focus of the inquiry is what, if anything, [it] did and what, if anything, should it have done to address his attendance failure. If the record reflected the more active intervention of [the district during the pertinent period], a different conclusion might be mandated.
Id. at 33-34.

46 *Renee J. v. Houston Indep. Sch. Dis*t., 913 F.3d 523, 531-32, 361 Ed.Law Rep. 925 (5th Cir. 2019). In analyzing this claim, the court seemed to confuse the diagnostic category of school refusal, which focuses on the child, with the limited case law specific to a school IEP team's refusal to discuss bullying. *Id.* at 531 (citing *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869 (2d Cir. 2016)).

47 *Id.* at 531. However, these efforts neither focused on directly addressing the bullying nor on providing proactive IEP services.

48 *Id.* at 532. Yet, the court arguably appears to confuse the parents' obligations under state law to obtain homebound instruction, which is a general education issue, and the districts' obligations under the IDEA to conduct an evaluation for the purpose of providing an appropriate IEP, not just to determine initial or continuing eligibility.

49 *Id.* Again, however, the neglected aspect is the ultimate individualized focus on "the child's circumstances," for what is the requisite reasonable calculation. *Supra* text accompanying 44.

50 *S.S. v. D.C.,* 68 F. Supp. 3d 1, 16, 318 Ed.Law Rep. 230 (D.D.C. 2014).

51 *Garris v. D.C.*, 210 F. Supp. 3d 187, 191-92, 341 Ed.Law Rep. 695 (D.D.C. 2014).

52 *Middleton v. D.C.*, 312 F. Supp. 3d 113, 145-46, 356 Ed.Law Rep. 551 (D.D.C. 2018).

53 S*.C. v. Chariho Reg'l Sch. Dist.,* 298 F. Supp. 3d 370, 354 Ed.Law Rep. 295 (D.R.I. 2018).

54 *Id.* at 389.

55 *Id.* at 390.

56 Courts have directly addressed this implicit obligation only in the infrequent cases of extreme and persistent parental noncooperation. *E.g., Horen v. Bd. of Educ. of Toledo Pub. Sch. Dist.,* 948 F. Supp. 2d 793, 805, 299 Ed.Law Rep. 613 (N.D. Ohio 2013) ("[T]he parents failed to fulfill their duty to participate in the IEP process, and thereby impaired that process irredeemably. They cannot contend they did not have such duty, or that they were unaware that they did, in light of my decision in *Horen I*, TTT 655 F. Supp.2d at 805 (N.D. Ohio 2009)").

57 *See, e.g.*, William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation after* Endrew F., 22 N.Y.U. J. Legal & Pub. Pol'y 495 (2020) (finding a pronounced district-favorable skew in courts' substantive FAPE rulings both before and after the Supreme Court's refinement of the applicable standard); *see also* Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?* 83 Exceptional Child. 219 (2016) (finding similar outcomes skew in courts' procedural FAPE rulings).

58 *Mendoza v. Placentia Yorba Linda Sch. Dis*t., 278 F. App'x.737, 739, 235 Ed.Law Rep. 808 (9th Cir. 2008).

59 *Rosaria v. Madison City Bd. of Educ.*, 325 F.R.D. 429, 441, 355 Ed.Law Rep. 1081 (N.D. Ala. 2018).

60 *S.C. v. Oxford Area Sch. Dist.*, 751 F. App'x 220, 223, 362 Ed.Law Rep. 789 (3d Cir. 2018).

61 *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 153, 161-62, 246 Ed.Law Rep. 780 (D. Mass. 2009).

62 *Id.* at 160.

63 The child's IEP services started in May 2007, and the period at issue was from the start of the following school year until his residence changed in January 2008. *Id.* at 154.

64 The hearing officer's remedy was for twenty-three days of special education services. The court observed that not only had the district originally offered this amount, but also "[t]he student] has (assumedly) been provided the compensatory education ordered by the hearing officer." *Id.* at 155 and 157.

65 *Id.* at 161. In the circumstances of this case, timely reconvening of the IEP team appeared to be the missing step. Without specifically making it part of its ruling, the court observed: "as [the district] has acknowledged, a Team needs to consider whether school truancy is related to a student's disability and, if it is, address it through the IEP." *Id.*

66 *Id.* at 161-62.

67 *Preciado v. Bd. of Educ. of Clovis Mun. Sch.*, 443 F. Supp.3d 1289, 1307-08, ___ Ed. Law Rep. ___ (D.N.M. 2020).

68 *E.g., M.R. v. Ridley Sch. Dist.*, 680 F.3d 260, 280, 280 Ed.Law Rep. 37 (3d Cir. 2012) (reasonable accommodation in combination with meaningful benefit); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1101-02, 261 Ed.Law Rep. 48 (9th Cir. 2010) (meaningful access in combination with deliberate indifference)

69 *E.g., A.G. v. Paradise Valley Unified Sch. Dist.*, 815 F.3d 1195, 1206, 328 Ed.Law Rep. 495 (9th Cir. 2016); *CTL v. Ashland Sch. Dist.*, 743 F.3d 524, 529, 302 Ed.Law Rep. 31 (7th Cir. 2014*); R.D. v. Lake Washington Sch. Dist.*, 74 IDELR ¶ 203 (W.D. Wash. 2019); *Zandi v. Fort Wayne Cmty. Sch.*, 59 IDELR ¶ 283 (N.D. Ind. 2012).

70 *Weixel v. Bd. of Educ.*, 287 F.3d at 148.

71 *See, e.g., H.D. v. Kennett Consol. Sch. Dist.,* 75 IDELR ¶ 94 (E.D. Pa. 2018) (upholding the appropriateness of a 504 plan for a high school student with anxiety disorder that affected his sleeping and timely attendance). For a similar relatively relaxed application of FAPE in combination with the overlapping least restrictive environment requirement under Section 504 for a student with attendance problems due to chronic migraine headaches, see *S.P. v. Fairview Sch. Dist.*, 64 IDELR ¶ 99 (W.D. Pa. 2014).

72 *Supra* note 37 and accompanying text.

73 *E.g., Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 357 Ed.Law Rep. 605 (8th Cir. 2018) (requiring exhaustion of parents' Section 504 claim relating to enrollment in a district online program for student with truancy-related diagnoses); *Dizio v. Manchester Essex Reg'l Sch. Dist.*, 74 IDELR ¶ 289 (D. Mass 2019) (requiring exhaustion of Section 504 FAPE and retaliation claims).

74 *See generally* Perry A. Zirkel, *Do Courts Require a Heightened Intent Standard for Students' Section 504 and ADA Claims Against School Districts?* 47 J.L. & Educ. 109 (2018).

75 *See supra* note 3. For illustrative cases, see *supra* note 27 (*Doe v. Cape Elizabeth Sch. Dist.*) and *Indep. Sch. Dist. No. 413 v. H.M.J.*, 123 F. Supp. 3d 1100, 327 Ed.Law Rep. 213 (D. Minn. 2015) (ruling that district's eligibility evaluation for student with absenteeism due to various physical illnesses and anxiety was not appropriate in light of state law requirement for medical examination for OHI-suspected students who meet at least three of eight specified factors, including excessive absenteeism).

76 As the allegations in the *Weixel* case (*supra* text accompanying note 33) suggest, such a response is likely to not only escalate the dispute but provide the foundation for a retaliation claim under Section 504. Yet, as a counterbalancing caveat, such claims face a rather daunting series of hurdles. *E.g., Genn v. New Haven Bd. of Educ.*, 219 F. Supp. 3d 296, 322-23, 342 Ed.Law Rep. 971 (D. Conn. 2016); *T.F. v. Fox Chapel Sch. Dist.*, 62 IDELR ¶ 74 (W.D. Pa. 2013), *aff'd on other grounds*, 589 F. App'x 594, 313 Ed.Law Rep. 34 (3d Cir. 2014).

77 *E.g., see supra* note 27 and accompanying text.

78 For the extensive literature concerning school refusal without the specific linkage to disability law, see, e.g., Julian G. Elliott & Maurice Place, *School Refusal: Developments in Conceptualisation and Treatment Since 2000*, 60 J. Child Psychol. & Psychiatry 4

(2019); Carolina Gonzalvez et al., *A Cluster Analysis of School Refusal Behavior*, 90 Int'l. J. Educ. Res. 43 (2018); Trude Havik et al., *School Factors Associated with School Refusal and Truancy-- Related Reasons for School Non--Attendance*, 18 Soc. Psychol. Educ. 221 (2015); Clare Nuttall & Kevin Woods, *Effective Interventions for School Refusal*, 29 Educ. Psychol. Prac. 237 (2013).

79 For the difference between the legal minima and the normative desiderata for FBAs and BIPs, see Lauryn Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 J. Positive Behav. Interventions 180 (2017).

80 For examples of the potential intervening role of bullying see *supra* text accompanying notes 46 and 57.

379 WELR 1

End of Document