

# SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions of general significance, specifically addressing issues of (a) IDEA standards for evaluations (including reevaluations) and (b) FAPE claims arising under COVID-19.

<b>In its officially published decision in <i>Smith v. Tacoma</i> (2020), a federal district court in Washington State addressed the parent's various challenges to an IDEA reevaluation in the wake of her request for an IEE at public expense. The reevaluation, which was during the child's second year in the district's preschool program, concluded that the child was no longer eligible for an IEP. It included the BASC-3, two classroom observations, and review of medical, parental, TS-Gold, and teacher/specialist academic and functional data. The parent's principal claims were that (1) the district used insufficient tools for the reevaluation, (2) the district improperly closed the reevaluation before the parent obtained a second opinion via the child's medical providers; and (3) the reevaluation inadequately considered the child's medical diagnoses, including hyperkinesia, general anxiety disorder, and sensory processing difficulties. Various other claims included challenges to the reevaluation team membership and alleged FERPA violations.</b>	
For claim #1, the court concluded: (a) the reevaluation was not required to include the same assessment tools as the initial evaluation, (b) consisted of the requisite variety of assessment tools and strategies, and (c) the failure to include the TS-Gold tool in the prior written notice (PWN) was not a harmful procedural violation.	For conclusions "a" and "b," the court observed that the applicable legal authority was rather skeletal and did not specifically support the parent's contentions. For conclusion "c," the court alternatively reasoned that the TS-Gold was not subject to PWN but even if it was a procedural violation, the parent did not show any resulting harm in terms of meaningful participation.
For claim #2, the court concluded that the district was not required to keep the evaluation open awaiting parental agreement or medical providers' opinion.	Again, the court straddled the fence by finding no procedural violation and, even if there were one, no showing of resulting harm.
For claim #3, the court concluded that the reevaluation personnel, including the school psychologist and occupational therapist, adequately assessed the child's sensory and other medically diagnosed difficulties.	The court's conclusion seemed to reflect a more generalized judicial deference to school rather than medical authorities for the critical need prong for IDEA eligibility, which is keyed to the respective expertise and familiarity with the child in school.
The court rejected the various procedural claims as having no prejudicial effect and the FERPA claim as lacking an underlying right of private action.	The disposition of these claims further reflected the rather callous judicial treatment of the nuances of special education law, which is likely attributable to institutional structure and overload.
The pro se status of the parent, who was the grandparent-caregiver and representative of three special needs children, may have heightened for her the hurdle of the district-deferential posture of courts, which is pronounced for evaluation issues.	

**In an officially published decision in *Hernandez v. Grisham* (Oct. 14, 2020), the federal district court in New Mexico addressed a proposed class action’s motion for a preliminary injunction against the state government’s COVID-19 reentry policy for the public schools. This policy gave schools discretion for in-person instruction if they met reentry criteria or with a priority, on a small-group basis, for K-3 students, students with disabilities, and students needing additional support. The plaintiffs claimed that this policy did not provide for in-person instruction with sufficient uniformity and rapidity. The basis for their claims included the Fourteenth Amendment equal protection and due process clauses on behalf of students generally and the IDEA for those students with disabilities. The defendants moved for dismissal on various grounds. Because such preliminary motions are expedited and only tentative, the summary of the principal rulings below has an overriding qualifier of “likely” subject to any subsequent more definitive proceedings.**

The court concluded that the plaintiffs showed that they had standing to sue the head of the state education agency (SEA) but not the head of the state health department or governor.	The reason was that the SEA issued and controlled the reentry process. Thus, the alleged violations were directly traceable to, and redressable by, this defendant, not the others. This ruling merely provided focus for the analysis; it was itself not fatal to the plaintiffs’ claims.
The court singled out one plaintiff, who was the only one who had a child who was a student with disabilities, as having standing under the IDEA and not affected by the state’s sovereign immunity to liability claims.	The other plaintiffs, including the one who was a member of the state legislature and of a local school board, lacked standing because they were not parents of a student with a disabilities. The state’s sovereign immunity under the Constitution’s 11 <sup>th</sup> amendment applies to the other liability bases of the suit, but the IDEA expressly waived this immunity.
The court rejected certification of the class action, including the proposed sub-classes of students generally and those with disabilities.	The sub-classes of nondisabled students failed due to lack of standing. The sub-class of students with disabilities failed basically because of the widely varying effect of the reentry policy and the individualized nature of the IDEA.
The court rejected the Fourteenth Amendment equal protection and due process claims.	The court basically found the policy to be rationally related to state interests in health and safety.
For the one parent’s IDEA claim, the court ruled that exhaustion was not required.	The court relied on an exception for purely legal questions, which arguably fits under the recognized broader emergency and futility exceptions.
For this IDEA claim, the court ruled that this child was entitled to small-group in-person instruction with social distancing and other health precautions.	The court relied on a combination of the state reentry policy, which provides this small-group option, and <i>Andrew F.</i> because this child was not progressing via remote instruction
This case illustrates the possible range of claims and rulings under COVID-19, but the applicable limitations include that (a) it is only a preliminary ruling by one federal district court; (b) it is specific to the context of this state’s policy; and (c) speculatively, the final IDEA ruling may represent a “bone” thrown to one plaintiff as a small consolation in a much larger adverse decision.	