

SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

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This month's update identifies recent court decisions of general significance, specifically addressing (a) FAPE via another case in the direct line after *Andrew F.*, and (b) employee rights emanating from the special education context, here via the case of a terminated teacher during the ongoing COVID-19 crisis. For related information about both broad issues, see perryzirkel.com.

In an unpublished decision *Elizabeth B. v. El Paso County School District 11* (2020), the Tenth Circuit Court of Appeals addressed the tuition reimbursement claim of the parents of a child with autism and epilepsy. The first substantive step for reimbursement cases is to determine whether the district's proposed IEP provided FAPE. The Colorado hearing officer and the federal district court ruled that the IEP was appropriate, thus not having to decide the other steps of the applicable analysis, such as the appropriateness of the private placement at an autism center. The parents appealed to the Tenth Circuit. Their primary challenges to the district's proposed IEP were that it did not include (a) a functional behavior assessment (FBA) and resulting behavior intervention plan (BIP); (b) one-on-one applied behavior analysis (ABA) therapy from an ABA-certified instructor; and (c) extended school year (ESY).

For the parents' FBA-BIP claim, they argued that their child had maladaptive behaviors that required these specialized interventions, as recognized in the state education department's technical assistance document.

The Tenth Circuit relied on the controlling "plain language" of the IDEA legislation, which requires the IEP team to "consider the use of positive behavioral interventions," and found not only that the district had done so, but also the parents did not prove that the child's behavior impeded her learning.

For the parents' ABA claim, they argued that the IEP was too generic and, in any event, the delivery was not done with best-practice training and fidelity.

The court concluded the provisions of the IEP and the delivery of specialized services met with applicable legal authority, including the "reasonable"—rather than optimal—substantive standard of *Andrew F.*

For their ESY claim, the parents argued that their child needed this summer programming, as evidenced by their plan to provide it at the private autism center.

The court concluded that the parents did not prove that the child met the criteria of the Tenth Circuit's *Johnson* (1990) decision, including the countering effect of "the availability of alternative resources."

Although various factors, including factual circumstances and jurisdictional differences, serve cumulatively to caution against overgeneralization, this appellate ruling illustrates the common distinction between (a) parental perceptions, which may include professional best-practice norms, and (b) the legal standards for FAPE. With due differentiation rather than confusing fusion of "a" and "b," both sides can benefit from collaborative proactivity rather than costly court battles in which often neither the child nor any other direct or indirect stakeholder is the winner. Litigation is necessary, but only in the exceptional cases, in education.

In an unpublished decision in *Mullen v. Tiverton School District* (2020), a federal district court in Rhode Island addressed the First Amendment freedom of expression claim of a terminated special education teacher. As the president of the local teachers' union, she insisted in participating in the meeting that the superintendent convened for developing the district's plan for distance learning during the pandemic. Her insistence was based on the state's law that provides teacher unions with the right to collectively bargain all terms and conditions of employment. The reason for firing her that the district provided in the termination letter was insubordination for (a) refusing to leave the meeting, and also (b) subsequently participating in an education discussion on Facebook contrary to a gag order the superintendent issued to her upon being placed on administrative leave prior to the termination. In a series of cases, the U.S. Supreme Court has established a flowchart-like multi-step analysis for First Amendment expression claims of public employees. The steps include these successive questions: (1) Is the expression as a private citizen rather than pursuant to the individual's employee status?; (2) If so, does the expression address matters of public concern rather than those of concern solely within the district?; (3) If so, upon balancing these interests with those of the district, did the expression have a disruptive effect on the efficiency and effectiveness of its services?; and, (4) If not, was the expression a substantial or motivating factor in the district's adverse employment action? The district defendants filed a motion to dismiss the claim for alleged failure to meet these threshold requisites, thus not putting at issue a final, causation-related step of the applicable analysis.

The court found that the plaintiff's allegations showed that her expression was as the president of the local union, not as part of her duties as a teacher.	Although she was obviously both a teacher and the union's president, her statements were in her role as the head of the organization that was the official bargaining agent of the teachers.
The court also found that the allegations met threshold sufficiency to show that the expression at issue addressed a matter of public concern.	Although speech related to union representation is not sufficient alone, here the subject of the expression, which was the district's response to the pandemic, was of great public concern.
Next, the court balanced the individual and institutional interests in favor of the plaintiff at this threshold stage.	The court found the expression minimally disruptive when weighed against the teachers' and public interest in an effective district plan.
The court easily found the pleadings sufficient for the initial causal connection step.	The district's stated reason made relatively clear that the plaintiff's expression was a substantial factor for her termination.
This ruling was only at the dismissal stage, thus leaving the subsequent stages of discovery (e.g., depositions) and, if not settled or summarily decided, a trial (and possible appeal). Moreover, the potential alternative legal bases for the plaintiff-employee's expressional claims included: (a) protections for union activity, depending on state labor law, and (b) § 504/ADA protections against retaliation for advocacy for students with disabilities, depending on their specific connection in the facts of the case.	