SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions illustrating (1) evolving COVID-19 issues and answers under various legal bases, and (2) continuing child find and FAPE interpretations and applications under the IDEA. For related information about these issues, see the various sections of **perryzirkel.com**

In *Borishkevich v. Springfield Public Schools Board of Education* (2021), a federal district court in Missouri addressed the school district's reentry phase in relation to the COVID-19 pandemic. After a survey and various public meetings, the district offered parents the choice of either in-person instruction, which initially was a transitional two days per week hybrid, or continuing the remote instruction. A group of parents of students in the district, including some with IEPs, challenged the reentry plan on a whole host of legal grounds, including broad-based constitutional claims and the disability-specific IDEA and Section 504/ADA. They sought injunctive relief against the plan, money damages, and attorneys' fees. During the pretrial proceedings, the school district transitioned the in-person option to five days per week based on tracking of improved conditions. At the close of the "discovery" process, which includes sworn depositions, the district filed a motion for summary judgment, which would dispose of the case without a trial.	
The plaintiff-parents claimed that the district's reentry plan violated both procedural and substantive due process under the 14th Amendment of the Constitution.	The court rejected these claims both on the lack of proof for (a) the threshold "liberty" or "property" interest and (b) violation of any such interest in the district's careful balancing of education and safety, including public input and medical information.
They alternatively claimed that the reentry plan violated the equal protection clause of the 14th Amendment, which prohibits governmental discrimination.	In the absence of race or other protected status, the court also made rather short shrift of this claim, finding no discrimination in uniformly offering everyone the same options and, even if there were any discrimination, in the requisite rational basis of the governmental interest in student safety.
For the subgroup of students with IEPs, the parents claimed that the full or partial virtual modality violated FAPE under the IDEA.	The court readily disposed of the IDEA claim due to the affected parents' failure to exhaust the available mechanism of due process hearings. They had not shown that they fit in any of the limited exceptions for exhaustion.
The same subgroup alternatively claimed violation of Section 504 and the ADA based on this pair of anti-discrimination laws' overlapping coverage with the IDEA.	The court disposed of the Section 504 claim based on lack of exhaustion of an IDEA due process hearing. For the ADA claim, even if exhaustion did not apply in that jurisdiction, it failed for lack of evidence of the requisite bad faith or gross misjudgment.
Although these parents inferably opposed virtual instruction, particularly in terms of the return to full in-school instruction, the court followed well-established precedents for their multiplicity of legal claims, including those under related state laws. The IDEA and Section 504/ADA claims are still alive but subject to the individualized adjudicative process of an IDEA impartial hearing.	

In *D.C. v. Klein Independent School District* (2021), the Fifth Circuit Court of Appeals addressed the child find and FAPE claims of a student identified in fifth grade as eligible under the IDEA as SLD in reading comprehension, fluency, and decoding. By the end of second grade, his teachers recognized his difficulties in reading. Despite the provision of accommodations and interventions in general education, including a 504 plan starting in grade 3, his grades and test scores showed his continuing struggles in reading. Upon completing the initial IDEA evaluation in grade 5, the district provided him with an IEP that identified him as SLD in reading comprehension, fluency, and decoding but also—at the parents' insistence—dyslexia. The IEP provided for 3.75 hours per week of co-taught reading instruction and, presumably per Texas' law, dyslexia services. The parents filed for a due process hearing, which resulted in a decision in their favor both on child find and, based on the IEP's failure to address his root problem of reading comprehension, denial of FAPE. The hearing officer awarded the student 108 hours of compensatory education and ordered revision of his IEP to include 45 minutes per day of Read 180 or another peer-reviewed program for reading comprehension. The parents filed an appeal for attorneys' fees, and the district filed a corresponding claim at the federal district court level against the hearing officer's rulings and compensatory education remedy. Upon the district court's decision in favor of the parents, the district filed an appeal with the Fifth Circuit, which encompasses the states of Texas, Louisiana, and Mississippi.	
For the child find claim, the Fifth Circuit agreed that (a) the trigger, or "reasonable suspicion," date was on April 27 of grade 4 and (b) the nearly 6-month period until the parent signed the consent on October 19 of grade 5 exceeded the ad hoc period of a "reasonable time."	For reasonable suspicion, the court primarily relied on evidence, after successive 504 plans, of lack of reading improvement, including 2nd percentile on a standardized test during the winter of grade 4. For reasonable time, the court followed *O.W.* (see Oct. 2019 Monthly Update) to find lack of sufficient proactive efforts to initiate the IDEA evaluation, including doing nothing at all during the summer toward obtaining consent.
Within its particular four-part analysis for substantive FAPE, the Fifth Circuit seemed to focus on the IEP's lack of a specific program to remediate his root problem of reading comprehension. Similarly, the court interpreted *Endrew F.* selectively and relatively unusually as rather rigorous.	For example, the court pointed to the insufficient evidence that the student had dyslexia and the accommodating, rather than remediating, nature of the limited co-teaching service. The court minimized his passing grades, instead pointing out the decline in his reading grade from 79 in grade 4 to 77 after his IEP in grade 5 and the marginal improvements in standardized test scores, which may have been attributable to testing accommodations.
Finally, the court upheld the denial of the school district's motion to vacate the compensatory education award, finding the issue of the remedy to be moot because the district had already provided its entire amount.	The court also disagreed with the district's resulting argument that the parents were not qualified for attorneys' fees as prevailing parties. The court concluded that, regardless of compensatory education, they obtained relief that altered the parties' relationship via the order for modifying the IEP with the addition of specialized instruction in reading comprehension.
Although not an officially published decision and limited to the Fifth Circuit, this case illustrates the varying interpretations of both child find and substantive FAPE, with due latitude for the multiple factors and particular circumstances of each individual case.	