SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

This month's update identifies a pair of recent court decisions that illustrate the continuing diversity of judicial rulings with regard to the IDEA's overlapping issues of child find and FAPE. For related publications and earlier monthly updates, see **perryzirkel.com**.

On April 26, 2023, a federal court in California issued an unofficially published decision in *E.E. v. Norris School District*, addressing the IDEA FAPE claims of a second grader with autism. When the child was in kindergarten (2018–2019), the school district provided an IEP that was for full inclusion except for speech and language services. The IEP continued in first grade (2019–2020), when the parents refused to agree to a new IEP that proposed to change the child's placement to a special education class with a behavior aide for the majority of the school day. For the last 7 weeks of the school year, the district switched to remote instruction due to the pandemic. After a due process hearing, the hearing officer ruled, in relevant part, that the proposed IEP was appropriate but the district denied FAPE to the child during the pandemic period. The parents and school district appealed these two respective rulings to federal court.	
First, the parents claimed that the proposed IEP's provision for occupational therapy (OT) was unclear as to the location and type (i.e., individual or small group) of services.	Ruling in favor of the parents, the court ruled that based on precedents in the Ninth Circuit, the IEP's failure to provide a blueprint for enforcement was a procedural violation that resulted in a substantive denial of FAPE in terms of the parents' material opportunity to monitor the IEP's implementation.
Second, the parents argued that the proposed IEP's amount of pull-out OT services were insufficient based on their expert's testimony.	Although concluding that the expert's recommended amount caused too much missing of in-class instruction, the court ruled that the proposed amount in the IEP was insufficient.
Third, the parents contended that the proposed IEP's lack of goals for pragmatic language and social skills also amounted to denial of FAPE.	The court agreed with this contention based on this child's established individual needs in these two specific areas related to his identified disability.
Fourth, the parents claimed that the IEP denied FAPE by failing to include training for the aide in applied behavior analysis (ABA) services.	The court also agreed with this claim based on an exception to the general rule that an IEP is not required to include a specific methodology when the record shows a consensus that the child needed it (here, ABA) for FAPE.
Fifth, the parents claim that the proposed placement was not the least restrictive environment (LRE).	Applying the Ninth Circuit's multi-factor test, the court concluded that the proposed IEP met the obligation for LRE.
Finally, the district claimed that its provision to the child of work packets and practice exercises met the FAPE standard during the pandemic.	The court concluded that, in light of the child's aversion to use of a computer, the district's failure to explore with the parents feasible ways of providing direct instruction virtually was a denial of FAPE.
This mixed ruling, which was largely in favor of the parents, should not be over-generalized but it provides a reminder of the varying interpretations of procedural and substantive FAPE during and beyond the pandemic period.	

On March 26, 2023, the Sixth Circuit Court of Appeals issued an officially published decision in *Ja. B. v. Wilson County Board of Education*, addressing the IDEA's child find obligation. In this case, the student struggled to regulate his emotions since an early age. During elementary school, while the family resided in Illinois, he sufficiently met academic and behavioral expectations in school with close parent-school collaboration and without a 504 plan or an IEP. The family moved to Tennessee when he was in eighth grade. During the third week at middle school, he received an in-school suspension for disruptive behavior. His parents responded by notifying his teachers about his adoption and behavioral history and by suggesting strategies that worked in his prior school. When his problems persisted, including lack of effort on tests and refusals to complete homework, his parents met in late September with his teachers and the assistant principal to discuss interventions and resources. However, the next day he received an in-school suspension for ripping up a folder of classwork and throwing it on the floor. His behaviors escalated at home that evening to the point of having him admitted for therapeutic hospitalization. His discharge 9 days later listed diagnoses of conduct disorder and generalized anxiety disorder. The parents promptly notified the school counselor of the hospitalization and diagnoses, and she explained that the school's multi-tiered approach was to use the Section 504 process, which started with a 2-week data-collection period, before engaging in an IDEA evaluation. Early during that period, he received an in-school suspension for disobeying a teacher's instructions and an out-of-school suspension for cursing at the school librarian. Before the end of the period in late October, a school resource officer arrested him for disorderly conduct. Although the charges were eventually dropped, the school suspended him pending a disciplinary hearing to determine possible placement in the district's alternative school. Concerned about the impact of this possible placement, the parents withdrew him from the district and home-schooled him for the rest of the school year. During that remaining period, they met with school officials to provide new diagnoses from a private neuropsychology evaluation and to discuss Section 504 and IDEA eligibility. For grade 9, they enrolled him in a local private school. In November and January, they had him re-admitted for therapeutic hospitalization due to behavior at home. Upon his discharge from the January hospitalization, they placed him in a residential treatment center in Texas. Upon his return during the spring, he finished his 9th grade year at the local private school. Then the parents filed for a due process hearing, alleging that the district violated its IDEA child find obligation during during the first few months of grade 8 and seeking reimbursement for the alleged resulting denial of FAPE. Upon the resolution-session step of the process, the district conducted an IDEA evaluation and determined that he was eligible for special education services. After hearing 4 days of testimony and arguments, the hearing officer ruled in favor of the district. Upon the parents' appeal, the federal district court affirmed the hearing officer's decision. The parents then filed an appeal with the Sixth Circuit.

While acknowledging that a district may not use RTI/MTSS to delay or deny an IDEA evaluation, the Sixth Circuit concluded that the district did not have the requisite reasonable suspicion to trigger an IDEA evaluation.	The court explained that although the district was not as proactive as it could have been to respond to the student's needs, its limited efforts did not amount to overlooking clear signs of disability or lacking rational justification for not initiating an IDEA evaluation.
This decision illustrates the distinction between professional norms and legal requirements. What professionally and proactively may be one or more "red flags" for an IDEA evaluation are not at all automatic FAPE violations for courts. In this case, the student's limited period in the district appeared to be one of the key considerations, although the court did not address the child find obligations during the period after the child's disenrollment from the middle school.	