

SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

© April 2018

This monthly legal alert summarizes two recent cases that are officially published federal appeals court decisions, one that illustrates various basic issues under the Individuals with Disabilities Education Act (IDEA) and the other that identifies a potentially significant additional obligation under the Americans with Disabilities Act (ADA). For automatic e-mailing of future legal alerts, sign up at perryzirkel.com; this website also provides free downloads of various related articles.

In *Mr. P. v. West Hartford Board of Education* (2018), the Second Circuit Court of Appeals addressed a wide variety of IDEA issues, starting with child find, for a student who received (a) a 504 plan in his sophomore year and (b) IEPs for emotional disturbance (ED) in his junior and senior years as the result of social, psychological, and psychiatric problems, including hospitalizations for suicidal and homicidal ideations. The IEPs successively included homebound tutoring, placement in a district alternative school program, and a vocational transition-services program.

The Second Circuit upheld rejection of the parents' child find claim, concluding that in the six-month period from the student's hospitalization until his first IEP the district met the "reasonable suspicion" and "reasonable period" standards under the circumstances, including the immediate provision of accommodations (via a 504 plan).

Although supporting the individualized, multi-factor nature of the ongoing child find obligation rather than the automatic "red flag" approach, the circumstances in this case that warn against over-generalization include (a) the effect of the IDEA's statute of limitations, (b) the "long period of time" element of the definition of ED, and (c) the parents' interacting actions, including their request for a special education evaluation. For further information, see the "Child Find" subheading of the Publications part of my website.

The court similarly upheld the rejection of at least seven other alleged procedural violations, including challenges to the sufficiency of the evaluation, homebound tutoring, and the IEP.

The court concluded that some of the procedural claims did not constitute violations and that others were violations that did result in result in the requisite loss to the student's education or parents' participation. See the "FAPE" subheading of the Publications part of my website for additional information.

Finally, the court upheld rejection of the parents' substantive FAPE challenge to the IEPs under *Endrew F.*, even though the hearing officer and lower court had used the Second Circuit's previous, "meaningful benefit" interpretation of the *Rowley* standard.

In upholding the substantive appropriateness of the district's successive IEPs, the Second Circuit concluded that its prior "likely to produce progress" approach is "consistent with the Supreme Court's standard in *Endrew F.*" See the "Game Changer?" article in "FAPE" section of the Publications section of the website.

In *Pollack v. Regional School Unit* (2018) the First Circuit Court of Appeals addressed the issue of whether a student with multiple disabilities, including autism, who was unable to communicate with his parents about his experiences at school was entitled to carry an audio recording device during his time at school. When the school administration refused their request, the parents resorted to adjudication, basing their claim initially on the IDEA and Section 504/ADA and ultimately on an ADA regulation.

For the IDEA claim, the parents proceeded to a due process hearing focused on FAPE. The hearing officer ruled in favor of the district, finding that the student had made significant progress without the requested device and that it provided him with no demonstrable benefit. The parents did not appeal this ruling, instead proceeding in court based on an ADA regulation that potentially extends the individual entitlement beyond the substantive scope of FAPE under the IDEA.

The IDEA, even under the revised FAPE standard of the Supreme Court's recent *Endrew F.* decision, poses an uphill slope for obtaining, via adjudication, such uncustomary means of access (with another example being service dogs). Nevertheless, the ultimate determination is a matter of the individual circumstances. In this case the evidence was preponderant that (a) the student had made continuous and significant progress without the requested accommodation for several years and (b) it was not a safety issue for the student. A change in either of both of these crucial findings might mean a different ruling.

The parents' relied in court on the ADA's effective communications regulation. The First Circuit cited its precedents that, as an essential threshold element, the parents had the burden to prove that the requested accommodation would be effective a benefits in the form of increased access to the district's services for students. Affirming the lower court's decision, this appellate court concluded that the IDEA hearing officer's factual finding that the recording device did not provide the student with the requisite benefit precluded the parents from establishing this essential element of their ADA claim. Thus, the ruling was in favor of the district.

The effective communications regulation of the ADA illustrates the added role of the ADA and its sister statute, Section 504, for students with IEPs as well as those with 504 plans. This regulation has been more successful for plaintiff-parents' request for Communications Access Realtime Translation (CART) devices in relatively recent cases in the Ninth Circuit. The interpretation and application of this regulation are not clearly settled, and in any event the varying intervening factors include the specific facts and the particular court. For further information, see, e.g., the "Three Birds" (2014) article and the "Updated Comparison" (2017) article under the "Section 504 and ADA" subheading of the Publications part of my website.