SPECIAL EDUCATION LEGAL ALERT

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This monthly legal alert addresses three significant procedural issues under the IDEA—child find when the child is determined not to be eligible; child-identified e-mails that are not part of the child's file; and the removal (or refusal to include) planning time in a child's IEP. For automatic e-mailing of future legal alerts, sign up at **perryzirkel.com**.

In *Burnett v. San Mateo-Foster City School District* (2018), the Ninth Circuit addressed two separate issues—whether a child find violation constitutes denial of FAPE if the ultimate determination is that the child is not eligible under the IDEA, and (b) whether e-mails concerning a child with a disability that are not part of the child's file are "education records" under the IDEA (and, based on its identical definition, FERPA), which are subject to access (i.e., inspection and review) by the child's parents (and, as a separate matter not at issue in this case, their consent for release, with limited exceptions, to other parties).	
For the first issue, in this case the district violated child find by failing to provide a timely evaluation of a child reasonable suspected of being eligible as specific learning disability (SLD) or other health impairment (OHI) but the parents failed to prove that the child qualified under either one. Affirming that the child did not meet the criteria for eligibility, the Ninth Circuit rejected SLD based on prong 1 (i.e., the classification) and OHI based on prong 2 (i.e., the need for special education). Thus, agreeing that the child find failure was a procedural violation without the requisite substantive loss, the Ninth Circuit ruled that the child find violation in these circumstances did not constitute a denial of FAPE.	Other courts have reached this same conclusion, but it limits the legal significance of child find. The alternatives for the parents in such cases of ultimate non-eligibility include (a) resorting to the state complaint procedures avenue, which tends to be much more strict about procedural compliance; (b) judicially testing the alternative argument that this procedural violation significantly impeded the parents' opportunity for participation in the FAPE decision-making process, which would require a stretched interpretation of FAPE; or (c) seeking attorneys' fees, which would require a similar stretching of prevailing party status, or (d) making an alternative claim under Section 504, which requires child find but has a broader scope of eligibility.
For the second issue, the court concluded that the district's failure to provide the parents with access to the emails concerning their child that were not printed out and added to the child's physical file was not a procedural violation under the IDEA (or FERPA), because although personally identifiable to the child, the district did not "maintain" these emails.	At a time when digital technology is changing the meaning of a child's file, this ruling needs to be applied with care. If the district had maintained the emails in a "permanent secure electronic data base," per the language of the Supreme Court's underlying FERPA decision in *Owasso Independent School District v. Falvo* (2002), the outcome may well have been the opposite of the court's decision in this case.

In *M.C. v. Knox County Board of Education* (2018), a federal district court in Tennessee focused on the issue of whether planning time for preparing the student's specially designed instruction is a either a "related service" or a "support for school personnel" under the IDEA and, thus, a required part of the IEP. In this case, the school district removed, without prior written notice, the materials preparation/curriculum modification time that had been part of the IEP of two separate students with disabilities.	
For the "related services" part of the analysis, the court concluded that this planning time was not like the examples of "other supportive services" specified in the IDEA definition and, thus, not within the intended scope of this term. The specified examples, such as counseling and occupational therapy, were additional necessary services, whereas materials preparation is "only a *means to the end* of providing a specified service." Moreover, the amount of each necessary service is critical, whereas "it does not matter how long it takes the educator to prepare the modified materials."	This decision is not an officially published or appellate decision, but it represents the rather conservative judicial approach that is increasingly prevalent in IDEA and other such cases. The court dispassionately examined the language of the regulations and—in agreeing with the practical variance in the ability and efficiency of teachers—deferred to the perspective of school authorities. In contrast, the court did not delve into the semantics of "modification" v. accommodation or other more limited adjustment that is prevalent in relation to the separable issue of high-stakes testing.
Rejecting for the same reasons the alternative of "supplementary aids and services," the court next focused on the definitional language for "supports for school personnel" and reached a similar conclusion: "So long as the students receive the specially designed instruction described therein, the IEPs are not rendered defective simply because they fail to include a single sentence describing the amount of time that must be spent preparing classroom materials." The court cited the "reasonable, not … ideal" language of *Endrew F.* as support for this conclusion.	Here, again, the court distinguished "must" from "should," concluding that the ultimate question of applicable requirements is for the legislature, not the judiciary. More specifically, the court examined first the IDEA legislation, then the IDEA regulations, and finally—in the absence of sufficient specification therein and in the interpretive case law—the official commentary accompanying the regulations, with overall reference to the Supreme Court's *Rowley-Endrew F.* approach to FAPE. Conversely, however, the IDEA does not prohibit a district from including planning time in IEPs.
Finally, the court addressed the district's failure to provide prior written notice (PWN) before removing planning time from the IEP. First, the court concluded that this planning time is not within the IDEA's specified scope of the requirement for PWN—identification, evaluation, placement, or FAPE. Second, even if it were within this required scope, it was only a procedural violation, without the requisite substantive harm to the student or participatory denial to the parents (who discussed the matter at IEP meetings before and after the removal).	Again, the court distinguished between the legal minimum and professional proactivity: "While it may be a better policy to give parents advance notice of any and all changes to an IEP, Defendants were not required to issue a PWN under the circumstances of this case." More generally, the court acknowledged the parents' understandable frustration in this case due to the prior inclusion of planning time in the IEPs, but in the absence of some legal basis for judicial action, "[s]uch detailed matters of educational policy are squarely within the legislature's purview."