SPECIAL EDUCATION LEGAL ALERT

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This monthly legal alert addresses the significant rulings of two recent, officially published federal appeals court decisions under the IDEA—*Krawietz v. Galveston Independent School District*, which reinforced the ad hoc nature of "child find," and *L.H. v. Hamilton County Department of Education*, which provided a new twist on both least restrictive environment and reimbursement for private placements. For automatic e-mailing of future legal alerts, sign up at **perryzirkel.com**.

In *Krawietz v. Galveston Independent School District* (2018), the Fifth Circuit addressed an issue that we have previously visited, reinforcing the individualized ad hoc—rather than absolutist red flag—nature of the ongoing child find obligation under the IDEA. In this case, in response to a two-month disciplinary alternative education placement and failing grades in most classes for a 9th grader whose parents had homeschooled for the previous five years, the district provided a 504 plan based on ADD, OCD, and PTSD. She successfully completed grade 9. However, the following semester her academic problems returned, including failure to pass half of her classes, and her parents therapeutically hospitalized her in October for two theft incidents at home. In mid-February, they filed for a due process hearing under the IDEA. At a resolution session, the parties agreed to an IDEA evaluation. The district completed the evaluation two months later, determining that she was eligible under the IDEA. Subsequently, first the hearing officer and then the federal district court ruled that the school district had violated its child find obligation. Upon appeal….

For the first component of child find, which is *reasonable suspicion*, the Fifth Circuit upheld the lower court's determination that in October the district had reason to suspect the student's need for special education based on her academic decline, thefts at home, and hospitalization "taken together."	In response to the district's contention that the lower court had relied on the hospitalization alone, the Fifth Circuit emphasized that the basis was a combination of factors and that the academic-decline was a reasonably known part of the combination prior to issuance of the final grades for the semester.
For the second component of child find, which is *reasonable period*, the Fifth Circuit ducked the district's argument that the relevant ending point should be the date of consent, not that of completion, of the evaluation. Assuming without deciding that the earlier date applied, the appeals court concluded that the four months between the October reasonable suspicion and the mid-February consent was unreasonable under the circumstances.	Although this second component is not quite as flexible as the first component, it is still based on the circumstances, with the various factors including the age of the child and the parents' level of cooperation. For a more complete picture of the substantial case law on each of these two components, see the successive items under the "Child Find" subheading of this website's Publications section.
Related but more general issues are remedies and attorneys' fees. Here the parents requested but did not receive reimbursement for private services and prospective residential placement. Nevertheless, they obtained attorneys' fees as the prevailing party.	Illustrating that these matters are also not black and white, the Fifth Circuit ruled that the more limited relief that the parents obtained still met the primary criterion to qualify for attorneys' fees, which is an alteration of the legal relationship between the parties.

In *L.H. v. Hamilton County Department of Education* (2018), the Sixth Circuit addressed two other significant issues under the IDEA—the meaning of least restrictive environment (LRE) as differentiated from free appropriate public education (FAPE), and (b) the applicable standard for the appropriateness of a unilateral placement in the context of tuition reimbursement. The child in this case was a mainstreamed second grader with Down Syndrome. When his progress "hit the wall" according to his teachers, the IEP team, over the parents' objection, proposed placement in a segregated special education class for grade 3. His parents unilaterally placed him in a Montessori School, where he made broad-based progress though still notably less than his peers.	
For the LRE issue, the Sixth Circuit ruled in favor of the parents. Although at least implicitly recognizing the overlap between LRE and FAPE, the appellate court elaborated on their divergence in several debatable ways. First, the comparative benefits component of the multi-factor test for LRE is not the same as the substantive standard for FAPE; *Endrew F*. modifies it "only slightly if at all." Second, mastery of the general curriculum is not the standard for LRE. Third, functional isolation does not demonstrate a failure of mainstreaming but a failure to properly implement it. Fourth, FAPE focuses on academics, such as methodology, for which school officials merit judicial deference, but LRE extends to other factors and does not merit such deference.	This decision is unusual because it directly addresses the tension and differentiation between FAPE and LRE. Similarly unlike the general previous trend of cases that include both issues, it does so in various ways that clearly, although not absolutely, support a pro-mainstreaming view of LRE. The court's opinion is subject to careful examination for possible internal inconsistencies and, in federal circuits that have a different variation of the multi-factor test of LRE, for possible jurisdictional limitations. Nevertheless, it should not be dismissed as wrong-headed or ignored as non-generalizable. One way or the other, like the Sixth Circuit's 2004 decision in *Deal v. Hamilton County Department of Education*, this ruling will likely play a "distinguished" role in future case law.
The second issue in this case was the standard for appropriateness of the private placement for the requested reimbursement remedy, which in this case was for not only the Montessori annual tuition but also the even higher cost of the full-time aide whom the parents additionally provided for each of the five years during this protracted litigation. While rejecting the district's stereotyping argument that a Montessori School lacks the systematic structure that a student with intellectual disabilities needs, the Sixth Circuit ruled that *Endrew F*. is the standard for the unilateral placement.	Although the Fifth Circuit's rejection of the district's argument for this issue is consistent with its treatment of the district's position for LRE, the much more significant generalizable ruling is the court's extension of *Endrew F.* to the private-school step for tuition reimbursement analysis. See the three *Endrew F*. articles under the "FAPE" subheading of this website's Publications section; they explain the inevitability of this conclusion despite its slow recognition in the lower courts previous to this officially published federal appeals court decision.