SPECIAL EDUCATION LEGAL ALERT

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This month's alert summarizes an unpublished federal district court decision that illustrates various current issues, including the possible child find-RTI connection and a published federal appeals court decision that illustrated the generally nondramatic impact of Endrew F. These various issues are further explained and updated in various articles listed in the "Publications" section of perryzirkel.com.

In *Avaras v. Clarkstown Central School District* (2018), a federal district court in New York addressed a child find claim in the context of response to intervention (RTI) plus subsequent IEP FAPE and tuition reimbursement claims. The basic factual sequence was: kgn – RTI Tier 2 in reading; gr. 1 – RTI Tier 3 in reading and math plus IEE diagnosis of dyslexia, with parental request in May and district evaluation in June, resulting in eligibility and IEP for SLD for last few days of the school year; gr. 2 – unilateral placement in private school and no IEP review and proposal; and gr. 3 – district revised and proposed IEP, which included a self-contained class for language arts, resource room for 30 minutes per day, and consultant teacher services for 30 minutes per week.	
For the child find claim, the court ruled that "the duty to evaluate, at the very least, was triggered 8 weeks after [the child] started Tier 3 services in first grade." Since the district did not initiate the evaluation within a reasonable time thereafter and the evaluation revealed his eligibility, the court found that this procedural violation impeded the child's right to FAPE.	The court apparently based its specific calculation on the fact that the district's RTI program had 8-week cycles. However, reasonable adjudicators can and do reach different conclusions based on these factual features. For example, both the hearing officer and the review officer had rejected the parents child find claim in this case. The general trend is infrequent case and largely pro-district rulings.
For the next year, which was gr. 2, the court ruled that the district denied FAPE because it did not have an IEP in place at the start of the year, concluding that the parents' unilateral placement did not excuse the district's continuing obligation to "provide FAPE"—i.e., propose annual IEPs.	The court deftly ducked the nuances of (a) the parent's consent for initial services, which in this case was an agreement for special education but not for the district's initially IEP proposals, and (b) the district's belated IEP for grade 2, which without review merely amended the previous IEP to show the unilateral placement.
For gr. 3, the court concluded that the proposed IEP provided FAPE in the LRE, finding the interaction with nondisabled students at an appropriately integrated level.	The court attributed the separable IEP problem of lack of updated information from the private school to the parents' failure to provide the requisite consent for this information.
For the remedy, the court awarded tuition reimbursement for the gr. 2 school year, finding that the private placement met the applicable substantive standard and that the equities supported this period.	Oddly, the court did not award compensatory education for the child find violation in grade 1. Perhaps the parents did not sufficiently raise this remedy as an issue separable from tuition reimbursement.
The court rejected the parents' claims (a) for money damages (as unavailable under the IDEA), (b) against the state education department (for lack of systematic violations); and (c) under Sec. 504/ADA (for lack of gross misjudgment or deliberate indifference).	These various additional rulings illustrate the increasing "spaghetti strategy" (throwing multiple claims against the way in hopes that something sticks) of special education litigants and the prevailing judicial standards for each of these claims.

In *Johnson v. Boston Public Schools* (2018), the First Circuit Court of Appeals addressed various parental claims arising from the successive IEPs for an elementary school student who had a substantial hearing impairment despite a cochlear implant. The student's initial IEPs included instruction in both sign-supported spoken English and American sign language (ASL) per the recommendations of his evaluations. Despite the child's reported progress, the district agreed to change his next IEP to exclude ASL based on his mother's insistence. His subsequent progress was negatively affected by his mother's intransigent opposition first to the use of ASL and, later, sign supported English; her lack of cooperation with district and clinical personnel; and the student's inconsistent use of the cochlear processor. After additional evaluations, the district proposed to increase the services, but the parent remained dissatisfied and filed for a due process hearing. As part of settlement negotiations, the district agreed to place the student in a private school for students with hearing impairments. However, the settlement fell apart during the prehearing conference, and the impartial hearing officer (IHO) subsequently issued a decision in the district's favor. After the federal district court affirmed the IHO's decision, the parent appealed to the First Circuit Court of Appeals, which encompasses Maine, Massachusetts, New Hampshire and Rhode Island.	
First, the parent claimed that the district court had erred by ruling that she had waived her "mainstreaming" claim. The appellate court readily rejected the parent's claim, pointing out at the due process hearing she sought placement in a private school for hearing impaired students.	Perhaps attributable to the parent proceeding pro se (i.e., without any attorney) at the due process hearing, she failed to clearly preserve a mainstreaming claim via her complaint statement, the prehearing conference, and opening arguments, which amounted to waiver..
Second, she raised various challenges to the conduct of the impartial hearing officer (IHO). The appellate court ruled that (1) the IHO's reliance on the mother's statements during the prehearing conference did not violate the IDEA; and (2) the IHO's consideration of these statements, the IHO's warning that proceeding with the hearing was a gamble, and the IHO's adverse assessment of the parent's credibility did not violate the impartiality requirement of the IDEA.	(1) The Rules of Evidence do not apply to due process hearings unless state law specifies otherwise, and settlement discussions during the prehearing conference do not transform the IHO to a mediator unless the parties agree otherwise. (2) These various instances of conduct, although arguable as a matter of best practice, did not fail the IDEA test for IHO impartiality, which is actual—not the appearance of—bias.
Finally and most significantly, the parent claimed that the Supreme Court's decision in *Endrew F*. significantly raised the bar for substantive FAPE. She argued that the adequacy of the district's challenged IEPs should be remanded to the IHO level for reconsideration, since the IHO's and district court's FAPE rulings were based on the pre-*Endrew F*. standard. The First Circuit affirmed rather than remanded the previous substantive FAPE rulings, concluding that the jurisdiction's prior standard of meaningful benefit comported with *Endrew's F.*'s formulation of being "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." The court pointed to the similarity of the educational methodologies between the district's original placement and the subsequent temporary private placement, which both yielded sufficient progress under the circumstances.	Notably, in response to the parent's reliance on the undisputed findings that the child's progress was "slow" and that his linguistic skills were "significantly delayed," the court emphasized the importance of the individual circumstances. In this case, the court identified as examples of relevant circumstances for this child "his starting point and [the parent's] own resistance to educating him. in ASL and spoken English." Thus, neither slow progress nor more rapid progress is generalizable as the *sine qua non* of *Endrew F.* in light of its individualized, ad hoc consideration of the substantive appropriateness of IEPs. Of course, this standard is the legal minimum, and there is good reason for IEP teams to aspire to the higher bar of best practice norms as a matter of partnership with parents and adherence to professional ethics.