SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies two new federal appeals court decisions focusing on the substantive dimension of FAPE, with secondary attention to interrelated requirements, such as LRE and transition services. Publications relating to both of these issues are available on my website perryzirkel.com.

In *C.D. v. Natick Public Schools* (2019), the First Circuit Court of Appeals addressed three claims of parents seeking three years of tuition reimbursement for a child with "borderline intellectual functioning and significant deficits in language ability." For grades 9 and 10, the district's proposed placement was for regular classes for elective courses and the other subjects in a self-contained special education class at the high school with a significantly modified curriculum. For grade 11, after two years in a unilateral private placement and a reevaluation, the district's proposed placement was for (a) a mix of regular education, significantly modified special education, and much less modified "replacement" special education classes—and in response to parent concerns—(b) a formal transition assessment, and (c) an extended day for speech/language therapy and career preparation services. Having lost at the hearing officer and district court levels, the parents' appellate challenges focused on the *Endrew F.* standard, LRE, and the transition services.

For the substantive standard for FAPE, the parents argued that *Endrew F.* required review of whether the proposed IEP not only was reasonably calculated for appropriate progress but also—as a separate test—contained "ambitious goals" and "challenging objectives."	Rejecting the parents' interpretation, the First Circuit concluded that the *Endrew F.* Court "used terms like … ambitious and challenging to define 'progress appropriate in light of the child's circumstances,' not to announce a separate dimension of the FAPE requirement."
The parents' second argument was that the First Circuit should move from its balancing test for LRE to a more nuanced multi-factor analysis, as exemplified by the Fifth Circuit's *Daniel R.R.,* the Tenth Circuit's *L.B.*, the Third Circuit's *Oberti*, and the Ninth Circuit's *Rachel H.* decisions.	Again rejecting the parents' contention, the First Circuit confirmed its established approach, which balances the benefits of mainstreaming with the improved progress that could be obtained in a non-mainstreamed setting. Its reasoning relied on the complex choices that warrant judicial deference to "the expert decisions of school officials and [hearing officers]."
The parents' final challenge was to the appropriateness of the transition assessment and transition services in the third IEP, which arose when the student reached the requisite age for these provisions.	Continuing its affirmation of its previous relatively relaxed approach, the First Circuit concluded that the IDEA does not require a transition plan or specify a particular form for the transition assessment.
Applying these relatively deferential standards, the First Circuit affirmed the rulings in favor of the defendant district. This officially published decision is binding in its four states (ME, MA, NH, and RI). It illustrates the courts' general trend of deferential rather than activist decisionmaking under the IDEA. Although subject to occasional exceptions, particularly in the relatively few, more parent-friendly circuits, this trend is likely to continue based on the current administration's record number of federal court appointees generally selected based on non-activist judicial postures.	

In *R.E. B. v. Hawaii Department of Education* (2019), the Ninth Circuit took the relatively unusual step of withdrawing its initial decision[1] and issuing, two years later, a dramatically different ruling. The case concerned a child with autism who attended pre-K in a specialized private school. In the proposed IEP for kindergarten, the district sought to move him to a public school. Disagreeing with the move, the child's father unilaterally continued the private placement and filed for a due process hearing, seeking tuition reimbursement. The left-hand column summarizes the original Ninth Circuit decision in 2017, and the right-hand column outlines the superseding decision in 2019.	
First, in the original decision, the Ninth Circuit agreed with the father's claim that the district violated the IDEA procedurally by refusing to address his concerns about the transition of his son from the private to the public placement, such as the class size and the daily routines. The court concluded that transition services between schools or programs qualify as "supplementary aids and services" in an IEP where they are necessary for the child's education and participation in the new environment.	In its replacement decision, the Ninth Circuit ruled that the IEP team sufficiently considered and addressed the parent's transition-related concerns, including a transfer meeting and a resulting plan for the child's gradual transition in small classes without mainstreaming during the initial summer. In so ruling, the court did not address whether transition services between schools fits under the IEP requirement for supplementary aids and services.
Second, the original decision also ruled in favor of the parent on LRE grounds, concluding that the IEP's statement that the child would be mainstreamed for Science and Social Studies activities "as deemed appropriate by his Special Education teacher … and General Education teacher" was both an improper delegation beyond the IEP process and too vague to serve as a blueprint for enforcement. Moreover, the court concluded that the district did not sufficiently consider the *Rachel H.* factors for LRE, resulting in serious infringement of the parent's opportunity for participation in the IEP process.	In the new decision, the Ninth Circuit clarified that Science and Social Studies were among the various subjects that the IEP specified for the self-contained special education class, with the cited provision reserved for teacher-designated activities. The court concluded that "this nuanced determination was reasonable" in light of (a) the nature of these curricula, such as experiments and field trips, and (b) the nature of the child's disability and her transitional adjustment to the public school environment. In a footnote, the court concluded that the district sufficiently considered the LRE factors.
Finally, the original decision contained a potentially major crack in the long-standing judicial view that methodology is a matter of district discretion. The court concluded that the district violated the IDEA by failing to specify a particular methodology (in this case, ABA) in the IEP where it played a "critical role" in the child's education.	Given the teachers' judgment that multiple methodologies, rather than one single method, was appropriate for the child and, as a result, that flexibility was warranted, the superseding Ninth Circuit decision relied on precedent and deference to rule that the IEP did not need to specify ABA methodology.
The details of the case warrant more in-depth review and analysis, including the judicial proclivities of the retired judge and his replacement, the role of the judge who dissented in the original decision, and the officially unpublished status of the new decision. Nevertheless, this unusual reversal of position between the first decision and, after rehearing by a reconstituted panel, the superseding rulings illustrates the prevailing gravitational resistance to moving IDEA jurisprudence from the district-deferential status quo to elevated and nuanced rigor.[2]	

[1] In 2018, after one of the three judges in the original panel retired and replaced for this case, the reconstituted panel voted to grant the defendant's motion for a panel rehearing. The ultimate decision agreed with the original on a fourth issue, which was that the IEP need not include staff qualifications.

[2] Incidentally, the odds of the a rehearing by the full membership of the Ninth Circuit or of the granting of review by the Supreme Court are very remote.