SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

This month's update concerns issues that were subject to recent relevant court decisions and are of general significance: (a) the emerging fourth dimension of FAPE—capability to implement the IEP, and (b) the overlapping issues of the procedural and substantive dimensions of FAPE with LRE. Publications relating to both of these issues are available on my website perryzirkel.com.

In *R.F. v. Cecil County Public Schools* (2019), the Fourth Circuit Court of Appeals faced intertwined FAPE and LRE challenges to the IEP for a seven-year-old with severe autism and a rare genetic disorder. The IEP called for 13.5 hours in the general education classroom and approximately 17 hours in a specialized classroom. Instead, the parents sought placement in a private special education school. For procedural violations, they principally pointed to two proven actions of the special education teacher: (a) after the first three weeks in the school year, he gradually increased the hours in his specialized classroom without notice to the parents or an IEP meeting, and (b) he destroyed the raw data upon writing his quarterly progress reports even though the district policy was to maintain these data for two years. For LRE, the parents argued that the district provided most of their child's instruction in the special education classroom, where she was—unexpectedly to the district based on last-minute enrollment choices of other parents—the only child.

The Fourth Circuit rejected the parents' LRE argument, concluding that (b) although the child spent most of the time in a separate setting, the district provided her with multiple opportunities for interaction with nondisabled students; (b) the parents were effectively contradicting their claim by seeking a completely segregated setting; and (c) LRE inevitably overlaps or intertwines with FAPE.	This decision, which is officially published and binding in the 5 states of the Fourth Circuit (MD, NC, SC, VA, and WV), serves as a reminder of the individualized meaning of LRE in terms of *maximum* interaction with nondisabled students to the extent *appropriate*. For the "appropriate" interconnection, the court excused the 1:1 arrangement because it met the child's needs and "[the district] cannot be said to have denied [the child] a FAPE merely because fewer students enrolled [in the class than anticipated]."
The Fourth Circuit agreed that the teacher's unilateral action in changing the implementation of the IEP was a procedural violation but concluded that it did not have a harmful effect on the substantive rights of either (a) the child (in terms of the *Endrew F.* standard) or (b) the parents (in terms of meaningful participation in the IEP process).	(a) Citing its gradual and individualized nature, the court concluded that the increased time in the specialized classroom was "reasonably calculated to enable the child to make progress in light of [her] circumstances." (b) In the courts' view, this action did not constitute the requisite "significant" impediment to parental participation, because it went in the parents' desired direction and the IEP team met again in December.
The Fourth Circuit concluded that the teacher's destruction of the raw data was a violation of the district's, not the IDEA's, procedural requirements and that, in any event, the quarterly summaries sufficed in this case for their requisite opportunity for participation.	The Fourth Circuit is generally one of the least parent-friendly federal appeals courts in IDEA cases. Compare its procedural analysis, especially for the teacher's first action, with the Ninth Circuit's *M.C. v. Antelope Valley School District* (2017) ruling reported in the June 2017 Special Education Legal Alert.
The bottom line is to avoid over-generalizing such LRE and FAPE issues, instead (a) focusing on the facts of the individual case, (b) considering your jurisdiction in relation to that of this court, and (c) engaging in proactive practices that differentiate and avoid such minimalist legal interpretations.	

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<tr><td colspan="2">In Board of Education of Yorktown Central School District (2019), a federal district court in New York addressed a tuition reimbursement claim arising from the district not having available at the start of the school year a special education class that met the specific size that the IEP prescribed. This claim illustrates the emerging fourth “face” of FAPE beyond procedural, substantive, and failure-to-implement: ability to implement the IEP.</td></tr>
<tr><td>In this case, the court concluded that the operative IEP was the June 2016 IEP, which provided for a special education class size of 12 students, rather than the October 2016 version, in which during the resolution session the district sought to change the specified class size to 15 students. Acknowledging, per the teacher’s admission to the parents, that the district did not have available for the child a special education class at the start of the year limited to 12 student amounted to the admission of the inability to provide the promised FAPE.</td><td>The court reasoned that the parents relied upon the June 2016 IEP in making their decision to place the child in a private school for the coming year and seek tuition reimbursement. In the court’s view, the opposite conclusion would have permitted the district to engage in “a ‘bait and switch,’ because the Parents did not consent to the modification and did not receive the October 2016 IEP with its revised class size recommendation until well after the beginning of the school year.” For this operative IEP, the inability claim was rather clear.</td></tr>
<tr><td>The district’s default argument was based on the “equities” step of tuition reimbursement analysis. More specifically, the district argued that the parents knew or had reason to know that the district intended to change the IEP’s class size and that they should have agreed to this change. However, the court concluded that “the record does not show the Parents understood the June 2016 IEP to recommend a [15-student] class size . . . . [; they] were under no obligation to agree to change the June 2016 IEP at the resolution meeting. … [and] there is no indication the Parents were uncooperative in the District's efforts to meet its obligations under the IDEA.”</td><td>This ruling is fairly typical of the equities analysis of judicial analyses in tuition reimbursement cases. If the district did not provide FAPE and the parents’ unilateral placement did meet the rather relaxed applicable substantive standard, courts often regard as within the broad bounds of reasonableness what the district perceives and proffers as inequitable on the parents’ part. In contrast, this case’s focus on the possible rectification at the resolution session is largely peculiar to the Second Circuit, which adopted in in R.E. v. N.Y.C. Department of Education (2012) what is generally regarded as an overly broad exception in addition to its rather complicated qualified four-corners approach to “retrospective evidence.”</td></tr>
<tr><td colspan="2">This this case is one of the relatively few parental victories thus far in an increasing line of cases under the emergent fourth face of FAPE. It may become the example rather than the exception, depending on the crystallization of this evolving dimension. The courts’ response to claims that the facilities or staffing of the “school” are not capable of implementing the IEP bears careful monitoring, because it revisits appropriateness issues in a new way and also intersects with the problematic differentiation between “location” and “placement.” Yet, again, simply adhering to a trustworthy commitment to full implementation, timely IEP team adjustments, and prompt compensatory corrections avoids such legal complications.</td></tr>
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