# SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns issues that were subject to recent federal appeals court decisions and are of general significance: (a) the application of *Endrew F.* and PRR, and (b) a surprising and puzzling wrinkle in tuition reimbursement jurisprudence. Both of these cases relate to other items available on my website **perryzirkel.com**.

**In *Albright v. Mountain Home School District* (2019), the Eighth Circuit Court of Appeals addressed various claims that a parent brought on behalf of her child with autism. Reflecting her highly contentious relationship with the district, the parent filed a series of due process hearings challenging the child's IEPs. The first two complaints resulted in settlement agreements. Arising from the third hearing, which consisted of 11 sessions, the claims in this case included (a) a substantively inappropriate fourth-grade IEP, (b) the use of sensory integration techniques in the BIP, and (c) lack of meaningful parental participation.**

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| The hearing officer concluded that the IEP met the *Rowley* standard for substantive appropriateness. The parents contended that the IEP did not meet the Supreme Court's revised standard in *Endrew F.* in light of her child's "true" potential. The Eighth Circuit ruled that "however regrettable the disagreement between [the parent] and the remainder of the IEP team on this matter," the child "made progress in a curriculum that was appropriate in light of her circumstances." | Further extending the two-year post *Endrew F.* case law analysis available on my website, this published Eighth Circuit ruling illustrates that *Endrew F.* has not had a significant outcomes effect in the courts. Rather than resolving the issue of the child's potential as one of the presumably pertinent circumstances, the court merely repeated the *Endrew F.* dictum that the IEP need only be reasonable, not optimal. Similarly, the court responded to the parent's four-year test score evidence by limiting its focus to the year in question, concluding that "although the test scores varied within the period, in total they demonstrate academic improvement." |
| The parent argued that the BIP's sensory integration techniques were pseudoscientific in violation of the IDEA requirement for services "based on peer reviewed research [(PRR)] to the extent practicable." The Eighth Circuit concluded that "alongside the 'extensive' use of peer-reviewed practices, the use of sensory integration techniques, which were recommended by [the child's] occupational therapist, did not deny [the child] FAPE." | Again consistent with the general, although not uniform, trend of judicial case law for (a) the application of the IDEA to BIPs, including but not limited to their appropriateness, and (b) the interpretation of the IDEA's qualified PRR requirement, this Eighth Circuit ruling was relatively relaxed and district-deferential in contrast with academic and professional norms. Note too that the court again did some deft ducking, avoiding directly addressing whether sensory integration techniques fulfilled the IDEA's PRR provision. |
| Faced with evidence of hundreds of pages of e-mails and transcripts of IEP meetings, the parent pegged her participation-violation claim on the district holding one of the meetings without her. However, the court concluded that (a) she chose not to attend the meeting despite the district's erstwhile efforts and (b) even if it was a violation, it did not result in substantive harm to her child. | The court's ruling in response to this third claim is in line with the majority of the parent-participation cases. However, the court's fallback, harmless-error approach missed the provision in the 2004 amendments of the IDEA requiring at the second step of procedural FAPE cases the alternative to substantive loss to the child—loss to the parents in terms of significantly impeding their right to participate in the IEP process. The outcome could have been different or the same, but failure to apply this alternate prong is clearly subject to question. |
| The bottom line to this case, which is unfortunately typical of many cases that reach the judicial level, was "a profoundly toxic lack of trust" that had developed between the parent and the district. | |

| **In *Steven R.F. v. Harrison Central School District* (2019), the Tenth Circuit addressed the appeal of a lower court decision that my December 2018 monthly legal alert summarized. Finding fatal procedural violations, including failure to comply with a complaint procedures corrective action order, the lower court reversed the hearing officer. The lower court concluded that the district had denied FAPE to the child with autism and ordering tuition reimbursement and attorneys' fees. The school district appealed this lower court decision. In the meanwhile, the district provided the reimbursement pursuant to the IDEA's stay-put provision. Surprisingly, the Tenth Circuit dismissed the appeal and vacated the lower court decision without addressing the merits of the case.** | |
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| The Tenth Circuit did not address the "merits," which for tuition reimbursement cases typically includes whether the district had provided FAPE and, if not, whether the parents' unilateral placement was appropriate. Instead, agreeing with the parents' initial argument, the court concluded that the case was moot, because the district had already provided the relief that the parent sought in this case. | Although mootness occasionally arises in other IDEA cases, this is the first published appellate case that has done so in a tuition reimbursement case. The court's ruling poses major questions and concerns for this high-stakes remedy. First, although stay-put applies upon a hearing officer or, in two-tier state, a review officer reimbursement order, does it also arise, without such an agreement on behalf of the state, upon a judicial order? |
| The school district counter-argued that the case fits the well-established exception to mootness, which is for cases that are capable of repetition and yet—due to the prolonged period for litigation—escape judicial review. In response, the Tenth Circuit agreed that this situation met the first required element for this exception—the challenged action expires prior to full litigation, because an IEP is for one-year and this appeal was well after the 2016-17 year. However, the Tenth Circuit concluded that the district did not meet the second prerequisite—a reasonable expectation that the complaining party would be subject to the same action again. Here, the court reasoned that even if the district had reasonable expectation that the parent would challenge the child's most recent IEP, the procedural FAPE claims that the parent raised were specific to 2016–17 without proof that any future challenges would be the same. | This part of the ruling is the second and stronger potentially limiting factor in the effect of the Tenth Circuit decision on other tuition reimbursement cases. The specific procedural violations in this case, as identified in my December 2018 legal alert, were quite unusual and specific to the year at issue. Would the Tenth Circuit reach the same conclusion about the mootness exception for a more typical FAPE challenge to a proposed IEP when in the course of litigation, the district proposed an IEP for the subsequent year that was similar to the originally challenged one and the parent promptly files or is reasonably expected to file for a second hearing? The answers to such questions are unclear for the Tenth Circuit, which encompasses the six states from Oklahoma to Utah. The effect of this ruling is subject to even less clear for jurisdictions outside the Tenth Circuit, which are not bound by its possibly narrow scope. The underlying concern is how to reach the merits upon appealing tuition reimbursement orders. |
| Not so oddly, the parents also argued that the exception applied, but the Tenth Circuit disagreed for the same reason—lack of likelihood that the district would subject the parents to the same alleged procedural violations, with reasonable likelihood of parental challenge. | The parent's reason and the court's rejection illustrate another concern. Although receiving the reimbursement (which they likely do not have to refund to the district), the parents lost not only the precedent in favor of their procedural claims but also their prevailing status to qualify for recovery of their attorneys' fees. |
| This case is a real head scratcher, raising various perplexing and practical questions for both districts and parents as to its legal effect. Stay tuned. | |