SPECIAL EDUCATION LEGAL ALERT

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This month's update highlights two recent federal court decisions that are of general significance: (a) an unpublished trial court decision that again illustrates the varying interpretations of the need for special education, and (b) a published appellate court decision with multiple issues, including the "reasonable period" dimension of Child Find. For further case law information on all of these issues issues, see recent publications on my website **perryzirkel.com**.

In *Hoover City Board of Education v. Leventry* (2019), a federal district court in Alabama addressed the issue of IDEA eligibility for a high school student with diagnoses of post-traumatic stress disorder and conversion disorder, which resulted in severe panic attacks, convulsions, hallucinations, and frequent pseudo seizures. The eligibility team concluded that the student qualified under emotional disturbance but did not need special education, instead proposing a 504 plan that included counseling, an academic success class, and various accommodations. The parents filed for due process, and the hearing officer concluded that the district engaged in circular reasoning by focusing on what services were available rather than on securing sufficient information about the student's unique needs. The school district appealed to federal district court.

The court affirmed the hearing officer's decision, concluding that the eligibility team had not obtained sufficient information about this "unique nature and severity of her disability" and, thus, whether she needed specially designed instruction. Specifically, the eligibility team did not consult with her regularly treating therapist, who was a licensed professional counselor specializing in conditions based on abuse and trauma, or, conversely, have its own psychologist personally examine the student.	The court was careful not to generalize the fatal flaws of the eligibility team in this case, emphasizing that "conversion disorder is rare, and its implications for a student are not common knowledge among professional educators" and that no member of the student's eligibility team had specialized knowledge of the nature and severity of her disability.
Similarly, the court did not rule that the student was eligible under the IDEA, instead affirming the hearing officer's order for the eligibility team to reconsider its need-for-special-education determination after obtaining sufficient information about the nature and severity of this individual student's particular disability.	As a result, the court ruled that the student's court-appointed guardian (as the result of family abuse and neglect) was not entitled to attorneys' fees "at this point," subject to a subsequent determination as to whether the student met the remaining eligibility standard.
The bottom that (1) the need for special education is a thorny issue that warrants special care and caution and, (2) given the mental health issues of the nation's youth, including increasing incidence of severe trauma, this relatively narrow ruling is bound to have broader applications and variations than the peculiar contours of conversion disorder in combination with PTSD.	

In *Spring Branch Independent School District v. O.W.* (2019), the Fifth Circuit Court of Appeals addressed a series of issues ranging from child find to remedies for a student with a history of behavioral problems. In August 2014, upon enrolling him in the district for grade 5, his parents shared with the principal that he was transferring from a private therapeutic school and that his diagnoses included ADHD, Mood Disorder, and Oppositional Defiant Disorder. They also provided a letter from the child's psychiatrist recommending a 504 plan. School personnel collaborated with his parents to ascertain positive incentives for on-task behavior, but his acting out reached classroom interruptions on a daily basis by early October. At a meeting on October 8, the team determined that he qualified under Sec. 504 and provided him with a BIP, which incorporated MTSS Tier 2 and possible movement to Tier 3 interventions. His misconduct decreased for a few weeks, but subsequently escalated until he assaulted a staff member on January 9. On January 15, the district convened a 504 meeting that resulted in a referral for a special education evaluation under the IDEA. The evaluation resulted in a determination of eligibility as ED, an IEP that included an FBA-based BIP, and placement in an "adaptive behavior program" at another elementary school. His problematic behaviors continued at his new placement, which resulted in various in-class time-outs and, in the wake of 8 incidents of violence, restraints. In May, the parents agreed with school officials on a three-hour day. During the summer, his parents unilaterally placed him in a therapeutic school for 2015–16. In October 2015, they filed for a hearing, seeking compensatory education and tuition reimbursement for a series of alleged violations, starting with child find.	
For the child find claim, the question for the Fifth Circuit was whether the 3-month interval between the un-appealed October 8 date of "reasonable suspicion" and the January 15 referral was a "reasonable period." Reasoning that the answer depends on the district's actions, the Fifth Circuit ruled that in light of the utter failure of the district's previous efforts "the continued use of behavioral interventions was not [the requisite] proactive step[s]."	This new approach to the second, "reasonable period" dimension of child find warrants careful attention. In this case, the court's application of this approach is subject to question. Rejecting rather than crediting the district for moving to a more formal, systematic step on October 8, the court appeared to negate any period at all, conflating it into the "reasonable suspicion" dimension of child find and focusing on the district's steps prior to rather than "during the relevant period." Future cases will resolve whether this seeming incongruity is either factually idiosyncratic or more generally explainable.
For the FAPE claim, the primary issue was the implementation, not substantive, standard. The Fifth Circuit concluded that, in light of Texas law, the district's use of time-outs, not restraints, was a failure to implement the IEP that amounted to denial of FAPE.	This ruling is largely jurisdiction-specific in two ways. First, Texas law broadly defines time-outs and, for their use, requires limits to be in the IEP, whereas it authorizes physical restraints for violence without any requirement for inclusion in the IEP. Second, the Fifth Circuit has a distinctive two-step approach for failure-to-implement denials of FAPE.
For remedies, the Fifth Circuit sent the case back for reconsideration, because (1) it reversed some of the lower court rulings, and (2) tuition reimbursement, unlike compensatory education, is limited to the period of denial of FAPE.	The problem was the lower court authorized two years of relief—reimbursement for 2016-17 as compensatory education and reimbursement for 2015-16 under tuition reimbursement—for the one-year denial of FAPE (being the child find and failure-to-implement violations in 2014-15).
This published appellate decision, which includes two other nuanced issues, illustrates the complexity and fluidity of the wide range of IDEA litigation claims and outcomes. The child find issue is probably the most practically significant one in this fertile case in light of the frequency of this issue and its seemingly new approach to the "reasonable period" dimension.	