SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

© December 2019

This month's update concerns issues that were subject to recent, unpublished federal court decisions of general significance: (a) the continuing issue of the need prong for eligibility under the IDEA, and (b) the occasional issue of "reverse attorneys' fees," i.e., where the district rather than the parent is the party seeking payment. For both of these issues, see Publications section at perryzirkel.com.

In *William V. v. Copperas Cove Independent School District* (2019), the federal district court issued the latest decision in the wake of its original ruling summarized in the April 2019 Legal Alert and its partial reversal on appeal, as summarized in the September 2019 Legal Alert. In the original decision, the judge ruled that (a) the district violated the IDEA by exiting the child from eligibility under the classification of specific learning disability (SLD) after originally diagnosing him with dyslexia but (b) the violation was harmless because the district had continued to implement the student's IEP (due to stay-put). On appeal, the Fifth Circuit concluded that the district court was legally wrong or at least incomplete by failing to reach the second essential element for eligibility—the need for special education.

Revisiting the case for the second time, the court concluded that William met the need prong for eligibility based on his continuing below-average reading skills and the resulting dyslexia services, which included 45 minutes per week of 1:1 tutoring in the Wilson Reading Program in addition to other, daily dyslexia services.	The IDEA defines special education in terms of adapting "the content, methodology, or delivery of instruction" for the individual needs of the child. The court concluded that the Wilson program, along with the various accommodations and daily interventions that William received under the state's dyslexia law, met this definition.
The judge also reaffirmed his original ruling that this violation amounted to a harmless procedural error. The reason, according to the judge, was that the IEP, which the district had continued to implement, met the substantive standard for FAPE; thus, the eligibility violation resulted in no loss to the student.	The oddity is that stay-put required the district to continue the IEP; thus, the only way the parents could prevail was to prove that either the IEP was not reasonably calculated for progress, which they argued, or the district had deprived them of a meaningful opportunity for participation, which they did not claim.
The dividing line between general and special education is, as the Fifth Circuit observed, "murky." Yet, this particular case warrants two cautions against over-generalization: (a) the non-eligibility issue was upon the exiting, not the entering, stage for an IEP, thus triggering a saving effect of stay-put; and (b) the child received individualized dyslexia services that went beyond limited accommodations, such as preferential seating and extra time.	

In *Oskowis v. Sedona-Oak Creek Unified School District #9* (2019), the federal district court in Arizona addressed the issue of whether a parent, who filed a series of due process complaints against a school district, had to pay for the district's attorneys' fees. In the 2004 amendments, Congress added a provision that allowed courts to order a parent or the parent's attorney to pay such "reverse attorneys' fees" to a prevailing local or state education agency if the parent's hearing complaint or appeal was frivolous and for an improper purpose, "such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." In this case, the parent of a child with autism filed, on a "pro se" basis (i.e., without legal counsel), three successive due process complaints within a nine-month period, and each one resulted in dismissal as being frivolous. The parent appealed to the federal court, which upheld all three dismissals. The district filed a claim for attorneys' fees for the judicial appeal, not the due process hearing, stage of these dismissals. All three complaints concerned alleged district denials of FAPE for the child, and they came in the wake of several previous due process complaints from the same pro se parent.	
First, the court easily concluded that the district prevailed.	The court pointed to its previous upholding of all three dismissals
Second, the court concluded that all three complaints were frivolous, because they lacked any "reasonable foundation in fact or law" and, thus, were "wholly without merit." The court rejected the parent's retaliation claim, which was based on the three hearing officer decisions being within one day of each other, as speculative conspiracy theory.	What a district perceives as frivolous is often not what a court would determine to be frivolous, because the only way to change case law is to raise novel claims and arguments, which may gain acceptance based on the evolving values of society. For example, *Brown v. Board of Education* (1954) may have seemed frivolous in light of the Supreme Court's separate-but-equal ruling in *Plessy v. Ferguson* (1896)
Third, the court concluded that the parent's claims were for an improper purpose, because they were part of a "persistent pattern of abusive litigation" for the purpose of "harassing the District and driving up litigation costs."	The parent had initiated 43 separate legal actions against the district in 9 years. Although a handful were in his favor, the court concluded that the vast majority were "frivolous, indefensible claims" that "consistently exhibited harassing litigation tactics"
Finally, after reviewing the entries in the billing statement, the court ultimately awarded $41.2k in attorneys' fees.	This amount included the time spent in this fees-collection phase and reflected a reduction for unjustified time entries.
This case is more the exception than the rule, because although the 2004 IDEA amendments provided a two-way street for attorneys' fees, the reverse lane is much narrower and an uphill slope. For a summary of a representative sample of such cases, see the "road in the reverse direction" attorneys' fees article in the Publications section of perryzirkel.com	