SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns issues that were subject to recent, unpublished federal court decisions of general significance: (a) the appropriateness of a district's evaluation in the context of the parents' request for an independent educational evaluation (IEE) at public expense, (b) the reasonableness of attorneys' fees in liability litigation for alleged public school physical abuse of students with disabilities. For further examination of both of these issues, see Publications section at perryzirkel.com

In *A.H. v. Colonial School District* (2019), the reevaluation of an eleven-year old with an IEP under the classification of emotional disturbance included various standardized tests; a behavior rating scale and an Asperger's disorder scale; student, parent, and teacher interviews; an observation; and an FBA. Dissatisfied, the parents requested an IEE at public expense. The district denied the request. Relying on their expert, a clinical psychologist who eventually conducted the IEE and who testified that the district's reevaluation was incomplete, the parents lost at the due process hearing and the federal district court. They filed an appeal with the Third Circuit, which issued an unpublished decision.	
In response to the clinical psychologist's general contention that the the reevaluation was inadequate, the Third Circuit observed that the lower court relied on the applicable standards in the IDEA regulations, including, for example, a variety of tools and strategies and the use of technically sound instruments.	As documented in the "Law of Evaluations under the IDEA: An Annotated Update" in the Publications section of my website, this ruling is representative because courts usually apply the evaluation criteria of the IDEA regulations with deference to school evaluation personnel.
In response to the parents' argument that the reevaluation should have included additional testing, the Third Circuit ruled that "the focus was not, nor should it have been, on whether the [reevaluation] explored all facets of Student's disabilities."	The aforementioned publication shows that the courts are split in their interpretation of the IDEA statutory requirement to evaluate the child "in all areas of suspected disability," which in effect is a partial child find claim.
In response to the parents' contention that the hearing officer and lower court discounted the opinion of their specialized expert, the Third Circuit concluded that the grounds were legitimate, including her lack of familiarity with the child and the child's school setting.	This relative deference to the school psychologist and other district professional personnel is the prevailing presumption in IDEA evaluation and IEE cases, although occasionally the parents' rebut it based on these same grounds.
Although this court decision is unpublished and rather cursory, it serves as a reminder of the general substantive considerations for litigation concerning evaluations, including reevaluations, and also as a stimulus to reexamine the procedural considerations that are particularly prominent in cases focused on IEEs at public expense (the subject of another article in "Publications" section).	

In *Hurd v. Clark County School District* (2019), the federal district court in Nevada addressed the amount of attorneys' fees in the wake of the settlement of a suit that alleged the district had failed to respond appropriately to a special education teacher's abuse of three nonverbal students with autism. The suit was for $35.8 million. In September 2017, the court denied dismissal of the Section 504, ADA, and state common law claims. Subsequently, the district entered into a settlement for $1.2 million, leaving the determination of attorneys' fees and costs to court within agreed-upon maximums of $500k and $425k, respectively. In this final stage of the litigation, the plaintiffs' lawyers submitted itemized bills for $678k and $428.5k, respectively, and voluntarily agreed to reducing these totals to the specified maximum amounts.	
The defendant district contended that the hourly rates for the five attorneys (ranging from $400 to $700) and their four paralegals ($250) were unreasonable in comparison to the prevailing market rate in Las Vegas. One attorney was local; all the paralegals and the other attorneys were from the Bay Area of California.	The court ruled that the two lead attorneys were entitled to Bay Area rates of $700/hr. due to the limited availability of local specialized attorneys and the defendant's failure to show that the local attorney's $425 rate was unreasonable for the community. However, the court reduced the rates for remaining attorneys and the paralegals to the local level based on their failure to show that comparable services were not available locally.
The defendant also challenged the number of hours that the plaintiffs' billed.	The court found the number of hours billed was reasonable largely due to the voluntary reduction to the agreed-upon maximum.
The defendant additionally argued for reduction in the total amount in light of the limited success of the plaintiffs, pointing out that the settlement was only 3% of the $35.8 million that the plaintiffs had sought.	While acknowledging the relatively slight percentage, the court reasoned that (a) "an award greater than $1,000,000 cannot be deemed nominal" and (b) the award has a deterrent effect on the abuse of students with disabilities.
Finally, defendants claimed that the separate $425k for costs, which were largely for expert witnesses (75%) and depositions (17%), was excessive.	Although acknowledging that the billed costs were high even upon reduction to the maximum, the court concluded that the defendants had not met their burden to show that the net total was unreasonable.
Thus, in addition to the $1.2 settlement, the district in this case was liable for almost the same amount (specifically $500k+$425k= $925k) for the plaintiffs' attorneys' fees and costs (in addition to its presumably similar defense expense). Although illustrating the sticker shock of such transaction costs, these amounts are not entirely generalizable to IDEA-based special education litigation because—unlike federal civil rights laws, such as Section 504—the IDEA does not provide for recovery of expert witness fees and, in most jurisdictions, money damages. Nevertheless, the bottom line is that staff abuse of students with disabilities can lead, with or without settlement, to costly consequences for school districts.	