SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions of general significance, specifically addressing the questions of (a) whether a functional behavioral assessment (FBA) qualifies as an evaluation under the IDEA, and (b) to what extent a school nurse's advocacy on behalf of students with disabilities provides legal protection from adverse employment action.

In an officially published decision in *D.S. v. Trumbull Board of Education* (2020), the Second Circuit Court of Appeals addressed the question of whether an FBA is an evaluation under the IDEA, thus requiring parental consent and subject to the regulation for independent educational evaluations (IEEs) at public expense. In this case, the school district voluntarily conducted an FBA each spring as part of the planning process for the IEP of a child with problematic behaviors. Dissatisfied with the 2017 FBA and the 2014 reevaluation of the child, the parents requested an IEE at public expense addressing not only his behavior but also various other specified areas (e.g., SLT, OT, PT, AT, and CAPD). The school district refused and filed for a due process hearing to defend its refusal. The hearing officer followed OSEP guidance that an FBA is an evaluation but ruled against the parents. She ruled that they were not entitled to the requested IEE at public expenses because its scope was well beyond that of the district's reevaluation and FBA. Upon the parents' appeal, the district court affirmed based on the same scope rationale for the FBA after concluding that the reevaluation was beyond the statute of limitations. The parents then appealed to the Second Circuit, which addressed the FBA and related questions.

Did the district's failure to object to the hearing officer's conclusion that an FBA is an evaluation serve as a waiver of this issue?	The appellate court concluded that although often accepting a district's apparent concession of an issue, doing so in this case would pose too much of a risk of misleading parents and schools in applying the IDEA's evaluation requirements.
Does an FBA constitute an evaluation under the IDEA?	No, the Second Circuit concluded that an FBA is understood to be a targeted assessment of a child's behavior, thus not meeting the IDEA definition of an evaluation as being a comprehensive assessment that goes well beyond behavior.
What about the longstanding OSEP interpretation that an FBA is an evaluation?	"[The agency's] interpretation ignores the plain text of the statute and regulations, and therefore we owe it no deference."
What about the scope rationale of the hearing officer's and lower court's IEE ruling?	In dicta, the Second Circuit disagreed, concluding that nothing in the IDEA suggests that a parent cannot challenge an evaluation as being too limited.
What about the statute of limitations for the reevaluation?	Reversing the lower court, the Second Circuit concluded that the time period to challenge an evaluation is until the next evaluation occurs.
Although only binding in Connecticut, New York, and Vermont, this decision is the highest judicial authority to date on these various questions and, thus, its significant rulings merit careful attention and assessment in other jurisdictions.	

In an officially published decision in *Kirilenko-Ison v. Board of Education of Danville Independent Schools* (2020), the Sixth Circuit addressed the Section 504/ADA retaliation and state whistleblower claims of a school nurse who had received a five-day suspension without pay in the wake of disagreements with the parents of two students with diabetes as to the mutual implementation of these students' 504 plans.[*] The court also addressed the nurse's failure-to-accommodate claim under Section 504/ADA and parallel state civil rights law that arose at the start of the next school year. She requested various accommodations based on multiple purported diagnoses, including Parkinson's, POTs, and polyneuropathy. She claimed that the school board forced her to resign by requiring medical authentication of her asserted disability diagnoses, as a pre-condition of determining whether to approve or deny her requested accommodations. The lower court granted the district's pretrial motion to reject all of her claims. She filed an appeal with the Sixth Circuit.	
For the retaliation claim, the appeals court reversed the lower court to the extent of allowing the plaintiff-nurse to proceed to a trial. The court concluded that she had provided sufficient evidence for a jury to make a final factual determination of the applicable flowchart-like steps: (a) did she engage in protected activity under Section 504/ADA; (b) if so, did she prove her suspension was causally connected to this activity; (c) if so, did the school district prove that it had a legitimate, nondiscriminatory reason for the suspension; and (d) if so, did she prove that this reason was a pretext for discrimination?	The sufficient evidence the appeals court found for each step was: (a) their complaints to the superintendent about the district's acquiescence to the parent's noncompliance and requests could reasonably amount to the protected activity of advocacy on behalf of students with disabilities; (b) the timing and related circumstances of the suspension could reasonably amount to the requisite causal connection; (c) the district's proffered reason of its FAPE obligations under Section 504 and the plaintiff's obligations under the nurses' code of ethics could reasonably be determined to be legitimate and nondiscriminatory, and (d) the alleged threats by the administration and the allegedly good employment record of the plaintiff raised a genuine issue of possible pretext.
For the whistleblower's claim, the appellate court affirmed the judgment for the defendant-district.	The plaintiff did not meet the requirement of the state whistleblower's law of reporting to a state agency any school district violation of law.
For the failure-to-accommodate claim, the Sixth Circuit also affirmed the lower court's summary judgement for the defendant-district.	For employee disability claims, Section 504 and the ADA require an interactive process, and precedent in the Sixth Circuit allows districts to require documentation of asserted disability status.
In some cases, either the plaintiff's or the defendant's assertion of ethically proper conduct may or may not square with the specific boundaries and standards of law. The mixed outcome in this case gives school professionals, including but not limited to nurses, teachers, and administrators, reason to think twice about their actions and reactions under the federal and state laws specific to employees, including those who assert disability status or who advocate on behalf of others with disabilities.	

[*] This case also extended to a second plaintiff, who was a part-time school nurse, with similar but not identical claims and factual allegations.