SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions of general significance, specifically addressing (a) FAPE and the remedy of compensatory education, and (b) FAPE and the remedy of tuition reimbursement, along with an added flourish under Section 504 and the Americans with Disabilities Act (ADA). For related information about these broad issues, see **perryzirkel.com**.

In an unpublished decision in *P.P. v. Northwest Independent School District* (2020), the Fifth Circuit Court of Appeals addressed the issues of FAPE and compensatory education in a case of a middle-school child in Texas with various specific learning disabilities including reading (per a dyslexia diagnosis) and math. The parents sought Lindamood Bell programming first in the IEP and ultimately in the form of compensatory education relief. The hearing officer ruled that the district's initial IEP for the last few months of grade 5 and the IEP for grade 6 provided FAPE but the district violated its child find duty for approximately six months starting near the end of grade 4. However, she denied the requested relief of compensatory education. Upon both parties' appeal, the federal district court agreed with the hearing officer's rulings except for the grade 5 IEP. Both sides again appealed, this time to the Fifth Circuit, which encompasses Louisiana, Mississippi, and Texas.	
For FAPE, the Fifth Circuit applied its own multi-factor test, concluding that both the grade 5 and 6 IEP**s** provided FAPE.	Its relevant rulings included that the reading method was within the school district's discretion and that the child was not entitled to an interim IEP prior to the completion of the evaluation.
For compensatory education, the only remaining basis was child find, but Fifth Circuit reviewed and affirmed the denial at the lower level more broadly in terms of the parents' burden to show a supporting (a) balance of equities and (b) foundation of expert testimony.	The Fifth Circuit respectively concluded that (a) the parents had unreasonably refused the district's offers of remedial services and stymied its efforts to correct the deficiencies in the initial IEP, and (b) the parents' expert recommended 240 minutes of dyslexia instruction but she lacked training or expertise specific to dyslexia.
This ruling illustrates not only the rather nuanced differences in the determinations of FAPE and, particularly relevant during the present COVID-19 context, the much more unsettled state of the law with regard to the remedy of compensatory education.	

In an officially published decision in *Montgomery County Intermediate Unit No. 23 v. A.F.* (2020), a federal district court in Pennsylvania addressed the tuition reimbursement claim of the parents of a preschool child with autism. When the child reached the age of 3, MCIU, which was the agency responsible for providing early intervention services under the IDEA, evaluated him, confirming the earlier diagnosis of autism. The initially proposed IEP included 90 minutes per week of behavior support in addition to various other services, such as speech/language therapy (SLT) and occupational therapy (OT). The parents disapproved this proposal, insisting that he needed intensive applied behavioral analysis (ABA) and higher levels of OT and SLT. MCIU revised the IEP to include increased OT and SLT but no longer any behavior support. Upon visiting the proposed classroom, the parent asked about ABA, and the MCIU representative mistakenly replied that the only personnel with ABA training were the classroom aides. At two subsequent IEP meetings, the Agency representatives were very general in response to the parents' specific concerns about intensive ABA services, and the IEP remained unchanged. The parent unilaterally placed the child in a private ABA placement and sought tuition reimbursement. The hearing officer ruled that MCIU's proposed IEP was substantively appropriate but the cursory information that MCIU provided to the parent was a fatal procedural violation warranting the requested reimbursement. Both sides appealed to federal court.	
For the substantive FAPE claim, the court reversed the hearing officer because in concluding that the proposed IEP met the *Endrew F*. standard he relied on testimony that materially altered, rather than clarified, the IEP.	This qualified "four corners" approach, which excludes evidence not in the IEP unless it clarifies ambiguities in its provisions, overlaps with but is not the same as the "snapshot standard" for evaluating substantive FAPE. In borrowing this approach from the Second Circuit, this court pointed to the testimony about behavior support services, which the IEP completely lacked.
For the procedural FAPE claim, the court agreed with the hearing officer that MCIU's inadequate information about behavior support and ABA in the wake of the parents' concerns and the IEP's silence denied them meaningful participation.	The court agreed with the hearing officer that this violation was "fatal" because it significantly impeded the parents' opportunity to participate in the IEP process. Without a reasonable explanation about these critical services, the parents were unable to evaluate or contribute to the appropriateness of the proposed IEP.
For the ADA claim that the parents additionally brought, the court ruled in their favor based on the two-birds-with-one-stone logic of an IDEA denial of FAPE meaning an ADA or § 504 FAPE denial.	The court did not mention the additional hurdle of deliberate indifference, which would clearly apply if they sought attorneys' fees, but the advantage to the parent is the possible entitlement to expert witness fees, which are not available under the IDEA.
Although repeating the frequently visited issues of tuition reimbursement and autism, this case illustrates (a) the importance of reasonably communicating the critical elements of the child's proposed FAPE in the meeting and in the resulting IEP document, and (b) the added wrinkle that § 504 or the ADA may add in litigation after exhausting due process under the IDEA.	