SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions illustrating the IDEA issues of "stay-put" and "reverse" attorneys' fees. For automatic e-mailing of future legal alerts, sign up at **perryzirkel.com**; this website also provides free downloads of various related articles and special supplements.

In its July 14, 2021 decision in *E.E. v. Norris School District,* the Ninth Circuit Court of Appeals addressed the IDEA issue of "stay-put" in the COVID-19 context. A few months prior to the pandemic, the parents of a first grader with autism filed for a due process hearing, claiming denial of FAPE. Soon thereafter, the IEP team issued a new IEP changing the placement of the child from a largely general education classroom in School A to a self-contained special education class in School B. The hearing officer ruled that the district materially failed to implement the prior IEP and commented that the proposed IEP at School B was the stay-put. Upon the parent's request for a preliminary injunction, the federal district court ruled instead that the stay put was the mainstreamed classroom in school A. The school district appealed to the Ninth Circuit, contending that the hearing officer had applied the correct standard and, if not, that the parent's challenge to the then current placement as a failure to provide FAPE should be a judicially public policy exception to the established approach to stay-put.

For the established standard, the Ninth Circuit concluded that the IDEA's requirement for maintaining the "then current placement" refers to the placement of the child at the time of filing for the hearing, which was the prior (i.e., School A)—not proposed—IEP.	Absent an agreement between the parties for another placement during the proceedings, the court concluded that the hearing "lacked the legal authority to reinterpret the word 'current' in the statute to 'future.'"
For the alternative argument, the court rejected the asserted public policy exception for parents challenging the appropriateness of the then current placement, finding it to be contrary to the language of the statute and without support in any other legal authority.	The court explained in challenging the district's proposed placement in favor of a different and better package of services, parents may have a legitimate concern that the district's proposal is worse than the child's current placement.
The Ninth Circuit did not specifically address the circumstances of the COVID-19 context, but implicitly seemed to reject any such "special circumstances" exception to stay-put.	The Ninth Circuit indirectly addressed the pandemic by affirming the lower court's stay-put order to maintain the challenged IEP "as best as possible" in the absence of a joint agreement.
The IDEA's stay-put (also known as the status quo or pendency) provision was a policy choice that Congress has left unchanged and that has been subject to various judicial refinements. However, although COVID-19 presents continuing claims about the meaning of "then current placement" upon changes to and from full in-person, in-school instruction, hearing officers and courts are not likely to reinterpret "then" as other than the time of either party's filing for the due process hearing.	

In *Oskowis v. Sedona-Oak Creek School District* (2021), the Ninth Circuit Court of Appeals addressed a parent's challenge to the lower court's costly adverse ruling under what is sometimes called the reverse attorneys' fees provision of the IDEA. Although since the 1986 amendments the IDEA has provided courts with the discretion to order the defendant education agency to pay the attorneys' fees of "prevailing" parents, it was not until the 2004 amendments that Congress added a more limited provision in the opposite direction. Relevant to this case, IDEA 2004 authorized courts to order the plaintiff parents or their attorney to pay the reasonable attorneys' fees of the prevailing defendant education agencies if the parents' complaint or ensuing litigation was for an improper purpose. Here, in the latest in a long series of filings against an Arizona district, the parent of a child with autism appealed to the court the dismissal of three successive due process complaints that hearing officers ruled as being frivolous. After the court consolidated and upheld these rulings, the defendant district filed a motion for attorneys' fees against the parent, who had engaged in the hearing officer and court proceedings "pro se," meaning without attorney representation.	
Because the school district had unquestionably prevailed, the next criterion for determination, at least in the Ninth Circuit, was whether the claims were frivolous.	Providing due allowance for novel or at least marginal claims, the lower court concluded that all of the parent's latest claims were objectively and wholly without legal and factual foundation. The Ninth Circuit agreed via a summary affirmance.
The next criterion for the judicial determination was whether the claims were for an improper purpose, such as harassment or unnecessary delay. For this determination too, the test is objective, i.e., a reasonable person standard.	Citing the persistent pattern of the parent's 43 separate legal actions against the district, even though he prevailed in a few of them, the lower court concluded that these latest claims were for the improper purposes of harassing the district and needlessly increasing the litigation costs. The Ninth Circuit summarily affirmed.
The final question was whether the district's request for $47.6k for attorneys' fees was reasonable in relation to prevailing community rates and documented non-excessiveness.	Finding a few time entries that were not sufficiently detailed, the lower court adjusted the total to $41.2k. The award, which the Ninth Circuit summarily affirmed, additionally included $557 of court costs in comparison to the district's amended request of $574.
As the 2015 "Attorneys' Fees" article [PDF] and the March 2018 monthly update [PDF] (both available on perryzirkel.com) show, reverse attorneys' fees awards are rare. Nevertheless, this provision in the IDEA raises serious policy questions that overlap with the availability and affordability of parent-side special education attorneys in various jurisdictions, the increasing ponderousness of the adjudicative process, and the choice of some parents to become frequent filers and/or to proceed pro se.	