SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies court decisions that address current issues for students with disabilities, including dyslexia identification/ interventions and masking policies. For various related articles, special supplements, and earlier monthly updates, see **perryzirkel.com**.

On January 12, 2022 in *Crofts v. Issaquah School District No. 411*, the Ninth Circuit Court of Appeals addressed the evaluation of and successive IEPs for a student with dyslexia. In the summer before the student started grade 2, the parents obtained an independent educational evaluation (IEE) that concluded that the student presented with "the classic profile of the specific learning disability of dyslexia." Providing the report to the district, the parents requested an eligibility evaluation under the IDEA. The district's evaluation determined that the student was eligible under the classification of specific learning disabilities (SLD). The resulting IEP provided for 40 minutes of reading and writing instruction per day in a special-education resource room as well as several accommodations in the general education classroom. At the end of grade 2, the student progressed toward but did not meet the goals in the IEP. The IEP team revised the goals and increased the special-education instructional time to 60 minutes per day. In grades 2 and 3, the IEP team rejected the parents' respective requests for (a) the Orton Gillingham reading program and (b) the specific classification of dyslexia and an IEE at public expense. The resulting due process hearing and federal district court decisions were in favor of the district, and the parents appealed to the Ninth Circuit.

For the evaluation, rejecting the parents' arguments based on the IDEA requirements for a comprehensive evaluation that assesses "all areas of suspected disability," the Ninth Circuit ruled that "the District did not procedurally violate the IDEA when it found [the student] eligible for language-related services under the [SLD] category rather than using the term 'dyslexia.'"	Careful reading of the court's rationale provides potentially mixed signals. The use of "procedural" in the ruling suggests that the parents faced the additional hurdle of showing resulting harm for denial of FAPE. On the other hand, the court narrowly reasoned that (a) the district's evaluation in this case incorporated the original IEE's dyslexia assessment and (b) the parents had neither identified any additional testing needed for this purpose nor shown that the student's educational difficulties were so different from SLD to require this specific label.
For the IEPs in grades 2 and 3, sidestepping the parents' contention that the student would have obtained more progress with Orton Gillingham, the Ninth Circuit ruled that the district met the substantive standard under *Endrew F.* without providing for this specific approach.	Although citing the traditional judicial deference to district's methodological discretion in the provisions and implementation of this aspect of IEPs, the Ninth Circuit recognized the exception for preponderant proof that a particular approach was necessary for the requisite progress. Similarly mixed in potential application, the court reasoned that the *Endrew F.* standard does not require meeting "all" IEP goals or grade-level expectations.
The bottom line is to continue individualized evaluation and FAPE determinations with due consideration for, but not overreliance on, particular diagnoses, such as dyslexia; methodological brands, such as Orton-Gillingham; or stilted interpretations of *Endrew F*.	

In response to the COVID-19 pandemic, various states have adopted policies that prohibit school districts from requiring masking of students and staff. The result has been litigation in several federal courts in which parents of medically vulnerable students with IEPs or 504 plans have claimed that such bans violate their rights under Section 504 of the Rehabilitation Act (§ 504) and the Americans with Disabilities Act (ADA). Although the challenged state policies are not all identical in their rigor and the pandemic context is similarly fluid, most of the federal district courts resulted in preliminary injunctions in favor of the plaintiff-students. However, four of these cases have resulted in federal appeals court decisions that reveal the unsettled state of the case law, with further judicial developments on the horizon.	
On November 19 in *G.S. v. Lee* and December 20, 2021 in *M.B. v. Lee*, the Sixth Circuit Court of Appeals denied Tennessee's motion for a stay of the lower courts' preliminary injunctions against the governor's order banning school district mask mandates.	The Sixth Circuit relied on the defendant's failure to show alternative reasonable accommodations under § 504/ADA beyond universal masking but pointed out that "there are significant arguments in favor of both sides of this case" for the various factors applicable for preliminary injunctive relief.
On December 1, 2021 in *E.T. v. Paxton*, the Fifth Circuit Court of Appeals granted Texas' motion for an emergency stay of the lower court's injunction prohibiting enforcement of the governor's ban, pending an ultimate appellate decision on the merits.	The Fifth Circuit alternatively relied on the plaintiff-parents lack of standing, their failure to exhaust due process hearings under the IDEA, and their failure to show that universal masking, as compared with other mitigation measures, such as social distancing and voluntary masking, was the requisite reasonable § 504/ADA accommodation.
On January 25, 2022 in *Disability Rights South Carolina v. McMaster*, the Fourth Circuit Court of Appeals vacated the lower court's preliminary injunction against the legislature's ban, but it only applied to the two of the original more widespread group of defendants who appealed—the governor and the state's attorney general.	The Fourth Circuit relied on its conclusion that the plaintiffs had not shown the requisite elements for standing. However, the decision was split 2-to-1, with the blistering dissent in the plaintiffs' favor, and, more importantly, the majority relied on a state supreme court ruling that the ban did not apply to school districts' use of funds beyond the 2021-22 appropriation act.
On the same day in 2022 in *ARC of Iowa v. Reynolds*, the Eighth Circuit Court of Appeals rejected the defendants' arguments based on standing and exhaustion but modified the lower courts' injunction to apply only to the schools that the plaintiff-students attended.	This decision was also 2-to-1, with the dissent relying on the IDEA's exhaustion provision, but the majority concluded that requiring at least some staff and students to wear masks (presumably those who posed direct risk to the plaintiff students) was the requisite reasonable accommodation under § 504/ADA.
These four decisions reveal not only the lack of a prevailing judicial view with regard to masking policies in schools in relation to medically vulnerable students with disabilities but also the complex litigation issues, including the prerequisites of standing and exhaustion and the ultimate contours of reasonable accommodations under § 504/ADA. Moreover, these rulings are only at the preliminary stage in the ponderous process of judicial decision-making, and they do not address other challenging issues, such as the § 504/ADA rights of students who have disability-related difficulties with mask wearing. In these polarized political times, the ultimate challenge for educators, parents, and other stakeholders is to find solutions that are a rational, effective, and harmonizing compromise among various competing interests and views.	