# SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies two recent court decisions that respectively address (a) various FAPE issues and (b) the less frequent but ongoing issue of LRE under the IDEA. For related articles, special supplements, and earlier monthly updates, see **perryzirkel.com**.

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| **In *Beebe School District v. Does,* an unpublished decision on March 30, 2022, a federal district court in Arkansas reviewed a hearing officer's decision that was in favor of the parents. The school district screened the student in grade 1 for dyslexia per the state's strong dyslexia law. In grade 2, the district determined, based on a comprehensive evaluation, that the student qualified for special education under the IDEA category of specific learning disability. The resulting IEP provided direct multi-sensory instruction, including dyslexia-specific interventions. The parents agreed that the student made good progress under the IEP in grade 2. However, they perceived a change in her school attitude and performance in grade 3 (2019–20), although her teachers maintained that she continued to make progress. During the last few months of that year, upon the pandemic transition to virtual instruction, the student experienced regression despite the teachers' erstwhile efforts. As a result, the parents unilaterally placed her in a private school that specialized in dyslexia and filed for a due process hearing to seek tuition reimbursement. The hearing officer ruled that the district failed to provide FAPE, ordering tuition reimbursement for one year and, if the parents decide to reenroll her in the district, a dyslexia-specific evaluation and a revised IEP including a state education agency-approved dyslexia program. The district appealed this decision, and the parents counter-claimed for the private school transportation expenses and their attorneys' fees under the IDEA and money damages under Sec. 504/ADA.** | |
| The parents argued that the district's dyslexia program per the child's IEP was not on the state education agency's approved list, which the state's 2019 Ready to Read Act requires for new purchases of dyslexia programs. | The court rejected this argument, finding that legislation to have limited applicability here, because (a) it only covered new purchases and was not exclusively limited to the approved list, (b) the child received supplemental dyslexia interventions beyond the challenged program, and (c) the district's justification for not immediately switching to a program on the approved list was reasonable. |
| The parents claimed that the child's lack of progress during the pandemic period was a clear violation of the substantive standard for FAPE under *Endrew F*. | Again disagreeing, the court cited the district's significant and responsive efforts during grade 3 before and during the pandemic period, concluding that the district met the reasonable-calculation standard under the particular circumstances regardless of the extent of actual progress. |
| Losing their requested relief under the IDEA, the parents pointed to their alternative claim under Sec. 504/ADA. | The court rejected this claim based on the prevailing requirement, at least for money damages under Sec. 504/ADA, for proof of a proxy for intentional discrimination, which in this jurisdiction amounts to gross misjudgment or bad faith. |
| This case is another illustration of increasing role of dyslexia, the latitude in the *Endrew F.* decision, and the limited litigation effect of not only the pandemic but also, at least for money damages, Sec. 504/ADA. | |

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| **In *H.W. v. Comal Independent School District*, an officially published decision on April 27, 2022, the Fifth Circuit Court of Appeals addressed the FAPE and LRE issues for a third grader who was first identified in kindergarten as eligible for special education in kindergarten based on Down Syndrome and various other learning and health impairments. Based on inadequate progress, her IEP for grade 1 provided for more inclusion support along with resource instruction in reading and math and a revised BIP. For grade 2, the district proposed an alternative rather than modified curriculum and increased separate special education services in light of the child's continuing academic and behavioral difficulties, but relented to the parents' adamant insistence on further inclusion support along with ESY. In November of grade 2, the parents reluctantly agreed to amend the IEP for more resource-room instruction. However, at the IEP meeting in the spring semester, the district proposed changing the placement to the majority of the school day in a self-contained special education classroom due to the child's failing grades in all subjects and related behavioral difficulties. This "blended" placement included 150 minutes per day in the general education classroom for nonacademic and other such activities. The parents disagreed and requested an IEE at public expense. The district initiated IEEs by a speech-language therapist and a private psychologist, but before their completion the parent filed for a due process hearing. Both IEEs recommended continued inclusion, but the hearing officer ultimately decided that the proposed blended placement provided FAPE in the LRE. Upon the parents' appeal, the federal district court affirmed the hearing officer's decision. The parents appealed to the Fifth Circuit (which covers Texas, Louisiana, and Mississippi), focusing their challenge on the jurisdiction's long-standing multi-factor analysis under *Daniel R.R.* (5th Cir. 1989).** | |
| The first factor is whether the school district has taken steps to accommodate the child in general education. The court's answer was "yes." | The court concluded that the district met this factor via its repeated revisions of the IEP, which included successive increases in inclusion support and amounted to the opposite of prohibited "mere token gestures." |
| The second factor is whether the child received meaningful academic and non-academic benefits in general education. The court's answer was "no." | Rejecting an IEP-centric test in favor of a holistic approach to "meaningful," the court concluded: "Even though [the child] ultimately mastered many of her goals, she was still regressing and falling behind in other areas, such as test scores and percentile rankings." |
| The overlapping third factor is whether the child's balance of benefits was in favor of general education. The court's answer was "no." | Although recognizing the potential benefits of language models in general education, the court concluded that her academic and behavioral benefits were much more notable than her increasing stagnation in the inclusive placement. |
| The final factor is whether the child had a disruptive effect on her nondisabled peers. The court's answer was "yes." | The court found that she engaged in various disruptive behaviors, including hitting, biting, and kicking staff and peers; screaming and moaning; and swiping materials off desks. |
| This case illustrates the application of the multi-factor test that prevails in most jurisdictions and that yields varying judicial outcomes. | |