SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions addressing IDEA issues arising during the extended pandemic period, warranting special consideration of districts' FAPE obligation. For related publications and earlier monthly updates, see **perryzirkel.com**.

In respective rulings on October 10, 2022 and November 7, 2022, the state appeals court (*In re Special Education Complaint 22-027C*) and the federal district court in Minnesota (*Skaro v. Waconia Public Schools*) addressed the various claims of the parent[*] of 3 children with IEPs and at least 1 with high health risk. When the District resumed in-person learning in the 2021–2022 school year without mandatory masking (after having provided virtual instruction various parts of the previous period due to the pandemic), the parent refused based on safety concerns. Insisting on virtual instruction without any direct contact with District personnel, the parent declined the District's various proposed alternatives, including a separate special education classroom with specified mitigation features. A series of legal actions ensued. At a due process hearing under the IDEA for these 2 children, the parents contended that home-based virtual services would be the LRE rather than the District's "segregated" classroom, but the hearing officer decided in the District's favor. The parents separately filed a charge of discrimination under the state's civil rights law with the Minnesota Department of Human Rights, which concluded that there was no probable cause for their claim for home instruction. They filed a state complaint under the IDEA with the Minnesota Department of Education, which decided in their favor after an investigation, concluding that the IDEA obligation to "provide" FAPE meant that the child would "receive" the services specified in their IEP, not just have them available. Because Minnesota is one of the relatively few states that provide for judicial appeal of state complaint decisions, the District filed for judicial review in the appropriate state court. Finally, the parents separately filed a pro se (i.e., without an attorney) a lawsuit in federal court seeking 20 million dollars in damages.

The state appeals court reversed the state complaint decision, concluding that the plain meaning of "provided" in the IDEA and parallel state law is "offered," or made available.	The state's interpretation was not reasonable because (1) it is inconsistent with the statutory standard for awarding compensatory education; (2) parents have a "reciprocal obligation" for cooperation under the IDEA; and (3) requiring "receiving" when the parent refuses would impose liability for circumstances beyond the district's control.
The federal court dismissed the parent's various claims based on lack of subject matter jurisdiction for several threshold adjudicative reasons.	The parent (a) failed to appeal the due process decision within the allowable period, (b) is similarly time-barred with regard to the discrimination complaint; (c) is not allowed to relitigate the state court ruling in federal court; (d) failed to make service of process for some defendants; and (e) failed to "exhaust" any new claims.
This case illustrates the formidable challenges for parents and districts during and immediately after the pandemic that thus far have resulted in court rulings under the IDEA. The parents reportedly have already filed an appeal with the Seventh Circuit.	

[*] The term "parent" is used generically here for clarity, although one of the parents filed at least one of these claims and both parents filed the others.

On October 28, 2022, a federal district court in Pennsylvania issued an unpublished decision in *A.D. v. Upper Merion School District*, addressing IDEA issues in the wake of the pandemic. In this case, the child was a nine-year old with significant health problems and conditions affecting brain development, and the great grandparents (here referred to generically as "guardians") had full legal custody since the child's birth. In 2019–2020 before the school's COVID-19 closure, the IEP provided for half of the school day in the regular kindergarten and the other half in a special education classroom; an aide and a BIP; and the related services of PT, OT, and SLT on a pull-out basis. During the state-mandated school closure, the District provided iPads and distance learning from March 30 to May 28, 2020, initially on an asynchronous basis and, after April 20, synchronously. Due to the guardians' technological problems and the child's behavioral problems, the District provided the guardians with tech support and substantial personalized assistance, but the guardians were uncooperative. They insistently requested having the school personnel provide the IEP services in-person at their home, which the District declined based on public health concerns. For 2020–2021, the District resumed in-person services at school on a phased basis. After 2 weeks of continued virtual instruction, the District invited selected special education students, including the child, to return for in-person instruction with various mitigation measures, such as social distancing, but the guardians refused based on concern for the child's health. Due to heightened COVID concerns due to holiday travel, the District returned to virtual instruction between Thanksgiving and the New Year, when in-person instruction resumed. The guardians and approximately a third of the other parents chose to continue virtual instruction, but for the child the technological and behavioral problems persisted at the expense of the child's attendance and progress. After the guardians filed for a due process hearing, the hearing officer decided in the District's favor, and they appealed to federal court. The court addressed both *Endrew F.* and compensatory education in these special circumstances with 4 successive conclusions.	
As of March 2020, the court concluded that "it was reasonable to expect the child's guardians to implement the IEP in light of the substantial resources and assistance the District provided."	The court pointed out the District-wide provision of iPads and straightforward instructions for parents/guardians to have a "learning coach" role in addition to the extensive added assistance offered to the child's guardians based on their individual circumstances.
By May 2020, when it was reasonably clear that virtual instruction could not be successfully implemented for the child, any change in course would have to wait until the next school year.	Because the Third Circuit had established a long-standing precedent for a reasonable period for rectification of a denial of FAPE in the equitable calculation of the compensatory education, the court concluded that the guardians were not entitled to this requested remedy for this period.
For the 2020–2021 school year, the court ruled that the District satisfied its FAPE obligation by offering an appropriate IEP that the guardians opted against.	A key factor in this case was that although assessing the child and the guardians to be at high risk, the child's physician characterized the choice of keeping the child at home as being at their discretion rather than medically mandatory.
For the two limited periods of District-wide virtual instruction, the District denied FAPE to the child.	Here, the reasonable rectification deduction did not apply, because the District had the intervening summer to devise a reasonable alternative.
Overlapping with the previous case, this one illustrates the muddied waters during and immediately after the pandemic closure, when the individualized determination of whether the District met the substantive standard for FAPE under *Endrew F.* includes the special expectations for parents or guardians and the fact-based role of their choices.	