SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions that illustrate the intersection of the continuing IDEA issues of child find and least restrictive environment (LRE) with current concerns, such as threats of school shootings and interpretations of the Supreme Court's *Endrew F.* decision, respectively. For related publications and earlier monthly updates, see **perryzirkel.com**.

On December 20, 2022, the Tenth Circuit Court of Appeals issued an unpublished decision in *D.T. v. Cherry Creek School District*, addressing the IDEA's child find obligation for a student who threatened to "shoot up" his high school. In grade 9, the student earned a weighted grade point average (GPA) of 3.36, although his mother emailed his school counselor at the midpoint of the year that her son was depressed and struggling to acclimate to the high school. In grade 10, his GPA dropped to 2.42. In April of that school year, his mother emailed the school counselor reporting his struggles with suicidal ideation. The school psychologist promptly followed up with a suicide risk assessment resulting in high concern, a referral to the Colorado Crisis Center for a follow-up evaluation, and information for the parent to obtain financial assistance for his mental health counseling. His mother replied about 2 weeks later that the immediate risk had abated but that her son refused therapy. On September 17 of grade 11, his mother emailed the counselor, reiterating his behavioral issues at home. The school counselor met with him the next day, finding confirmation of his discontent with family life. Three days later, after an argument with his parents, he left home and checked himself into the local children's hospital for a mental health evaluation and inpatient psychiatric treatment. The hospital discharged him a week later with diagnoses of Major Depressive Disorder and Unspecified Anxiety Disorder. The school counselor and school psychologist implemented a reentry plan in late September and further informal accommodations during October pending an evaluation for and formulation of a 504 plan. On November 10, a classmate reported that the student had threatened "to shoot up the school." The school immediately contacted him, whereupon he admitted to the statements but denied any intent to take any such action. Soon thereafter, the district took two overlapping steps: (1) expelling him after determining that the offense was not a manifestation of his disability, and (2) conducting an initial evaluation under the IDEA that determined he was eligible for special education under the classification of emotional disturbance (ED) and, thus, entitled to FAPE in another placement. He eventually graduated from a high school in another district, but his parent filed a due process hearing based on their claim that his original district had reasonable suspicion of ED eligibility as early as April of grade 10 and, thus, violated child find under the IDEA. The hearing officer and the federal district court concluded that the district did not have the requisite reasonable suspicion until the time of the school-shooting threat. His parents appealed to the Tenth Circuit.

Focusing on the classification prong of suspected eligibility, the Tenth Circuit relied on the additional critical requirements for ED in Colorado's corollary state law —(a) the criterion of at least 2 settings; (b) the prior use of general education interventions without success; and (c) the exclusion of isolated situational responses to the child's environment.	Finding no reason to suspect ED eligibility, the Tenth Circuit observed that (a) the purported red-flag emails focused on the student's difficulties in the home setting at a time when he had "no substantial behavioral issues during school, and he continued to engage in his studies"; (b) the school provided a variety of responsive mental health accommodations and supports that seemed sufficient; and (c) the connection of his emotional episodes to environmental stressors, such as family conflicts and honors courses.
This case illustrates variation in applying the totality-of-the-circumstances approach and the potential role of state law in child find cases.	

On December 20, 2022, the Ninth Circuit Court of Appeals issued an officially published decision in *D.R. v. Redondo Beach Unified School District*, addressing the IDEA presumption for the least restrictive environment (LRE). In this case, a student with autism made progress socially but fell increasingly behind his nondisabled classmates in a 75% inclusive placement, which included a 1:1 aide, in grades 3 and 4. Despite meeting 4 of the 6 academic goals on his IEP and making progress on the remaining 2, the school members of the IEP team at the end of grade 4 proposed changing his placement for grade 5 so that the majority (56%) of the school days would be in a special education class. They pointed out that he was several grades below his nondisabled peers in math and language arts and that he spent most of his time in the regular classroom working with his aide on a heavily modified general education curriculum. His parents, who had successfully resisted such proposals in grades 3 and 4, reached their frustration point, withdrew him and, after searching without success for a suitable private school, hired an instructor for a 1:1 educational program. They filed for a due process hearing, claiming that the district's proposed placement violated LRE and seeking reimbursement for the costs of the private instructor. The hearing officer and the federal district court ruled in favor of the district, and the parents filed an appeal with the Ninth Circuit, which covers the 9 states in the Far West. Recognizing that the other factors in the Ninth Circuit's long-standing *Rachel H.* test for LRE favored the parents, the school district focused on the most important first factor—comparing the child's academic performance in the more inclusive placement with that in the less inclusive placement.	
The defendant district argued that the child's academic performance several grade levels below his peers meant that education in the regular education classroom could not be achieved satisfactorily, thus outweighing the other factors under the Ninth Circuit's test for LRE.	The Ninth Circuit disagreed, interpreting the Supreme Court's *Endrew F.* decision to mean, for students whose disabilities preclude grade-level performance, that the appropriate academic benchmark is progress toward meeting their IEP's academic goals.
Next, the defendant district argued that even if the IEP academic goals constituted the appropriate benchmark, the comparison for reasonably calculated progress was in favor of the more segregated placement.	The Ninth Circuit again disagreed, here relying on "unrebutted expert testimony, based on a wealth of … peer-reviewed studies" that showed better academic outcomes in inclusive placements than in segregated settings.
The defendant district's final argument was that due to the 1:1 aide and the substantively modified curriculum, the child was "effectively on an island in general education for academic purposes," thus making the comparison a fiction.	Once again disagreeing, the Ninth Circuit cited the IDEA regulations for LRE in concluding that the use of supplementary aides and services and curricular modifications are part and parcel of LRE, thus being irrelevant for applying the comparison factors.
Due to the resulting conclusion that the district's proposed placement was not FAPE in the LRE, the parents argued that they were entitled to the remedy of reimbursement, which ultimately depends on the equitable assessment of the reasonableness of both parties' conduct.	The Ninth Circuit concluded that the parents' unilateral removal and private arrangements were not reasonable under the circumstances because they could and should have relied on the applicable consent and stay-put protections.
This decision serves as a reminder of the sometimes surprising judicial outcomes in applying the multiple criteria for both the "strong preference" for LRE and the high-stakes remedy of reimbursement under the IDEA. Similarly, the Ninth Circuit's interpretation of the LRE aspect of *Endrew F.* illustrates the inevitable variance in divining what the Supreme Court meant by "grade-level advancement."	