SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies recent court decisions that illustrate various IDEA issues, including the statute of limitations, the duty to assess all areas of suspected disability, and the continuing residue from virtual instruction during the pandemic period. For related publications and earlier monthly updates, see **perryzirkel.com**.

On January 31, 2023, the Ninth Circuit Court of Appeals issued *D.O. v. Escondido Union High School District*, an officially published decision that addressed the parent's claim that the school district did not timely identify autism for D.O., a fourth grader (2016–17) who had an IEP since kindergarten (2012–13) under the classification of other health impairment (OHI). In June and July 2016, due to violent behaviors in grade 3, the student was hospitalized for psychiatric issues. In October 2016, the district conducted an education-related mental health assessment of D.O. due to his escalating aggression. As part of the assessment, Dr. D, a clinical psychologist retained by the parent, reported her diagnoses of psychosis and mood disorder without mentioning that the parent has asked her to evaluate D.O. for autism. In December 2016, when the members of the IEP team met to review the results of the overall assessment, Dr. D informed them that she had completed an IEE that diagnosed D.O. with autism. A member of the team asked the parent to share a copy of the report, which Dr. D encouraged the parent to do. The parent filed for a due process hearing in March 2017, and the district promptly responded with a request for consent to evaluate D.O. for autism. The parent did not provide her consent, and although the district's attorney repeated the request for a copy of the IEE for the IEP team's consideration, the parent did not provide it until July 2017. In August she provided consent for the district's evaluation. The district completed the evaluation in October 2017, when the team met and concluded that D.O. did not qualify for autism under the IDEA and the state's corollary special education law. The hearing officer ruled in the school's favor. However, the district court reversed, ruling that the 4-month delay between Dr. D's oral report of her autism assessment was unreasonable and that it resulted in a per se denial of FAPE. The remedy included reimbursement for the $3,500 cost of the IEE. The school district appealed to the Ninth Circuit.

The Ninth Circuit agreed with the hearing officer that the private evaluator's oral report of the diagnosis sufficed as the trigger for conducting an evaluation for autism but that the 4-month delay was not a procedural violation.	The delay was justifiable in this case because (a) all of the professional personnel who had provided special supportive services to D.O. during the previous 4–5 years, including the mental health therapist and the school psychologist, disagreed with the autism diagnosis, and (b) the IEP team sought the report so as not avoid the inaccuracy of repeating the same tests within a limited period.
Alternatively, the Ninth Circuit concluded that even if the delay were a violation, it did not result in a denial of FAPE for either D.O.'s substantive right or the parent's participation.	D.O.'s IEP remained the same based on the ultimate unchallenged determination that he did not meet the applicable criteria for autism. The effect on the parent's opportunity for participation was attributable to her delay in providing both the report and her consent, not to the district's actions.
One of the three appellate judges on the panel that decided this case partially dissented, concluding instead that the 4-month delay was unreasonable in light of previous Ninth Circuit decisions but agreeing, in any event, that this procedural denial did not amount to a denial of FAPE. The courts more generally across the country varies rather widely in the "all areas of suspected disability" cases.	

On February 1, 2023, a federal court in Pennsylvania issued an unofficially published decision in *Connor v. Kennett Consolidated School District*, addressing the IDEA FAPE claims for C.J., an elementary student with OHI and SLD, for the period from September 2017 until November 2020. For 2017–18 (grade 2) and 2018–19 (grade 3), the IEPs and their various revisions reflected continuing behavioral problems and classifications of OHI and, upon reevaluation, SLD (in reading) and OHI. The IEP for 2019–20 (grade 4) included a personal care assistant (PCA). The November 2019 reevaluation recommended systematically fading access to the PCA, but CJ's regular PCA's departure precluded doing so, and the resulting use of rotating PCAs increased CJ's behavioral issues. In March 2020, upon the COVID-19 change from in-person to remote instruction, the district refused to provide a PCA for CJ at home, and the alternative of a virtual PCA did not work due to CJ's difficulties with the use of the computer. As a result of his disabilities and the lack of the PCA in his IEP, he rarely attended his online classes. CJ returned to in-person instruction in November 2020, per the district's system-wide phase-in process. The parents' filed for a due process hearing, claiming denial of FAPE for this entire period. The hearing officer ruled that the statute of limitations barred recovery prior to February 2019,* the district denied FAPE during the months of online instruction, and CJ was entitled to compensatory education for this FAPE-denial period. The amount was 5 hours per day, with deductions for (a) the reasonable no. of days it would have taken to rectify the denial initially, and (b) the recovery services that the district had provided to CJ in response to federal and state guidance. Both sides appealed.	
The court reversed the hearing officer's statute of limitations ruling, finding instead that the date that the parents "knew or should have known" (KOSHK) of the alleged prior lack of FAPE for SLD in reading was upon the November 2019 reevaluation.*	The KOSHK date is the key to the IDEA's statute of limitations, although the case law concerning its application varies, with the relevant rulings of the federal courts in Pennsylvania being particularly nuanced.
However, the court ruled that the hearing officer's error as to the KOSHK date was harmless in this case.	The reason is that the court found that, based on the snapshot standard, the previous evaluation and IEPs were appropriate.
The court affirmed the denial of FAPE, finding that the lack of the PCA at home, regardless of state guidance about safety, was fatal in the application of *Endrew F.*'s standard.	The court concluded that "from the time classes went virtual, [CJ's IEP] was no longer reasonably calculated to enable him to make appropriate progress."
The court also affirmed the hearing officer's award of 60 hours of compensatory education, finding the calculation in line with Third Circuit precedent and the equitable nature of this remedy.	The Third Circuit provides for a quantitative approach, with an equitable deduction for reasonable rectification. The deduction for recovery services equitably adjusted against double dipping.
Although the particular rulings may vary in other jurisdictions for these facts, the issues of the statute of limitations, the *Endrew F.* standard during the pandemic and post-pandemic period, and the remedy of compensatory education remain prominent at this time.	

* The hearing officer concluded that the KOSHK date was in fall 2017, when the family enrolled CJ in the district with an IEP from the state where they had previously resided and the district's evaluation showed deficits in reading. Interpreting those "occurrences" as establishing the requisite parental knowledge for their claims, the hearing officer reasoned that their February 2021 filing for the due process hearing was beyond the 2-year period, thus limiting their claims to the last 2 years before filing. In reversing this conclusion, the court explained that the applicable approach was for the discovery, not occurrence, date based on when the parents had reason to be aware of the district's potential violation of the IDEA, which started with an "all areas of suspected disability" claim.