SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

This month's update identifies a pair of recent court decisions that illustrate differing adjudicative systems and approaches for FAPE and related issues. For related publications and earlier monthly updates, see **perryzirkel.com**.

On February 10, 2023, the federal district court of Delaware issued an unofficially published decision in *A.C. v. Brandywine School District*, addressing various claims under the IDEA, Section 504, and the ADA on behalf of an elementary school child. In grade 3, the district provided the child with Tier III response to intervention (RTI) services in reading. In grade 4, the district continued the Tier III RTI services. After the parents obtained and shared a diagnosis for the child of general anxiety disorder, the district conducted in an evaluation that resulted in a 504 plan for grade 5. When the child evidenced continuing anxiety symptoms in grade 5, the parents requested and received an IEE at public expense, which resulted in an added diagnosis of ADHD. The district conducted an IDEA eligibility evaluation toward the end of grade 5, determining that she qualified for an IEP. The resulting IEP for grade 6 included goals for reading and anxiety, services in a learning support class for 90 minutes every other day, and individual counseling for two 30-minute sessions per week as well as consultative counseling. The parents rejected the IEP and unilaterally placed the child in a private school. They filed for a due process hearing, seeking compensatory education for alleged child find violations in grades 4 and 5 and tuition reimbursement for alleged denial of a substantively appropriate IEP thereafter. The tripartite panel, which is unique to Delaware for its hearing officer level, agreed with the parents that the district should have known that the child needed special education services for grades 4 and 5, awarding compensatory education worth $31,800, but ruled that the proposed IEP was appropriate, thus denying the requested reimbursement remedy. The parents appealed, but the school district did not, thus leaving the child find compensatory education award in effect.	
First, the parents challenged the proposed IEP as allegedly providing insufficient reading services and no math services.	The court ruled that the reading services met the *Endrew F.* "reasonably calculated" standard and that there was no reason to suspect the need for specialized instruction in math.
Second, the parents claimed that the proposed IEP failed to address the child' emotional, behavioral, and executive functioning needs.	Again, the court rather cursorily ruled that the proposed IEP met the substantive standard, observing that the services provided in the IEP exceeded the corresponding offerings at the private school.
Third, the parents challenged the proposed IEP as not notifying them of continued RTI services.	The court concluded that RTI was a general education service, whereas the IDEA only requires the IEP to specify the special education and related services.
Finally, the parents claimed that the school district violated Section 504 and the ADA.	Regarding the Section 504 and ADA claims as coterminous with the parents' IDEA FAPE claim, the court applied the same outcome.
This case illustrates not only the courts' often relatively relaxed, district-favorable approach to IDEA and Section 504/ADA substantive FAPE claims but also the skewing effect of selective appeals, which left intact the parent-favorable child find ruling and remedy in this case. As an aside, the extended use of RTI Tier III services likely contributed to the child find violation.	

On March 23, 2023, a federal court in Kansas issued an unofficially published decision in *Beer v. USD 512 Shawnee Mission*, addressing several claims on behalf of a first grader with diagnoses of autism and ADHD. The case started with the parents' disagreement with the district's determination that the child was not eligible under the IDEA. The school district did not change its eligibility evaluation conclusion until the parents obtained and provided the district private diagnoses of autism and ADHD midway through the child's kindergarten year. After belatedly and successively determining that the child qualified under the IDEA classifications of other health impaired (OHI) and autism, the district did not propose an IEP to which the parents consented until November in grade 1. In the remaining months until the school closed for the pandemic, the child did not make progress on the IEP, and the district implemented some changes in the IEP without parental participation or agreement. The parents filed for a due process hearing, resulting in rulings of child find, evaluation, and IEP violations. The hearing officer awarded various remedies that included orders for the district to hire independent consultants for evaluation, IEP formulation, and board-certified behavior analyst (BCBA) services plus 25 hours of in-home compensatory education tutoring. Both sides appealed to the state review officer, because Kansas is one of the relatively few two-tier states. The review officer largely affirmed the hearing officer's decision, only reversing the child find violation. The review officer also largely awarded similar remedies, which included reimbursement of the fees of the parents' lay advocate. Both parties appealed to the federal district court.	
The school district argued that the parents' expert witness, who testified at the due process hearing, relied on best practices rather than legal requirements and information beyond the "snapshot" standard for IEP formulation.	Rejecting this argument, the court concluded that (a) expert witnesses may provide best practice evidence to help inform the adjudicator, who is responsible for applying the law, and (b) the lion's share of the information was within the snapshot standard, with the rest harmless.
The school district challenged the hearing and review officer rulings that the evaluation was procedurally and substantively not appropriate.	Instead, the court affirmed that the evaluation violated the timeline (due to lack of informed parental consent) and was substantively inadequate (including an FBA with significant defects).
The school district also contended that the delays in developing and implementing the IEP resulted from the parents' failure to provide consent.	Unconvinced, the court strictly interpreted the required timeline and consent requirements in affirming the review officer's ruling that these procedural violations resulted in a substantive loss to the child.
The school district additionally challenged the review officer's rulings that the IEP contents and its implementation amounted to denials of FAPE.	The court identified various defects in the IEP, including outdated data and vague language, and implementation failures that resulted in substantive losses to the child and the parents.
The parents challenged the review officer's ruling that the district did not violate child find in kgn. or grade 1.	Affirming the review officer's ruling, the court concluded that the parents conflated the child find with the evaluation/eligibility issues.
The parents challenged the remedies as not enough, and the district challenged them as too much.	With slight refinements, the court upheld the various review officer remedies except for payment of lay advocate fees.
This unpublished decision is relatively unusual in its detailed scrutiny without notable deference to the school district. It is worth independently reading this decision. Although it has limited precedential weight, this decision serves as a forewarning against overrelying on an expectation of a relaxed, district-friendly adjudicatory analysis. The adjudicators' affirmative exercise of their broad equitable authority for remedies is also noteworthy.	