SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies a pair of recent court decisions that illustrate unusual issues that arise in school districts' implementation of their IDEA obligations. For related publications and earlier monthly updates, see **perryzirkel.com**.

On May 19, 2023, the federal district court in Massachusetts issued an unofficially published decision in *Pitta v. Medeiros*, which primarily addressed the issue of whether parents have a First Amendment right to video record IEP meetings. On February 15, and March 8, 2022, the IEP team met to discuss the district's proposed exiting of the parent's child from special education services. The official minutes of the meetings that the district sent to the parent did not make any mention of statements that IEP team members had made that were counter to their proposed action, such as their admission that they lacked supporting data. The district denied the parent's request for amending the minutes. At the next scheduled meeting, which was via a virtual platform, the parent requested activation of the platform's recording function. The special education director refused based on district policy, only agreeing to an audio recording controlled by a district employee. When the parent sought to make his own recording, the special education director discontinued the meeting. The parent filed suit pro se, i.e., without an attorney, claiming violation of his right to gather information protected by First Amendment freedom of expression. The district moved for dismissal on several grounds.

First, the district argued that the parent's lawsuit was moot because the district subsequently agreed to the use of the recording function with the members' cameras off but with the thumbnail box lighted for whomever was speaking.	The court rejected this argument because the district's policy remained unchanged, and precedent clearly established that mootness does not apply to (a) one-time exceptions to an unconstitutional policy and (b) when there is "'a reasonable expectation that the challenged conduct will be repeated following dismissal of the case.'"
Second, the district argued that the parent failed to exhaust the available administrative remedy of a due process hearing before going to court.	The court also rejected this argument, relying on the Supreme Court's *Fry* (2017) decision, which held that the IDEA's exhaustion requirement does not apply to other federal claims for which the gist is not FAPE.
Third, the court ruled that "under the circumstances" parents do not have a First Amendment right to video record IEP meetings.	The reasons included that (a) IEP meetings, whether virtually or at school, are not public forums, and (b) the purpose here was to gather information for a private purpose, not to expose governmental misconduct to the public.

The parent's pro se status, specific circumstances, unofficial publication, and the particular precedents in the jurisdiction arguably limit the generalizability of this ruling. Consider too this issue under the IDEA itself: (1) there is limited judicial authority for the right under the IDEA to record IEP meetings (*V.W. v. Favolise* - D. Conn. 1990), and (2) the IDEA's administering agency has issued policy guidance that state and local education agencies have authority to limit or prohibit recording of IEP meetings, provided that these policies (a) allow exceptions when necessary for the parent's opportunity for meaningful participation and (b) are uniformly applied (Letter to Savit – OSEP 2016).

On April 6, 2023, a federal court in the District of Columbia issued an officially published decision in *Pierre-Noel v. Bridges Public Charter School*, addressing various IDEA claims of a child who is medically fragile, nonverbal, and wheelchair-bound. During the 2021–22 school year, when the child was in kindergarten, the school provided distance education from a special education teacher as part of the system-wide response to the pandemic. For return to in-person instruction in 2022–23 (grade 1), the May 2022 IEP provided for various services, including single transport accompanied by a nurse and 22.5 hours of specialized instruction accompanied by a dedicated aide. However, there are at least 14 steps from the family's apartment to the ground level, and the only family member physically able to carry the child and the wheelchair down the steps is only available on Thursdays and Fridays. To test the district's refusal, per its policy, to provide the stairs-carrying service, the IEP team specifically included it in the May IEP. However, in July, when it became clear that the district would not be providing this service and the child would be unable to be at school, the IEP team changed the IEP to virtual instruction and removed the in-school aide. At the same time, despite having reason to know that the child needed in-person support during instruction, the IEP team did not provide for any such support. In October, after the parents filed for a hearing, the school initiated such in-person services at the child's home. The hearing officer ruled that the district's transportation obligation extended only to the outer door of the apartment building and that the July IEP's failure to include in-person support services to the child during virtual instruction, but not its removal of the in-school aide, amounted to a denial of FAPE. The parents appealed to federal court.	
First, court ruled that the related service of "transportation" in the IDEA is limited to conveyance in a vehicle or other such mechanical conveyance.	The court based its interpretation on the IDEA definition that refers to "specialized equipment," the analogous ADA definition's limiting language of "by school bus vehicles," customary usage at the time of the passage of the IDEA, and the need for clear notice in legislation under the Spending Clause.
Second, the court rejected the parents' alternative argument that the district failed to implement the IEP's transportation provision.	The court reasoned that in this context of the IEP exceeding the scope of the IDEA, the requirements of federal law supersede the provisions of the IEP. This reasoning intertwines with the particular charter school-district relationship.
Third, the court also rejected the parents' argument that lifting/carrying fits as "supportive services," which is separate from transportation.	The court reasoned that "[n]othing in the enumerated list [for supportive services] resembles lifting or carrying a student to a bus from his residence before the school day begins."
The court agreed about the fatal part of the July IEP, but —unlike the hearing officer—specified a remedy for this FAPE denial.	The court ordered the IEP team to amend the IEP provisions to provide the child with in-person support services during virtual instruction, although the court failed to remedy the gap between July and October.
The court also agreed with the hearing officer that the removal of the in-school aide was not a denial of FAPE.	The key to this conclusion was that the removal in the July IEP was accompanied by a provision clarifying that the dedicated nurse aide would be added back to the IEP when the child resumes in-school instruction.
This case is unusual in many respects, but it illustrates the complexity of circumstances that students with disabilities and their families face and the limits of law in clearly resolving these difficulties within the values and resources of our diverse society. The parents filed an appeal in May 2023. Stay tuned for the eventual decision at the D.C. Circuit Court of Appeals.	