

**SPECIAL EDUCATION LEGAL UPDATE**  
**Perry A. Zirkel**  
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This month's update identifies recent court decisions that illustrate the issues of eligibility, FAPE, and hearing officer remedial authority. For related publications and earlier monthly updates, see [perryzirkel.com](http://perryzirkel.com).

**On July 25, 2023, the federal district court in New Jersey issued an unofficially published decision in *H.R. v. West Windsor-Plainsboro Board of Education* that addressed both the issues of eligibility and FAPE for a kindergarten student with an undisputed diagnosis of ADHD. In spring 2019, while the child was in the District's preschool program, the initial evaluation determined that the child was eligible under the IDEA, and he received an IEP related to his ADHD. After a delay due to the pandemic, the IEP team met in November 2020 of the child's kindergarten year, determining based on the recent reevaluation that the he was no longer eligible under the IDEA. The team concluded that, despite a 51-point discrepancy between his IQ and achievement test scores, he met his IEP goals and was progressing well in relation to his classmates in general education. The parents filed for a due process hearing, claiming that the 2019–20 and 2020–21 IEPs did not provide FAPE and that the determination of non-eligibility was incorrect. The hearing officer ruled in favor of the District. The hearing officer's conclusions included that the child's preschool and kindergarten teachers' and the District's special education teacher-consultant's testimony was more convincing than that of the parents' expert witness, who was a speech pathologist and clinical director of a private learning center. The primary reason the hearing officer provided for this conclusion was that the private expert did not have teacher certification and did not observe the child in his school setting. The parents filed an appeal with the federal district court.**

First, the parents claimed that the hearing officer erred in relying on the opinions of the District's witnesses over the "data-driven" recommendations of their private expert.	Citing the applicable judicial deference to the credibility determinations of hearing officers, the court concluded that the record showed that the hearing officer duly weighed the expert testimony and that the resulting factual findings were not "clearly erroneous."
Second and more specifically, the parents claimed that the child continued to be eligible, pointing to the 51-point achievement-ability discrepancy.	The court concluded that under New Jersey's permissive identification approach to the classification of specific learning disability, the 51-point discrepancy was relevant to the classification but not to the lack of adverse impact requiring special education.
Next, the parents claimed that the district committed various procedural violations, including a delayed reevaluation and IEP for kgn.	Citing the two-part harmless-error approach in the IDEA, the court ruled that none of the alleged violations resulted in the requisite substantive harm in light of the child's continuing behavioral and academic progress and ultimate defensible declassification.
Finally, the parents challenged the substantive appropriateness of the IEPs due to the lack of the private expert's recommended reading method.	Citing <i>Endrew F.</i> and the child's notable progress, the court concluded that "even if the Fountas & Pinnell test is inferior to [the expert's] suggested 'structured literacy program,' Defendant was not obligated to provide an 'optimal level of services.'"
Although of negligible precedential weight more generally, this decision illustrates the prevailing case law approaches under the IDEA of (a) deference to school authorities and, upon appeal, to hearing officer credibility findings; (b) emphasis on the ultimate, so-called "need prong" in eligibility cases, (c) focusing the second step of the harmless-error test for procedural FAPE claims on substantive student loss, and (d) the relatively relaxed but not precise or necessarily predictable substantive standard for FAPE under <i>Endrew F.</i>	

On September 20, 2023, the federal district court in New Mexico issued an unofficially published decision in *Los Lunas Public Schools Board of Education v. Schneider* addressing the FAPE obligation of school districts and the remedial authority of hearing officers. The child in this case has Angelman Syndrome, a rare neuro-genetic disorder that includes developmental delays, sleeping problems, a happy social disposition, and lack of speech. From preschool through grade 4, the child had an IEP that included speech therapy, occupational therapy, physical therapy, and assistive technology for communication. He enjoyed interaction with his peers and was well-liked. However, at times he engaged in disruptive behaviors, including on one occasion disrobing, defecating, and rubbing feces on a file cabinet. The problems started to escalate in grade 5. Despite the District hiring a specialist to provide training to the teachers about Angelman Syndrome, they were not effective in dealing with the child. After the parents rejected an addendum to the last IEP that would have changed placement to instruction in the home, the District moved him to a closet-like storage room for instruction without amending the IEP. After his mother's objected, the District next provided 30-minutes of services Monday to Thursday at the cage-fenced tennis courts of his elementary school, although he would not participate unless his mother stayed with him. After several days of absence, the District, per its policy, disenrolled him with notice to the state but not to his parents. The parents filed for a due process hearing but withdrew it based on a settlement agreement that provided for his attendance for grade 6 at the District's middle school. During summer 2018, he visited the middle school twice but did not show up at the start of the school year. The District cancelled the scheduled IEP meeting, but in November 2018 the team met and prepared an IEP that provided for a shortened school day and week and that inaccurately reported him as receiving his actual placement and school. In December 2019, the parents filed a state complaint that resulted in a finding of denial of FAPE and a corrective action plan. However, all that the District provided to him was several weeks during the summer of 30 minutes per day of remote instruction and "co-treating" related services. He received no instruction in math, reading, or written language in grades 6, 7, or 8. Moreover, the District did not provide a reevaluation after 2014. The lack of instruction and reevaluation continued in grade 9 (2020–21), when the District provided system-wide distance learning, which he was not able to access due to lack of accommodations for his communication limitations. In April 2021, the parents filed for a due process hearing, resulting in a decision that the District committed various serious procedural violations and substantively denied FAPE for more than 4 years. The hearing officer's remedies in addition to 4 years of compensatory education included an independent educational evaluation (IEE) by an educational expert in Angelman Syndrome within 30 days and a promptly subsequent IEP meeting facilitated by this expert to provide for the child's transition to full-time return to school with the support of a Board Certified Behavior Analyst. The District filed an appeal with the federal district court.

First, the District claimed that it had made "reasonable efforts" for FAPE and, citing a 10 <sup>th</sup> Circuit decision, that the fault was the parents' failure to accept these efforts and assure the child's attendance.	The court concluded that (a) the asserted "reasonable efforts" defense is antithetical to the FAPE obligation of the IDEA; (b) the cited court decision was not at all on point; and (c) the "disturbing facts" in the record amply supported the hearing officer's FAPE ruling.
Second, the District claimed that two of the hearing officer's remedies constituted an abuse of discretion— (a) the specialization that the hearing officer specified for the IEE expert, and (b) the IEP-facilitating role that the hearing officer designated for the IEE expert.	The court roundly rejected these claims, concluding that (a) the IDEA and its case law do not prohibit a hearing officer from designating IEE expertise in a child's particular disability and (b) the record also amply supported this added role for the IEE expert so that "the District can finally begin to understand [this child's] needs and provide him with a FAPE."
This case shows the challenges that districts face in appropriately addressing the complex needs of some low-incidence disabilities and the broad equitable remedial authority that hearing officers have for those districts that fail in fulfilling their IDEA obligation to do so.	

