SPECIAL EDUCATION LEGAL UPDATE
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This month's update identifies a pair of recent court decisions that address behavior-modification issues. For related publications and earlier monthly updates, see **perryzirkel.com**.

On July 27, 2023, a federal district court in Pennsylvania issued an unofficially published decision in *Upper Darby School District v. K.W.* that addressed FAPE for a student with autism who exhibited major needs in behavioral and social-emotional functioning. For 2019–20, the IEP team placed K.W. in a local private special education school, where he exhibited frequent disruptive behaviors, including shouting obscenities, hitting/kicking, and eloping from the classroom. An independent educational evaluation (IEE) at the start of that year recommended an FBA-BIP. For 2020–21, the IEP team placed the K.W. in a different private special education school. Despite K.W.'s history of disruptive conduct and his parent's repeated concerns, the IEP checked "no" for the required special consideration of whether he exhibited learning-impeding behaviors and did not include any behavioral goals or a functional behavioral assessment (FBA)-behavior intervention plan (BIP). K.W. continued to engage in shouting and running around the classroom. In response to his parent's concerns, the IEP team met in February 2021 but did not change the IEP with regard to K.W.'s repeated behaviors. For 2021–22, the parent obtained an IEE that K.W. required an FBA and BIP. Yet, despite a behavior analyst's echoing of this recommendation based on K.W.'s increased verbal and physical aggression, inappropriate social behavior, task refusal, peer taunting, and elopement in early fall 2021, the district did not convene an IEP meeting or conduct an FBA. In November, the district received notice in November 2021 that the private school was terminating services to K.W. In response, the district notified the parent of an IEP meeting to discuss placement of K.W. in a third private special education school that it had arranged for without parental input. The parent filed for a due process hearing, resulting in a prehearing interim agreement to explore other private schools and to provide K.W. with reading and math instruction at home from a private autism program pending a new placement. However, these services were inconsistent and only lasted about a month due to the district not paying travel time for the private program's instructors. The parent re-filed for a due process hearing, which resulted in a decision in July 2022 that the district provided FAPE to K.W. for the two years at issue except for the intervening months since the cessation of the private tutoring services. The hearing officer ordered compensatory education for that intervening period and an IEP meeting to arrange promptly for an appropriate placement. Both parties appealed.	
The parent's first challenge was to the hearing officer's FAPE ruling for the 2020–21 school year.	Citing the IEE in 2019–20, a Pennsylvania regulation that can be interpreted to require an FBA-BIP for learning-impeding behavior, and the resulting substantive loss under *Endrew F.*, the court reversed the hearing officer's 2021-22 FAPE ruling.
The parent's second challenge was to the hearing officer's FAPE ruling for the 2021–22 school year.	Citing the FBA-BIP recommendations of the IEE and the behavior analyst in at the start of the 2021–22, the court concluded that the district's failure to revise the IEP all the more clearly was a denial of FAPE.
The district's challenge was to the hearing officer's order for compensatory education.	The court expanded the compensatory education award to more than 1800 hours due to the two-year denial of FAPE.
This decision should not be overgeneralized because most state laws have not added to the IDEA's FBA-BIP requirement, which is limited to disciplinary changes in placement, and the clear majority of courts have regarded any IDEA behavior-specific goals or services to be sufficient in response to learning-impeding conduct unless such provisions are blatantly ineffective.	

On September 7, 2023, the supreme court of Massachusetts issued an officially published decision in *Judge Rotenberg Educational Center, Inc. v. Commissioner of Department of Developmental Services* addressing the use of electric skin shock within rather narrow circumstances. The ruling is largely if not entirely inapplicable to students with IEPs but is of interest in light of the interest in acceptable and effective behavioral interventions. The narrow circumstances include the context of a 1986 consent decree, or court-approved settlement, in Massachusetts specific to JRC, a residential center for individuals with severe developmental disabilities that is the sole facility in the country that uses electric skin shock as a treatment modality. JRC is often the last resort for clients who, due to the severity of their self-injurious behaviors, are expelled or refused admission by facilities that rely on alternative treatment modalities, including medical sedation or physical restraint. JRC's policy is to avoid or minimize the use of psychotropic medication, instead relying on applied behavior analysis (ABA), including functional behavior assessment and the use of aversives only when positive reinforcement alone was not effective and the parents agree with this option. The aversive at issue was the use of the Graduated Electronic Decelerator (GED), a device that administers a 2-second electric shock of either 15 or 41 milliamps to the skin surface of an arm or leg. The consent decree includes various restrictions on the use of the GED, such as staff verification of the requisite self-injurious behavior, a treatment plan approved by various clinical committees, and authorization from the probate court as being the least intrusive, most appropriate treatment for the individual patient. Based on a history of bad faith and pretextual state agency regulatory conduct to discontinue this treatment, the consent decree also includes a requirement that both parties act in good faith. In 2016, in the wake of further state agency attempts to eliminate this controversial technique, a 44-day trial resulted in a ruling that rejected termination of the consent decree. The state administrative authorities filed an appeal with the state's highest court. The narrow issue is whether the lower court's decision was an abuse of discretion based on the 2016 trial record, which the parties declined to update. At the time, JRC treated 30% of its 244 patients with GED, including a few minors.	
First, the state agencies challenged the trial court's finding that they had engaged in bad faith conduct in violation of the consent decree.	The state supreme court found no abuse of discretion in light of its 1997 ruling of agency bad faith actions, the 2009 alteration of a clinical advisory group's report, similar alterations of a 2010 certification team report, and new regulations in 2013 that prospectively banned GED without assessing scientific evidence.
The agencies alternatively argued that the standard of care had coalesced against this practice, thus constituting changed circumstances warranting the consent decree's termination.	The state supreme court again found no abuse of discretion because at the time of the lower court's decision "there was an ongoing debate about the potential necessity of level three aversives [i.e., GED] among the very experts that the department elected to consult in formulating practitioner guidelines" and also by a nationally recognized specialist and a commonly used ABA text.
The court emphasized the "heart wrenching" nature of this issue and narrow scope of its ruling, including the possible legal changes in Massachusetts from (a) legislative action, (b) robust evidence that GED is outside the now current standard of care, or (c) a well-established record of ongoing good faith regulatory conduct toward JRC. Moreover, occasional litigation in other states (e.g., *Bryant v. New York State Education Department*, 2012; *Phelan v. Bell*, 1993) has addressed this shocking aversive in the IDEA context.	