SPECIAL EDUCATION LEGAL UPDATE

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This month's update identifies recent court decisions that illustrate the application of the IDEA in relation to in-home services, evaluating all areas of suspected disability, and the statute of limitations. For related publications and earlier monthly updates, see **perryzirkel.com**.

On January 17, 2024, the federal district court for New Jersey issued an unofficially published decision in *S.M. v. Freehold Regional School District Board of Education* addressing the FAPE claim for compensatory education for 2017–18 and 2018–19 on behalf of a then 19-year-old with autism and a history of extreme problematic behaviors in opposition to attending any school or participating in instruction at home. In 2013–14, the district arranged for a comprehensive in-home special education program via a private agency that was unsuccessful. For the next 3 years, the district provided for a residential placement, where his behaviors significantly improved. His parents withdrew him contrary to the recommendation of the state disabilities agency. Based on a district-funded independent educational evaluation (IEE), the student's IEP for 2017-18 included door to door transportation services, an individual transportation aide, and a day school for students with autism. Due to their work schedules, his parents were not available for at least an hour before the bus arrived to take him to school. During fall 2017, his oppositional conduct escalated, including altercations with his parents and self-injurious behaviors. The state disabilities agency twice provided an aide to come to the home to assist in getting him ready for the school bus, but these attempts were fruitless. For 2017–18, he had 29 days of absence and 40 days of lateness, and for 2018–19, he had 86 absences and 38 days of lateness. The school district arranged for residential placement starting in the second semester of 2018–19, but the parents refused to cooperate, filing for a due process hearing. The hearing was delayed due to the pandemic, but the parents agreed in the interim to alter the stay-put to the residential placement, where he remained until aging out in June 2020. In October 2021, the hearing officer issued his decision, denying compensatory education. The parents appealed the case to federal court.	
The parents' first contention was that the district should have provided home-based assistance to address the transitioning issues each morning to get him from ready for the school bus arrival.	Citing the relatively few analogous other court rulings, which rejected before-school services beyond transportation, and the particular circumstances of this case, which included the fruitless prior attempts at in-home aide services, the court concluded that the parents had not met their burden to provide an IDEA entitlement to such assistance.
The parents' alternate assertion is that the district should have provided in-home instruction as the special education placement based on the initial results of the IEPs for 2017–18 and 2018–19.	Interpreting the IDEA and New Jersey regulations as providing for in-home instruction only when appropriate and after exhausting less restrictive alternatives, the court concluded that it would not have met this first of these two requirements in light of the recommendations of the IEE and the unsuccessful prior experience.
The parents' final claim was that the district failed to reevaluate their son during the 2017–18 and 2018-19 school years.	Rejecting this claim, the court concluded that (a) the three-year period for reevaluation, starting with the IEE in February 2017, had not passed, and (b) in the absence of a parental or teacher request, the specific circumstances did not warrant a reevaluation.
The rulings in this decision should not be over-generalized in light of the limited applicable case law and the particular factual circumstances of this case. Nevertheless, it is relatively clear that parents face a steep uphill slope in seeking in-home services before school. Moreover, neither parents nor districts should insist on in-home special education services except in the relatively few cases that this placement complies with both the FAPE and LRE requirements of the IDEA. Finally, the reevaluation issue at most would constitute a procedural violation, thus requiring preponderant proof of a substantive loss to the student or to the parents' participation right.	

On December 21, 2023, a federal district court in California issued an officially published decision in *J.R. v. Ventura Unified School District* addressing a compensatory education claim that covered a 9-year period. In May 2012, when the child was in first grade, the district determined that he was eligible for an IEP under the primary classification of specific learning disability (SLD) and secondary classification of speech impairment. During the next 9 years, the district's school psychologists conducted 3 reevaluations confirming these eligibility classifications without testing for autism despite the child's nonverbal and verbal communication difficulties. In April 2021, the parents filed for a due process hearing asserting that district failed to assess the child in all areas of suspected disability since 2012. Their evidence included a private evaluation from their clinical psychologist expert who diagnosed him with autism and testified that the district had reason to suspect this classification based on his "verbal/nonverbal deficits, and social immaturity, which [the district] documented in each triennial assessment report, and IEP [since 2012]." The hearing officer decided that under the IDEA's two-year statute of limitations, the applicable period started in April 2019 and for this period the district violated this "all areas" obligation. Concluding that this procedural violation resulted in a substantive denial of FAPE by significantly impeding the parents' opportunity for participation in the IEP process, the hearing officer awarded 152 hours of compensatory education amounting to $19,000 (12 mos. x 12.7 hrs./mo. x $125/hr.). The parents appealed, seeking extension of the compensatory education award to cover the previous 7 years.	
For the statute of limitations, the parents challenged the hearing officer's rulings that (1) they "knew or should have known" (KOSHK) based on the combination of the 2012 evaluation and the 3 resulting annual IEPs that documented his communication and behavioral problems, and (2) neither the IDEA's misrepresentation nor information-withholding exceptions applied.	The court concluded that the hearing officer erred as a matter of law by (1) applying the KOSHK standard based on experts' specialized knowledge rather than what these parents subjectively knew or objectively had reason to know, and, alternatively, (2) failing to find, for the exceptions, that the district "at least recklessly misrepresented [the student's] assessment results" and/or "withheld information that prevented the Parents from understanding, based on those results, that [the district] had improperly diagnosed [him] since 2012."
The parents claimed that the Ninth Circuit's *Timothy O.* decision (2016), which held that the failure to administer standardized tests for autism upon having reason to suspect this disability was a FAPE violation, applied back to 2012.	The court agreed with the parents' contention, concluding that "autism was a 'suspected disability' beginning in 2012 because the undisputed facts of the record demonstrate that [the child] exhibited symptoms of autism beginning in 2012" and that this "undiagnosed, neglected, and improperly treated disability" resulted in IEPs that amounted to a substantive denial of FAPE.
The parents sought to extend the compensatory education award to the preceding 82 months, amounting—based on the hearing officer's original calculus—to an additional $130,175 of services.	Instead, the court decided to "issue a separate order requiring the parties to submit supplemental briefing as to the appropriate remedy, including whether an additional assessment is required and, if not, what recommendations and frequency breakdown serves as the basis for Plaintiff's request."
The court decision is unusually parent-friendly for both the statute of limitations ruling and—in light of the *Timothy O.* precedent in its jurisdiction—the "all areas" ruling. Stay tuned, because the district has appealed this decision to the Ninth Circuit.	