

SPECIAL EDUCATION LEGAL UPDATE

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This month's update identifies recent court decisions that illustrate issues arising from (a) proficiency testing and (b) substantive FAPE, including the IDEA's statute of limitations. For related publications and earlier monthly updates, see perryzirkel.com.

On November 16, 2023, a state appellate court in Texas issued an officially published decision in <i>Klein Independent School District v. Sisk</i> that addressed the termination of a tenured special education teacher for unauthorized assistance in proctoring the state proficiency tests for fifth grade students who were allowed to take the tests orally based on evidence of reading deficiencies, limited English proficiency, or “Section 504 or Special Education accommodations.” The allowed accommodations included a whisper phone and reminders to stay on task. The testing procedural manual prohibited proctors from reinforcing, reviewing, or distributing testing strategies. Subsequently investigating possible testing irregularities, the designated district administrators interviewed the teacher. She admitted giving students looks and handing them the whisper phone without saying anything if she thought they were not using the allowed strategies. The administrators concluded that these actions constituted an indirect method of violating the prohibition against reinforcing testing strategies. They placed the teacher on administrative leave and recommended termination for good cause. Upon her request, the state education agency provided an independent hearing examiner to review the case and advise the district’s board of education. The examiner’s report concluded that the evidence did not establish the requisite good cause. However, the school board unanimously voted to terminate the teacher. She appealed to the state commissioner of education, who upheld the school board’s decision. She the appealed to the state trial court, which reversed the decision. The school board and state commissioner appealed.	
The appealing parties argued that, although state law required them to limit the record to the independent examiner’s factual findings, the judicial standard of review was deferential to school authorities.	The state appellate court agreed that the standard was substantial evidence, which is defined as more than a scintilla of evidence, and prior rulings in Texas have established that judicial review under this standard is highly deferential—“the issue is not whether the agency's decision is correct, but whether the record demonstrates a reasonable basis for it.”
They also observed that “good cause” in this context is the failure to meet the accepted standards of conduct for the profession (a) as generally recognized in federal or state law or (b) as generally applied in similarly situated school districts in this state.	The court agreed with this definition but concluded that the school authorities (a) relied solely on the testing manual, which is not a state statute or regulation and which was not internally consistent as to whether a whisper phone is an accommodation, an accessibility feature, or a testing strategy, and (b) the only testimony about other districts was specific to a single district without any evidence that it met the requisite of being similarly situated.
The state commissioner argued that school districts have wide latitude in determining good cause.	The court decision responded to this argument by differentiating the latitude for school district’s termination of nontenured and tenured teachers, with “good cause” requiring more for terminating a tenured teacher.
The court’s decision is not necessarily a complete win for the teacher, because its order was to remand the case to the state commissioner of education for further action according to the applicable state law, which provides the alternatives of reinstatement with backpay or one year’s salary from the date the teacher would be been reinstated. Nevertheless, the case illustrates one of the unintended consequences of high states testing and exceptions from standardized administration.	

On September 29, 2023, a federal district court issued an officially published decision in *Edward M.-R. v. District of Columbia* that addressed the parents’ challenge to the IEPs for grades 4, 5, 6, and 7 for their seventh grader with autism and ADHD. The various alleged defects of the IEPs included the measurability of the goals, the IDEA’s peer-reviewed research (PRR) provision, and the decrease in the extent of services. They filed for a due process hearing at the end of grade 7, in June 2020. The hearing officer ruled that the date that the parents “knew or should have known” (KOSHK) of the alleged FAPE violations was at the time of the development of each IEP, thus the IDEA’s two-year statute of limitations barred consideration of the IEPs prior to grades 6 and 7. Next, the the hearing officer concluded that each of these two IEPs met the substantive standard for FAPE under *Andrew F.* and did not violate the IDEA’s requirement that the specified special education and related services be based on PRR to the extent practicable. The parents filed an appeal with the federal district court of the District of Columbia.

For the statute of limitations, the parents did not challenge the hearing officer’s KOSHK ruling but argued that the annual IEP developed in November of grade 5 should not have been time-barred because it extended into the first 3 months of grade 6.	The court rejected this argument, concluding that for the grade 5 IEP, the two-year period started to run on the KOSHK date and, thus, expired before they filed for the hearing. The court reasoned that “the triggering incident here is the creation of the IEP, not any failure to revise the IEP at the beginning of [the next school year].” The court observed that the parents did not argue a “continuing violation” exception but, in any event, it would not apply to “claims that have a specific [triggering] date.”
The parents claimed that the various goals in these two IEPs were not measurable, which the IDEA specifically requires.	The court concluded that they were reasonably measurable without being precisely quantifiable or objective and, even if they were not measurable, this procedural violation did not result in the requisite harm to the child or the parents.
The parents argued that the IEPs did not specify the research-based instruction that the child would receive.	The court concluded that the PRR provision does not require specification of a particular methodology and even if it did, it was a procedural violation for which the parents’ failed to prove resulting substantive harm.
The parents alleged various other procedural violations, such as the absence of a general education teacher at the grade 7 IEP meeting.	The court dismissed these procedural FAPE claims based on the exhaustion doctrine, i.e., that the parents had failed to raise these claims at the due process hearing and, thus, they were not part of the hearing officer’s decision under review.
Pointing to the repetition in the grade 7 IEP of many of the goals from the grade 6 IEP, the parents argued that the child’s limited progress showed the failure to meet the <i>Andrew F.</i> standard.	Pointing to rather extensive case law, the court concluded that in light of the snapshot approach, they key to <i>Andrew F.</i> is the reasonable calculation of appropriate progress at the time of formulating the IEP, not whether the child subsequently obtained only limited progress.
This various rulings in this case follow the prevailing but not uniform trend in the case law. Nevertheless, as a reminder of the ponderous adjudicative process under the IDEA, the parents filed for a hearing 3.5 years ago and its currently on appeal to the D.C. Circuit.	