

SPECIAL EDUCATION LEGAL UPDATE
Perry A. Zirkel

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This month's update identifies recent court decisions that respectively illustrate (1) the IDEA's state complaint process, which is investigative rather than adjudicative, and (2) a variety of IDEA issues, including independent educational evaluations (IEEs) at public expense and FAPE during the shift to virtual instruction due to the COVID-19 pandemic. For related publications, see perryzirkel.com.

On February 5, 2024, the state appellate court in Minnesota issued an unofficially published decision in *Complaint Decision File 23-101 re D.V.G.* addressing the appeal of a state complaint (not due process hearing) decision. The parent of a high school special education student who had multiple behavioral incidents and suspensions during the 2021–22 school year filed the complaint. After its investigation, the state education department issued a decision that the school district violated (1) the state's general education law for suspension/expulsion by failing to provide the parents with notice of the suspensions, and (2) the IDEA by failing to appropriately respond to the parents' request for an IEE after disagreeing with the district's functional behavioral assessment (FBA). The corrective action amounted to 60 hours of compensatory tutoring services at \$50 per hour. Because Minnesota is among the minority of states that allow for judicial appeal of IDEA state complaint decisions, the school district filed an appeal with the designated state appellate court.

The school district's first contention was that the IDEA state complaint process does not extend to enforcement of state general education laws.	The court more narrowly ruled that the IDEA state complaint process extends to this state's suspension/expulsion law because the state's special education law expressly incorporates its suspension procedures as applying to students with disabilities.
For the IEE, the school district claimed that the state complaint decision relied on confidential information from mediation sessions.	The court ruled that the decision relied on a non-confidential document and that to the extent that the document contained any confidential information, it was the district, not the parent, who improperly disclosed the information.
The district alternatively argued that the IDEA's IEE requirement does not apply to FBA's, per a 2020 Second Circuit decision.	The court also rejected this argument, because (a) Minnesota's special education law treats an FBA as an evaluation, and (b) the district had explicitly afforded the parent the right to request an IEE if she disagreed with the FBA.
Finally, the district challenged the authority for and amount of the compensatory education award.	The court upheld the award based on the state complaint process's broad authority for corrective actions, including compensatory services, and the record in this case.

This case illustrates the IDEA's alternate decisional avenue for dispute resolution, which appears relatively rarely in court decisions under the IDEA due to its much more limited right of appeal as compared to that for the due process hearing avenue.

On January 31, 2024, a federal district court in Maryland issued an unofficially published decision in *Lee v. Board of Education of Prince George's County*, addressing various procedural and substantive FAPE claims on behalf of a middle-school child with an IEP for specific learning disabilities. The relevant two-year period from included the COVID-19 pandemic. At the end of grade 5 for the child, the parent requested at least two IEEs, for which the school district did not provide funding or file for due process. Midway in grade 6, the parent provided various IEEs to the guidance counselor, who did not share them with the IEP team. The pandemic-caused shift to virtual instruction started at the end of grade 6. During this overall period, the child's absenteeism amounted to 36 days in grade 5, 29 days in grade 6, and 45 days in grade 7. The parent filed for a due process hearing midway in grade 7. In response to the parent's various claims, the hearing officer decided in favor of the school district. The parent appealed to federal court.

The parent claimed that the IDEA required the district to fund the requested IEEs or to file for due process to defend its own evaluations.

The court agreed but ruled in favor of the district, because the parent failed to show that this procedural violation was causally connected to any lack of progress for the child.

The parent also claimed that the district's failure to consider her IEEs violated the IDEA.

The court concluded that this failure was a procedural violation, but the parent did not prove a resulting substantive loss of FAPE.

The parent asserted that the district also violated the IDEA by shifting her child to virtual instruction without an IEP meeting.

The court concluded that the shift was not a placement change but even if it was a procedural violation, the parent failed to prove the requisite resulting harm in their participation or the child's progress.

The parent claimed that the district failed to fully implement the child's IEP during the period of virtual instruction.

Citing mixed rulings in other jurisdictions, the court interpreted the federal guidance and the facts of the case in a markedly district-deferential way, concluding that the parents failed to prove a material denial of FAPE.

The parent's next claim was that the IEPs were substantively deficient by failing to include an FBA to address the child's attendance issues.

Here, the court agreed that the IEPs did not sufficiently provide for the child's attendance issues, but the lack of an FBA was a procedural violation for which the parent failed to prove the requisite harm.

This case illustrates the uphill slope that parents face in adjudicating claims primarily specific to the various procedural requirements of the IDEA, particularly in courts that focus on student rather than parental loss at the second step of the applicable procedural FAPE analysis. This court's rulings appeared to overrely on the burden of persuasion and, for the substantive side of FAPE, to exhibit outermost deference to school authorities.