SPECIAL EDUCATION LEGAL UPDATE

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This month's update identifies recent court decisions that respectively illustrate, within the context of jurisdictional variation, (1) the differences in substantive standards under the IDEA and Section 504/ADA, and (2) the variety of claims under the IDEA, including free appropriate public education (FAPE), functional behavioral assessments (FBAs)/behavior intervention plans (BIPs), extended school year (ESY), and independent educational evaluations (IEEs). For previous monthly updates and related publications, see **perryzirkel.com**.

<table>
<tr><td colspan="2">On March 21, 2024, the Eighth Circuit issued a pair of officially published decisions in Osseo Area Schools v. A.J.T. and A.J.T. v. Osseo Area Schools for the respective IDEA and Section 504/ADA claims of the parents of a middle schooler with a rare form of epilepsy that requires assistance with everyday tasks including walking and toileting. Due to the high frequency and severity of seizures in the mornings, the child was unable to attend school until noon, which resulted in a 4.25-hour school day in elementary school and, upon the age-related move to middle school, further reduction to 3.0 hours. The parents requested that the IEP provide for late afternoon instruction because she was sufficiently able to learn until 6 pm. The district refused, and the parents filed for a due process hearing. Ruling that the district's failure to address the child's individual needs amounted to a denial of FAPE, the hearing officer ordered the district to provide 495 hours of compensatory education and to add certain services to her IEP for in-home instruction each day from 4:30 to 6:00 pm. The district appealed this IDEA decision, and the parents counter-claimed under Section 504 and the ADA. The federal district court in Minnesota affirmed the hearing officer's IDEA ruling and rejected the parents' Section 504/ADA claim. The parties appealed to the Eighth Circuit.</td></tr>
<tr><td>The appellate court affirmed the hearing officer's and lower court's IDEA decisions in favor of the parents, liberally applying Endrew F. to the specific circumstances of the case.</td><td>Rejecting the notion that the IDEA's reach is limited to the regular hours of the school day, the court concluded that the district's "purely administrative decision" caused the child's de minimis progress overall and regression for toileting, thus violating Endrew F.'s "demanding" substantive standard for FAPE.</td></tr>
<tr><td>However, in a separate decision, the Eighth Circuit rejected the parents' Section 504/ADA claim, based on their failure to show that the district's refusal met the jurisdiction's requirement for "wrongful intent."</td><td>In a footnote, the court acknowledged that its bad faith or gross misjudgment standard, which dates back to an Eighth Circuit decision in 1982, "has been questioned." Nevertheless, the court concluded, without further discussion or even identification of whether the parents sought equitable or monetary relief, that "for the time being it remains the law of our circuit."</td></tr>
<tr><td colspan="2">This case illustrates the continued testing of districts' regular practices against the IDEA's obligations for FAPE, which are oriented to the individual disability-based needs of the child, and the similarly unsettled and sometimes unsettling obligations under Section 504 and the ADA.</td></tr>
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On March 7, 2024, the Tenth Circuit Court of Appeals issued an officially published decision in *Alex W. v. Poudre School District R-1* that addressed various IDEA claims of the parents of a fourth grader with autism and both hearing and vision impairments. As a result of these disabilities, the child is substantially nonverbal and exhibits behaviors including grabbing, kicking, pulling hair, disrobing, eloping, and perseverating self-stimulatory actions. The IEP in the primary grades was in a self-contained special education class and included speech/language therapy (SLT) and occupational therapy (OT). As a result of the triennial revaluation at the end of grade 3, the district's proposed IEP included less direct and more consultative OT. Disagreeing with the reevaluation, the parents requested and received an IEE at public expense that focused on SLT and OT. Still dissatisfied, the parents requested a publicly funded neuropsychological IEE. Upon the district's refusal, the parents arranged for it at their own expense. Near the end of grade 4, the district provided an FBA and a BIP. At the start of grade 5, the parents withdrew the child from the district and filed for a due process hearing. After ruling under the IDEA's statute of limitations that only the claims for grades 3 and 4 were at issue, the hearing officer concluded that the district provided the child with FAPE, but the parents were entitled to reimbursement for the second IEE. Both sides appealed to the federal district court in Colorado, which affirmed the hearing officer's decision. Both parties appealed to the Tenth Circuit.	
The parents' first claim was that the IEP inadequately identified and addressed their child's behavioral needs, including the lack of a timely FBA and BIP.	Citing rather settled case law from various jurisdictions, the Tenth Circuit ruled that the IEP adequately addressed the child's behavioral needs, thus not requiring an FBA and BIP for FAPE.
The parents' second claim was that the IEP failed to meet the substantive standard for FAPE based on allegedly insufficient progress.	Finding it unnecessary to determine whether the child's actual progress was sufficient, the court pointed out that *Endrew F.* only required reasonable calculation of appropriate progress based on the snapshot approach.
The parents' third FAPE challenge was to the restructuring of the SLT and OT services.	The court also affirmed rejection of this claim, finding that the district relied on reasonable calculation on individual rather than institutional grounds.
The parents' next claim was that the grade 3 and grade 4 IEPs violated the IDEA by not providing ESY.	Again ruling in favor of the district, the Tenth Circuit concluded that the district's IEP team appropriately determined that the child was not entitled to ESY based on the jurisdiction's applicable regression/recoupment approach.
The parents' last claim was that the reevaluation did not meet the applicable IDEA standards.	Rejecting this contention, the Tenth Circuit ruled that the reevaluation passed muster for the challenged areas of autism and functional communications.
The district's only challenge on appeal was to the hearing officer's order, which the lower court upheld, requiring it to pay for the second IEE.	The Tenth Circuit reversed the payment order, relying on the IDEA regulation that entitles parents to "only one" IEE at public expense per school district evaluation.
The rulings in this case, which amounted to a shut-out in favor of the school district, illustrate the uphill slope that parents face in IDEA adjudication, often representing the significant disparity between the legal requirements of case law and the professional standards of proactive best practice.	