

SPECIAL EDUCATION LEGAL UPDATE

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This month's update identifies two recent court decisions that respectively revisit the issues of identification (child find and eligibility) and FAPE (procedural and substantive) in varying fact patterns. For previous monthly updates and related publications, see perryzirkel.com

On September 26, 2024, a federal district court in Tennessee issued an officially published decision in *G.E. v. Williamson County Board of Education*. Based on the student's behavioral and attendance problems in grade 5, the counselor met with the parents, who explained that he was under treatment for anxiety and depression. Despite the student's continuing problems, including panic attacks, the district did not evaluate him until the end of grade 6. The evaluation encompassed multiple sources of information, including passing grades; private psychological and medical diagnoses; parent, student, and teacher interviews; various testing and checklist results; and attendance records. In grade 7, after determining that the student did not need special education, the district provided various best-practice interventions via homebound instruction starting in October, when the student was admitted to a partial hospitalization program. The parents filed for a due process hearing, raising child find and eligibility claims under the IDEA and Section 504 for grades 5–7.* First, after a 12-session hearing, the administrative law judge (ALJ) decided in the district's favor. Second, upon the parents' appeal, the federal district court sent the case back to the ALJ for "lifting almost verbatim" the core of her decision from the district's filings. Third, the ALJ issued a new decision that was in favor of the district. Finally, the parents again appealed to the federal district court, raising various challenges under the IDEA and Section 504.

First, the parents challenged the failure to apply the difference between the IDEA and Sec. 504 for child find based on Sec. 504's broader definition of disability.	The court rejected this challenge because the parents' claims were limited to the overlap between the IDEA and Sec. 504 instead of extending to showing how the student's mental health impairment substantially limited a major life activity.
Second, the parents challenged the overreliance on their child's academic performance in determining that the student was not eligible under the IDEA for emotional disturbance (ED) or other health impairment (OHI).	Rejecting this challenge, the court ruled that the ALJ did not solely rely on academic performance, but rather considered the student's social and behavioral circumstances in determining whether his mental health conditions adversely affected his educational performance, which is required for both ED and OHI.
Third, the parents argued that the district's provision of services resembling special education showed a violation of its IDEA identification obligation in grade 7.	Rejecting this challenge, the court ruled that this argument "shrinks the various elements needed to establish an IDEA child-find claim into a single-factor analysis" and does not per se establish the need prong for IDEA eligibility.
This case illustrates (a) the ultimately fuzzy boundaries of child find and eligibility, (b) the similarly fact-intensive interplay between the IDEA and Section 504/ADA, and (c) the ups and downs of the ponderous adjudicative process, which here included a state hearing officer system with concurrent jurisdiction for IDEA and Sec. 504 claims, a full-time panel of ALJs, and a problematic writing short-cut. Stay tuned, because the case is now on appeal to the Sixth Circuit.	

* Tennessee is one of a handful of states in which hearing officers also have jurisdiction for Sec. 504 claims.

On October 31, 2024, the Eleventh Circuit Court of Appeals, which covers Alabama, Florida, and Georgia, issued an unofficially published decision in *I.S. v. Fulton County School District*. The student in this case is a teenager with an IEP for autism and ED and with a history of severe anxiety, school phobia, and self-harm. He has a high level of both academic capability and school refusal. In his first year of middle school, his parents enrolled him in a specialized private day school. His emotional and school-refusal challenges continued intermittently, leading to changes to three other private schools during the next two years. He returned to the original private school for grade 9, when he made significant progress in overcoming his anxiety and school refusal. He took a full load of classes and achieved an A average. At the end of that school year, his parents filed for a due process hearing, seeking reimbursement for his tuition there. The school district settled, agreeing to pay for his tuition for grade 9 and continuing in grade 10 unless he experienced a significant change in functioning, whereupon the IEP team would meet to consider revising his IEP and placement. Two weeks after the start of grade 10, he again refused to attend school. The IEP team met several times between September and December, with the goal of gradually returning him to the private school for continued success. The school district retained a behavior analyst to develop a gradual reentry plan that would take several weeks for full-time return. In the meantime, the school district offered to send a certified teacher to the home to help the student complete online coursework so that he could earn credits toward high school graduation. In the middle of the year, the parents notified the district of their intent to move him to an out-of-state residential therapeutic placement at district expense. The district opposed the move as premature and revised the IEP in January to provide the proposed home instruction and reintegration plan. Disagreeing, the parents proceeded with the unilateral placement, where the student was so successful that he transferred after six months to a standard boarding school for the duration of his high school education. They filed for a due process hearing to seek reimbursement for the six months at the residential therapeutic placement. The ALJ ruled that the district's proposed homebound/reentry IEP was appropriate, thus denying the requested reimbursement. Upon the parents' appeal, the federal district court affirmed the ALJ's decision. The parents then sought review by the Eleventh Circuit based on several alternate grounds.

First, the parents claimed denial of FAPE based on the alleged procedural violation of predetermining the child's home-instruction placement.	The appellate court rejected the predetermination claim based on the case record showing that (a) the IEP team only used home instruction as a stopgap as part of the systematic plan to restore the original agreed-upon placement at the private day school, and (b) the team duly considered the parents' proposed residential placement and its timing.
Second, the parents also alleged a procedural denial of FAPE due to the lack of a functional behavioral assessment (FBA) and behavior intervention plan (BIP).	The appellate court also rejected this claim, concluding that (a) the behavior analyst collected sufficient information for a gradual "demand-fading" reentry process with notable communication to and participation by the parents, and (b) the lack of an FBA-BIP did not result in requisite loss to the student or parents.
Third, the parents claimed that the January IEP did not meet the <i>Endrew F.</i> substantive standard for FAPE.	Disagreeing, the appellate court concluded that the IEP was reasonably calculated for appropriate progress under the circumstances, which included the parents' rejection of the district's offer of services and their delays in providing access for the behavior analyst.
Finally, the parents added to their substantive challenge the lack of counseling in the IEP.	Again drilling down to the record in this case, the appellate court pointed to the parents' rejection of the district's offer of counseling, opting instead to engage a private therapist.
This case illustrates the harmless-error approach for adjudication of procedural FAPE, the flexibility of the <i>Endrew F.</i> substantive standard, and the variation among courts as to examining only the contents of the IEP or also the balance of the equities in the parent-district conduct.	