SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns issues that were subject to recent, published federal court decisions and are of general significance: (a) the longstanding but continuing application of the two-part test for eligibility under the IDEA, and (b) the new, difficult issue of medical marijuana when legally prescribed for students with disabilities. For the first of these two issues, see recent publications on my website perryzirkel.com.

In *William V. v. Copperas Cove Independent School District* (2019), the Fifth Circuit Court of Appeals reviewed a lower court decision, which is summarized in my April 2019 Legal Alert and which ruled that the school district violated the IDEA by determining that the student did not qualify as specific learning disability (SLD) after diagnosing him with dyslexia. The lower court relied on dyslexia being one of the psychological processing disorders in the IDEA definition of SLD. The specific context of the case, including not only a diagnosis per Texas' strong dyslexia law but also the student's ongoing IEP for speech/language impairment, complicated matters, but the overall generalizable significance of the two-part eligibility test is the key.	
The Fifth Circuit vacated and remanded the decision of the lower court for failing to apply the second essential element of eligibility for SLD (and any other IDEA classification—the need for special education.	The appeals court pointed out that IDEA eligibility requires two parts—not only whether the child meets the criteria of any of its listed classifications, such as SLD, but also—based on its impact—the resulting need for special education.
The appellate court did not determine whether this particular student needed special education, instead sending the case back for the district court to make this determination based on missing factual findings within this overall guidance: "While the line between 'special education' and 'related services' may be murky, case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making educational progress, the child does not 'need' special education within the meaning of the IDEA."	More specifically, the appeals court identified two fatal omissions in the lower court's consideration: (1) whether the accommodations that the district provided to this elementary school student constituted special education rather than related services, and (2) whether the student was making process with these accommodations. Although emphasizing the essentiality for the second, "need" part of IDEA eligibility, the court also reinforced the blurriness by contrasting special education with "related services" rather than general education and by using the term "accommodations" rather than interventions.
The bottom line is simple to state but increasingly difficult—due to state dyslexia laws, RTI/MTSS, Section 504, and other variations in general education—to do: defensibly determine eligibility based on not only the classification but also the need for special education.	

In *Albuquerque Public Schools v. Sledge* (2019), the federal district court in New Mexico addressed FAPE for a young child who, as a result of Dravet Syndrome, has had life-threatening seizures since infancy that were unchecked by traditional pharmaceuticals but significantly reduced by daily administration of cannabis. The New Mexico Department of Health had determined that she qualified under the state's law for medical marijuana, which did not extend its immunity to the school grounds and did not conflict with federal criminal law. For the two years of preschool, the IEP team decided upon placement at the neighborhood school for a shortened session rather than instruction in the home, whereupon the child's mother accompanied her to the classroom and took her off school grounds for the authorized administration upon the start of a seizure. However, at the IEP meeting for full-day kindergarten, when the school district denied the parents' request for instruction in the home, they filed for due process. The hearing officer found denial of FAPE and ordered the district to provide instruction in the home and an abbreviated option interaction with nondisabled peers at school. The district appealed the decision to federal court, and the parents cross-appealed the adequacy of the remedy for failing to provide fuller relief, including a retroactive remedy and an order for the state education agency (SEA) to seek an amendment of the state's cannabis law cover such school situations.

First, the court ruled that the district denied FAPE for kindergarten, not preschool, concluding that the proposed full-day IEP did not meet the *Endrew F*. reasonable- calculation standard because it put the student's life or health at unreasonable risk. The court affirmed the hearing officer's remedy of instruction in the home placement with optional socialization opportunities as FAPE in the LRE.	In reaching its overall outcome, the court concluded that (a) FAPE under the IDEA does not require administration of, or accommodation to administer, cannabis; (b) the IDEA does not allow a district to compel parents to either obtain prescription medication or to accompany the child as a condition for attendance at school; and (c) the district personnel's implementation of the hearing officer's homebound order did not pose the asserted risks of losing federal funding or facing criminal prosecution.
Second, the court granted the district's motion for dismissal of the parents' cross-appeal, concluding that they were not entitled to: (a) IDEA relief for preschool, because the parent had chosen to accompany the child to effectuate the IEP or (b) Sec. 504 relief for either the preschool or kindergarten year because its refusal to store or administer cannabis complied with state and federal law.	The difference between voluntary choice and district compulsion is not a bright line, with other cases potentially reaching the opposite IDEA outcome depending on the specific factual findings. However, the Sec. 504 conclusion appears more generalizable in light of the existing federal law and its ultimately decisive effect on the IDEA. Nevertheless, the emerging relationship between federal and state statutes regarding the use of cannabis bears careful attention based on continuing state-based policy changes.
Third, the court granted the SEA's motion for dismissal, concluding that (a) the IDEA cannot be reasonably interpreted to obligate an SEA to pursue amendments of state law in general and particularly those that would permit a federal crime, and (b) the SEA's failure to seek such an amendment also did not violate Sec. 504, because it was based on the illegal status of cannabis, not the reason of disability.	The parents' requested SEA remedy was obviously a long shot, probably grounded in symbolic and aspirational reasons. For the alternative Sec. 504 basis, the court expressly stopped short of going in the opposite direction, declining to hold that the student, "as a young child whose parent gives her cannabis to treat a life-threatening seizure disorder, is excluded from the protections of Section 504 or subject to school discipline because she is 'currently engaging in the illegal use of drugs.'"
The bottom line is to stay attuned to this fluid, fast-moving issue at confluence of the cross currents of federal and state law.	