# SPECIAL EDUCATION LEGAL ALERT

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This month's update concerns two issues that were subject to recent court decisions of general significance: (a) FAPE in a dyslexia methodology case, and (b) parents who proceed in due process hearings without an attorney. For further examination of such issues, see Publications section at **perryzirkel.com**

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| **In *Preciado v. Board of Education of Clovis Municipal Schools* (2020), a federal district court addressed the FAPE claims of a sixth grader with a diagnosis of dyslexia and an IEP for specific learning disabilities (SLD). In grade 4, the IEP included 300 minutes per week of specialized reading instruction, which her special ed teacher provided via Read Naturally and Orton-Gillingham (OG). The district used the Istation program to track her reading progress. The same level of services continued in grade 5 until April, when a reevaluation determined that she no longer qualified as SLD despite being two years below grade level in reading. The parent promptly filed for a due process hearing, which kept her IEP in place during grade 6, when the impartial hearing officer (IHO) issued a decision in her favor and the district appealed to federal court.** | |
| First, the court affirmed the IHO's ruling that the district committed a prejudicial procedural violation by relying on Istation scores in reviewing and revising the IEP without properly explaining them to the parent. | This ruling serves as a reminder that denial of FAPE may be based on significantly impeding the parent's opportunity to participate in IEP meetings. Interestingly too, the IHO's remedy for this violation, which the district did not separately challenge, was to hire a facilitator and pay for an advocate for the parent's future IEP meetings. |
| Second, the court also affirmed the IHO's ruling that the district did not meet the *Endrew F.* substantive standard of "appropriate progress" by failing to present a cogent explanation why the student could not read at grade level. | The reasons included (a) the grade 4 teacher's lack of training in dyslexia and O-G, (b) the grade 5 teacher's substantial failure to implement the IEP services, and (c) the repeated or reduced goals and services despite an identified need for "urgent intervention." The court rejected the district's deference argument, distinguishing implementation from choice of methodology. |
| Third, the court upheld the IHO's remedy of compensatory education for the FAPE denials in grades 4–5, which included keeping the student in special education at least through grade 6 and one year of specified 1:1 OG-based services. | The court used the qualitative approach that started with *Reid v. D.C.* (2005), concluding that the IHO sufficiently explained, despite the lack of detail, the award of compensatory education placed the child in the position she would have occupied but for the district's denial of FAPE and was appropriate in light of the IDEA's purposes. |
| The full court decision makes for a good read because it extends to notable issues, including absenteeism, and is different from most of the dyslexia methodology cases (as canvassed in the latest downloadable article under "RTI/MTSS and SLD" on my website). | |

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| **Two separate court decisions in Virginia illustrate problems that sometimes arise when parents proceed in due process hearings either with a lay advocate or "pro se," i.e., on their own. In *Henrico County School Board v. Matthews* (2019), lay advocates represented them, which Virginia law permits. The hearing officer ruled in the parents' favor, ordering the district to provide a private placement for their child with autism as compensatory relief. Soon after, the district filed an appeal, the parents moved their residence to another district. One of the two lay advocates stayed active, which included (a) advising the parents their move would not affect the private school order and, thus, they need not tell the court; (b) filing for a seventh due process hearing, all for the same child and issues, to cause the district to "listen"; and (c) making false sworn statements as part of the court's discovery process. Upon learning that the parents had moved, the district filed a motion to dismiss the case as moot, which the parties agreed to do, and to sanction the parents and the advocate, which was subject to further proceedings. In *Chesterfield County School Board v. Williams* (2020), the parent proceeded pro se, filing for a due process hearing and, within a few weeks, agreeing to a settlement with the district. The agreement specified that the district provide certain services to the child and that the parent not file further due process complaints about events prior to the settlement date. However, three months later the parent filed for another hearing on events within that proscribed period. The district filed an enforcement action, and she filed a motion for dismissal.** | |
| For the motion against the lay advocate in the *Henrico County* case, the court found sanctionable only the false sworn statements. In contrast, the advice about the move was not frivolous in light of mixed judicial authority. Similarly, the scorched earth policy, although "reprehensible," was not meritless in light of the favorable hearing officer's decision. | In light of the various applicable factors, including the extent of culpability and the public interest, and the lay advocate's financial circumstances, the court ordered her to pay $1,000 and to not allow her to participate in any future IDEA proceedings at this court. The district's request for her to pay its attorneys' fees was not deemed fitting in this case. |
| For the motion against the parents in the *Henrico County* case, the court declined to order sanctions, concluding that they had engaged in misconduct but that it was largely attributable to the advice of the lay advocate. | Although the parents' escaped sanctions, their extensive efforts on behalf of their child in this case went for naught, and they incurred inferable major emotional and fiscal costs based on not only the due process hearing but the sanctions proceedings. |
| In the *Chesterfield County* case, the court denied the parent's motion to dismiss the case, finding that the school district had met the three threshold elements of a breach of contract claim under Virginia law: (a) a legally enforceable agreement; (b) breach of the agreement; and (c) a resulting injury to the other party. | Separately, the court issued a preliminary injunction enforcing the agreement pending a final decision. For both this purpose and the injury element for the contract claim, the court cited the undue costs and personnel disruption for the district. Yet, the case is not over; the decision and any remedy await further proceedings. |
| The bottom line is that in some cases parents understandably choose to proceed without an attorney for various reasons, including the high emotions in trying to do the best for one's child and the lack of affordable specialized parent attorneys in many places. The choice of a lay advocate or to proceed pro se may compound the original dispute in some cases and may resolve it in others. Increasing the availability and efficacy of the options for parents appears to be necessary and appropriate. | |