SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies two recent court decisions that respectively address attorneys' fees for parents and FAPE for students with dyslexia. For various related articles, special supplements, and earlier monthly updates, see **perryzirkel.com**.

In *A.B. v. Brownsburg Community School Corporation,* an unofficially published decision on February 2, 2022, a federal district court in Indiana addressed the attorneys' fees request of the parents of a child with diagnoses of ADHD, generalized anxiety disorder, and depression. In 2017–18 and 2018–19, after a Section 504 evaluation, the school provided the child with a 504 plan. Early in 2019–20, the school suspended him, subject to further proceedings, after finding an unspent shotgun shell in his locker along with a crude device that appeared capable of discharging the shotgun shell. The school promptly scheduled a manifestation determination conference. The next day, the parents filed for due process, contending that the school should have previously evaluated him for IDEA eligibility. At the scheduled conference a few days later, the team determined that the incident was not a manifestation of his disability, whereupon the school district expelled him for the rest of the year. As a result of immediate settlement discussions, the district conducted an IDEA evaluation, determined that he was not eligible under the IDEA, provided additional 504 plan accommodations, and agreed to reduce the expulsion to the fall semester. After further settlement discussions during the spring semester, the district agreed to provide him with an independent educational evaluation (IEE). Upon the hearing officer's scheduling of the impartial hearing for July 2020, after delays attributable in part to the pandemic, the district drafted a settlement agreement that provided for the rest of the parents' requested relief, including IDEA eligibility, and $10,000 of their attorneys' fees. In response to the proposed agreement and further motions from both sides that included further demands from the parents, the hearing officer issued a dismissal order that (a) the student was eligible as ED and OHI, (b) the IEP team shall meet within two weeks to develop an IEP, (c) the district will pay for one of the parents' experts to attend the meeting, and (d) the student shall receive IEP services by the start of the school year. However, after further back-and-forth acrimony, the parents' filed a motion in federal court for district payment of their attorneys' fees, amounting to $64K.

In response to the parents' motion, the district argued that the parents did not qualify as "prevailing"	The IDEA provides that a court, in its discretion, may award reasonable attorneys' fees to the parents if they are the "prevailing party."
The applicable requirement for "prevailing" status is for the party to achieve a material alteration in the legal relationship of the parties in the form of an enforceable judgment or court-ordered consent decree.	The court denied the parents' motion, concluding that the hearing officer's order "did not require that the District do anything it had not already agreed to do." Although recognizing that the applicable standard was debatable, the court reserved such policy arguments for Congress or the appellate court.
This case illustrates the transaction costs of the legalization of special education. The trade-off for providing enforceable legal standards for correcting the historic inequities for students with disabilities is the adversarial process that puts attorney representation in a leading position and that makes the formulation and application of "prevailing" status for plaintiff parents as high a priority as is FAPE. In this case, the determination of this status is much closer than the district court found it to be, thus possibly going to appeal.	

On March 30, 2022 in *C.M. v. Rutherford County Schools*, a federal district court in Tennessee addressed the FAPE issues for a student with dyslexia. In grades 4–6, the student had an IEP based on specific learning disabilities (SLD) that included the Wilson reading program. However, upon entering middle school in grade 7, the IEP team decided to provide him with a different reading program, "Using Language!," as well as reduced goals and accommodations. At the midpoint of the second semester of grade 7, the district conducted the triennial evaluation, determining that he was no longer eligible under the IDEA. Instead, the district provided him with a 504 plan. The parents filed for a due process hearing, requesting an IEP with Wilson services and an IEE. The district agreed to pay for the IEE, which concluded that his low average scores in reading qualified for IDEA eligibility as SLD. After a four-day hearing, the hearing officer upheld the IEP for grade 7 and the triennial evaluation toward the end of that year. The parents filed an appeal in the district court, which focused on FAPE for the IEP.	
The parents claimed that the district's choice of Using Language amounted to predetermination, as the Sixth Circuit had decided for a child with autism in *Deal v. Hamilton County Board of Education* (2004).	Although finding some parallels with *Deal*, the court concluded that the following distinctions disproved predetermination: (a) the IEP team's choice and the parents' preferred program were comparable; (b) the middle school offered several reading programs; and (c) the parents actively participated in the IEP meeting with assistance of a dyslexia advocate.
The parents also claimed that the reduction of the previous IEP's goals and accommodations in the grade 7 IEP amounted to predetermination.	Distinguishing preparation from predetermination, the court concluded that the parents' active participation in the IEP meeting, resulting in various revisions to the district's draft, showed that the district did not take an unwavering position.
The parents' next claim was that the district's failure, despite their repeated requests, to provide the reading testing data before the IEP meeting was a prejudicial procedural FAPE violation.	The court agreed that this failure was a procedural violation but concluded that the parents failed to preponderantly prove that it resulted in the requisite harm to either the student or, more fitting here, the parents' opportunity for meaningful participation in the IEP process.
The parents' final major claim was that the grade 7 IEP did not meet the substantive standard for FAPE under *Endrew F.*	Characterizing the IEP as resulting in "a veritable salmagundi of outcomes ranging from inspiring progress to unfortunate setbacks," the court postponed a ruling on this issue, ordering the parties first to engage in mediation.
This case was a close one, as the court acknowledged and as the federal magistrate's different recommended ruling illustrated. It serves as a reminder of the procedural FAPE issues that sometimes overlap with methodology disputes and the "high bar" for predetermination claims in the years since the *Deal* decision. Finally, without explanation it did not address the reevaluation IEP-exiting issue, leaving one wondering about the common but questionable practice of providing a 504 plan as, in effect, a consolation prize. More specifically, in this case, if the basis of the 504 plan presumably was a substantial impairment in the major life activity of reading as compared to most students in the general population, is not this child entitled to specially designed instruction in reading in his 504 plan? In any event, why does he not qualify as needing special education as SLD in one or more of the enumerated areas of reading under the IDEA?	