SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies two recent court decisions that respectively address (a) various FAPE issues, including predetermination, and (b) the problematic adjudicative hurdle of "exhaustion." For related publications and earlier monthly updates, see **perryzirkel.com**.

In *G.A. v. Williamson County Board of Education,* an unpublished decision on March 25, 2022, a federal court in Tennessee addressed various IDEA FAPE issues, including "predetermination." The student, who had what the court characterized as "significant mental and physical challenges," attended a local private LD-oriented school from kindergarten through grade 6. Upon parental request for moving him to the district for grade 7 (2017–18), the district evaluated him and determined that he qualified for special education under the IDEA categories of autism and emotional disturbance (ED), notifying the parent that the part of the evaluation for hearing and sensory processing would take longer to complete. On the day before the 2017–18 school year started, the IEP team met and developed an IEP that proposed placement in the district's middle school. The parent rejected the IEP and notified the district of her decision to keep the child at the private school and seek tuition reimbursement. After a due process hearing decision in favor of the district, the parent filed an appeal with the federal court.	
The parent's first claim was that the district inadequately evaluated the student's gross motor, sensory processing, and hearing needs.	Rejecting the rather nuanced criticisms of the parents, the court concluded that the district's evaluation was, per the IDEA regulatory requirement, "sufficiently comprehensive" with regard to each of these three areas.
The parent's second claim was that the district violated procedural requirements by failing to prior written notice for the supplemental hearing and sensory processing evaluations.	The court concluded that under the particular case circumstances, including the parent's unclear communications and immediate withdrawal of the student, the district was not required to issue a prior written notice for either the hearing or sensory processing evaluations.
The parent's next claim was that the district did not offer the IEP in a timely manner.	Although sympathizing with the parent, the court found that the district met the regulatory deadline of proposing the IEP before the beginning of the school year.
The parent's primary claim was that the district exhibited the "closed mind" attitude that equates to predetermination of the decision to place the student in the district's middle school.	Despite the pre-filled forms that listed the middle school as the proposed placement and the alleged practice of requiring a psychiatrist's hospitalization prescription for private mental health placements, the court relied on the district's offer for a second IEP meeting to discuss the parent's placement proposal as disproving the predetermination claim.
The final claim was that the IEP goals, lack of percentile data, and failure to include counseling amounted to a substantive denial of FAPE.	Although mixing procedural and substantive claim categories, the court ultimately concluded that the IEP met the *Endrew F.* standard and the failure to share percentile data did not significantly impede the parent's opportunity for meaningful participation in the development of the IEP.
This decision illustrates the prevailing, but not uniform, view of courts in evaluating procedural and substantive claims of denial of FAPE, which tends to be rather holistic, non-nuanced, and distinct from professional best practice.	

***T.B. v. Northwest Independent School District,* a federal court's unpublished decision in early 2022, is the latest chapter in a long adjudicative saga. The story started in April 2017 when a teacher of a 10-year-old with an IEP for autism and ADHD allegedly knocked the child to the ground, dragged him across two classrooms, jumped on top of him, and kicked him in the chest in response to his latest of his "maladaptive behaviors." The principal then allegedly placed the child handcuffed behind his back in a chair for more than two hours until law enforcement arrived and transferred him to juvenile detention center. A judge released him the next day with a no-contact order for the teacher. Almost a year and half later, the parent filed for a due process hearing under the IDEA, resulting in dismissal due to Texas' then one-year statute of limitations. Next, alleging that the April 2017 incident was only part of continuing verbal and physical abuse of the child by the teacher and the paraprofessional, the parent filed suit in federal court under Section 504, claiming a disability-based hostile environment. In August 2019, the district court granted the district's dismissal motion based on failure to exhaust administrative remedies, which was a due process hearing. In November 2020, upon the parent's appeal, the 5th Circuit voted 2-to-1 to affirm the dismissal, concluding, per the Supreme Court's *Fry* decision in 2017, the gist of the complaint was IDEA denial of FAPE. Next, the parent again attempted exhaustion by filing for a due process hearing, but the hearing officer granted a dismissal motion for lateness of the filing, i.e., being beyond the statute of limitations. Subsequently, rather than appeal the hearing officer's ruling, the parent filed again in the federal district court including a claim under the ADA. The district defendants responded with a motion to dismiss, including an exhaustion defense.**	
Prior to the Jan. 25, 2022 decision, the judge confirmed the parent's voluntary dismissal of the claims against the individual defendants. The focus then became the ADA claim.	The likely reasons for focusing on the district defendant are (a) in general, under the Section 504 and the ADA, institutions rather than individuals are the responsible parties; (b) one or more immunity defenses may have applied to the parent's Section 1983 and state claims; and (c) the school district is, by far, the "deeper pocket" for liability. The reason for focusing on the ADA may have been to increase the apparent difference from the IDEA.
First, in the Jan. 25, 2022 decision, the judge rejected the defendants' exhaustion basis for the motion to dismiss the ADA claim.	Largely tracking the dissent's analysis in the 5th Circuit's aforementioned Nov. 2020 decision, including the purported "physical abuse" exception in footnote 9 of the *Fry* decision, the judge concluded that the ADA claim was outside the ambit of the IDEA's exhaustion requirement.
Second, the judge rejected the defendants' alternate basis of the dismissal motion—issue preclusion based on the 5th Circuit's decision.	Nailing shut its denial to dismiss the ADA claim, the judge concluded that the 5th Circuit's decision did not preclude litigating this issue because (1) the majority opinion did not specifically address the ADA claim, and (2) it ruled on whether the parent exhausted IDEA remedies, not whether the ADA claim required exhaustion.
This ongoing saga illustrates the problem of providing equitable and efficient dispute resolution under the overlapping framework of the IDEA, Section 504, and ADA, in the various steps of the "exhaustingly" ponderous and complicated adjudicative process.	