SPECIAL EDUCATION LEGAL ALERT
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This month's update identifies two recent court decisions addressing various FAPE issues, including the foundational role of evaluations and, in the second case, the overlay of Section 504. For related publications and earlier monthly updates, see **perryzirkel.com**.

On June 2, 2022, the Fifth Circuit Court of Appeals issued an officially unpublished decision in *Heather H. v. Northwest Independent School District,* addressing the issue of IDEA eligibility evaluation. Upon enrolling their child for kindergarten for the 2018–19 school year in Texas, the parents requested that the school district evaluate him for special education eligibility and provided a private psychological evaluation that diagnosed him with Autism Spectrum Disorder, Generalized Anxiety Disorder, and separation anxiety. Upon completion of the evaluation, which focused on autism, the multi-disciplinary team determined that the child did not qualify for IDEA services. Disagreeing with the determination, the parents requested an independent education evaluation (IEE) at public expense. The district denied their request and filed for a due process hearing. The parents then arranged for the IEE, which concluded that the child was eligible for special education under the IDEA classification of emotional disturbance (ED). After conducting the hearing, the hearing officer ruled that the district's evaluation was appropriate, thus declining to order reimbursement of the IEE. The parents filed an appeal with the federal district court, which affirmed the hearing officer's decision. The parents next filed an appeal with the Fifth Circuit.	
Upon appeal, the parents' first claim was that the district violated the IDEA requirement to evaluate the child "in all areas of suspected disability" by not specifically extending the evaluation's focus beyond autism to ED.	The Fifth Circuit rejected their claim, concluding that (a) the district did not have reason to suspect ED because the kindergarten teacher credibly testified that in the school setting the child did not manifest the anxiety diagnoses, being instead well within the range typical for kindergartners, and, in any event, (b) the evaluation included the BASC-3, which assessed his behavior and emotional functioning.
Alternatively, the parents claimed that the district's evaluation should have assessed autism via the ADOS-II rather than the CARS-2 and the SRS-2.	The Fifth Circuit also rejected this claim, concluding that in the absence of IDEA statutory or regulatory criteria beyond general standards for technical soundness and lack of specific evidence of violations of these standards, the school district's selection of evaluation tools is entitled to judicial deference.
Next, the parents claimed that the district violated the IDEA requirement to follow the publisher's instructions for administering the instruments.	The Fifth Circuit found the evidentiary support for this claim limited to the failure to obtain the teacher's input in the administration of the SRS-2, but without accompanying specifics as to either the publisher's instructions or clear violations.
Finally, the parents claimed that the IDEA regulation for IEEs required the district also to prove that the IEE was not appropriate.	The Fifth Circuit pointed out that the applicable regulations required the district to show that its evaluation was appropriate "or" that the IEE did not meet these same criteria.
This decision is the most recent illustration of the general pro-district trend of court decisions specific to district evaluations/ reevaluations and IEEs under the IDEA. Nevertheless, readers should continue to keep in mind the distinction between minimum legal requirements and proactive professional best practices.	

A cluster of court decisions in *Doe v. Portland Public Schools* from July 2020 to July 2022 addressed the IDEA and Section 504 claims of the parents of a fourth grader, who struggled with reading and writing since kindergarten. Despite the parents' repeated expression of concerns, the school district did not evaluate him until the start of second grade (2017–18). In December, the multi-disciplinary team determined that he was not eligible under the IDEA and should instead receive response to interventions (RTI) services. In grade 3 (2018–19), the parents obtained an evaluation at a local private school that specialized in learning disabilities. This private evaluation yielded a diagnosis of dyslexia. Starting in May 2019, the parents unilaterally placed the child for part of each school day in Lindamood-Bell tutorials at this private school. For grade 4 (2019–20), the parents unilaterally placed him in another private school full-time, while also arranging for private supplemental Lindamood-Bell tutorials twice a week. In fall 2019, the school district conducted another evaluation, concluding that he qualified under the classification of specific learning disabilities (SLD). In January 2020, the district proposed an IEP that provided for 70% in general education with accommodations and 30% for separate specialized instruction in the parents' choice among the district elementary schools. Dissatisfied with both the IEP and the second private school, they unilaterally moved the child back to the original private school. They filed for a due process hearing, seeking reimbursement as compensatory education from December 2017 to December 2019 and tuition reimbursement along with prospective placement at this private school for the subsequent period. The hearing officer ruled in their favor for the first period based on the district's ineligibility determination but concluded that the district's proposed IEP was appropriate, thus limited the remedy to the FAPE denial in the first period. The parents appealed the ruling specific to the district's proposed IEP and also separately sought relief under Section (§) 504.	
The parents' initial claim was that they were entitled to continued placement at the first private school as the stay-put.	In a decision in July 2021, the district court agreed, but in March 2022 the First Circuit reversed, concluding that the hearing officer's decision, representing the state's agreement, was expressly limited to the first period without any approval of the private placement.
Undaunted, the parents proceeded with their appeal regarding the district's proposed IEP, claiming it should have provided for grade-level progress and more specially designed instruction.	On July 14, 2022, the federal district court ruled that the proposed IEP met the *Endrew F.* standard, which did not require grade-level progress and which provided for sufficient support in both general and separate classes, while also being in accord with the least restrictive environment. The court also concluded that the IEP was reasonably calculated to address his specific reading deficits without specifying the particular methodology.
The parents also proceeded with their separate claim of disability discrimination under § 504. The district replied with a motion for summary judgment, contending that the IDEA claim precluded the concurrent § 504 claim and, in any event, that the district did not engage in the § 504 prerequisite of "disability-based animus," such as deliberate indifference.	Also on July 14, the federal district court issued a separate decision on the parents' § 504 claim. First the court concluded that although the IDEA and § 504 claims overlapped, the parents sufficiently elicited evidence of the separable additional element of disability-based animus. Second, the court concluded that a jury could reasonably either accept or reject the following evidence of this required addition for § 504 discrimination: (a) the admission by the school psychologist for the first evaluation that she has a "bias of let's not disable kids" in close cases, instead for trying RTI; (b) the hearing officer's finding that the original eligibility determination was not a close case; and (c) the independent assessment of the parents' expert that the data from the first evaluation clearly evidenced SLD eligibility.
This case illustrates the potential unpredictability and ponderous process of IDEA litigation of both eligibility evaluations and IEP formulations, but also the tricky overlap with § 504, which in occasional cases may pose a viable path to additional relief for plaintiffs.	