SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel

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This month's update identifies two recent court decisions addressing various FAPE issues, including the "assess all areas" obligation, and, in the second case, the overlay of Section 504/ADA. For related publications and earlier monthly updates, see **perryzirkel.com**.

On July 29, 2022, the Eighth Circuit Court of Appeals issued an officially unpublished decision in *Minnetonka Public Schools v. M.L.K.,* addressing the issue of assessing "all areas of suspected disability." In the initial evaluation after an unsuccessful year in kindergarten, the district determined that the child was eligible under the classification of autism. The resulting IEPs for a repetition of kindergarten and then for grades 1, 2, and 3 provided for specialized instruction in reading, writing, and math. Based on the child's slow progress in reading, including attention, these successive IEPs increased the 1:1 support in reading and, in grade 3, added small group instruction in the Wilson Reading System. Dissatisfied, the parents filed for a due process hearing at the end of grade 3. The parents also requested an independent educational evaluation (IEE) at public expense, which the district provided and which formally diagnosed the child with dyslexia and ADHD in addition to autism. In response, the district only revised the IEP to add a secondary classification of speech/language impairment. After conducting the hearing, the hearing officer decided that the district denied FAPE to the child for the entire period, including failure to assess the child in all areas of suspected disability. Interpreting the IDEA's statute of limitations as applying to 2+2 years, the hearing officer awarded 4 years of compensatory education. Upon the school district's appeal, the federal district court in Minnesota upheld the denial of FAPE based on the failures to identify dyslexia and ADHD and to design an IEP to address the child's resulting needs in reading. However, the court interpreted the statute of limitations to restrict the compensatory education award to 2 years. Both parties filed an appeal with the Eighth Circuit.

First, the Eighth Circuit ruled that the failure to add the diagnoses of dyslexia and ADHD was not a violation of the IDEA.	The appellate court concluded that the school district fulfilled its obligations to assess all areas of suspected disability "including his specific struggles with reading and attention."
Alternatively, Eighth Circuit concluded that even if the school district misclassified the disability, the child was not denied FAPE because the IEP met the *Endrew F.* standard.	"While we acknowledge that the IEP goals were largely the same for [the two years], the overall trend shows that the School District set achievable, measurable goals that, when combined with consistently increasing special education services, were reasonably calculated to allow [the child] to make appropriate progress."
The Eighth Circuit did not directly address the issue of the IDEA's statute of limitations.	Although indirectly focusing on the last two years, the court referred more generally to the district's IEPs during the entire K–3 period in finding no denial of FAPE.
This decision illustrates the difficulty of applying the IDEA's "all areas" evaluation requirement. The majority approach, which the appellate court chose, is to focus on the substance of the IEP under *Endrew F.* rather than on the diagnostic labels within the classifications of the IDEA. However, as the hearing officer and lower court decisions in this case show, this particular language is subject to more than one interpretation, depending on the particular circumstances of the case, including the judge and the jurisdiction.	

On August 9, 2022, the First Circuit Court of Appeals issued an officially published decision in *Falmouth School Department v. Doe*, addressing various issues relating to the parents' unilateral placement of a child with dyslexia and ADHD. After the child attended a private preschool and kindergarten, the parents enrolled him in the school district for grade 1 (2016–2017). Based on pre-k literacy skills, the district conducted an evaluation, found the child eligible under the IDEA, and provided an IEP that started at mid-year and that provided specially designed instruction in reading, writing, and math. For reading, the special education teacher chose the "SPIRE" program. The next annual IEP, which was in January 2018, increased the reading instruction from 30 minutes to 60 minutes per day based on the child's difficulties with orthographic and phonological processing. The special education teacher continued using SPIRE, finding that the child took longer to complete its first level than any other student she could recall. At the start of grade 3 (2018–2019), in response to the parents' concern with the child's lack of progress in reading, the IEP team only added audio books to the IEP. Agreeing with the parents' concern, the new special education teacher tried the Wilson "Foundation" program but switched back to SPIRE. In December 2018, the parents obtained a private reading evaluation from a local private special education school. The evaluation found some core reading skills to be at the "pre-k to kindergarten" levels and recommended 1:1 Lindamood Bell "LiPS" and "Seeing Stars" programming. In response to this evaluation, the January 2019 IEP modestly increased the level of special education, including "some instruction using the Lindamood Bell 'Seeing Stars' program." Dissatisfied, the parents arranged for part-time placement at the private school each afternoon for 1:1 LiPS and Seeing Stars instruction. In March 2019, after the school district agreed to the child's early dismissal for this purpose but with no change to the morning's special education instruction, the parents revoked consent for the IEP and kept the child in the general education classroom for the mornings under a 504 plan for the remainder of grade 3 and the beginning of grade 4. In November 2019, based on the child's slow progress, the parents requested a full-day placement at the private school. Instead, the district proposed an IEP that provided for full-time placement in the district with an increase in specially designed instruction in math, the addition of behavioral interventions, and no Lindamood Bell programming. The parents rejected this IEP, unilaterally placed the child full-time at the private school, and filed for a due process hearing to obtain tuition reimbursement. The hearing officer ruled that the January 2018, January 2019, and November 2019 IEPs did not meet the *Endrew F.* standard and awarded reimbursement for the private school from January 2019 until June 2020. The federal district court in Maine affirmed the FAPE ruling and remedy, but rejected that parents' added claims of retaliation. Both sides appealed.	
The First Circuit rejected the district's defense of its use of SPIRE, instead affirming the conclusion that these IEPs were not specially designed to address the child's specific orthographic processing deficit.	The appellate court recognized that school districts are entitled to judicial deference to choose among competing methodologies but observed that the choice must meet the *Endrew F.* standard of being reasonably calculated to enable the child to make progress appropriate to the child's circumstances.
The appellate court also rejected the district's challenge to the appropriateness of the unilateral placement, including the IDEA's provision for the least restrictive environment (LRE).	Although using a pre-*Endrew F.* Sixth Circuit standard based on the private placement providing "'some element of the special education services' missing from the public alternative," the court relied on precedents ruling that LRE does not disqualify unilateral private placements for tuition reimbursement.
The First Circuit also rejected the parents' retaliation claims under § 504/ADA and the 1st Amendment.	The parents' retaliation claims lacked the requisite showing of causally connected adverse action and, for § 504/ADA, the requisite disability-based intent.
This case illustrates the continuing limited but unpredictable "play" in the analysis of (a) methodology disputes, (b) the tuition reimbursement remedy, and (c) non-IDEA overlays, such as § 504 claims, that offer the potential remedy of money damages.	