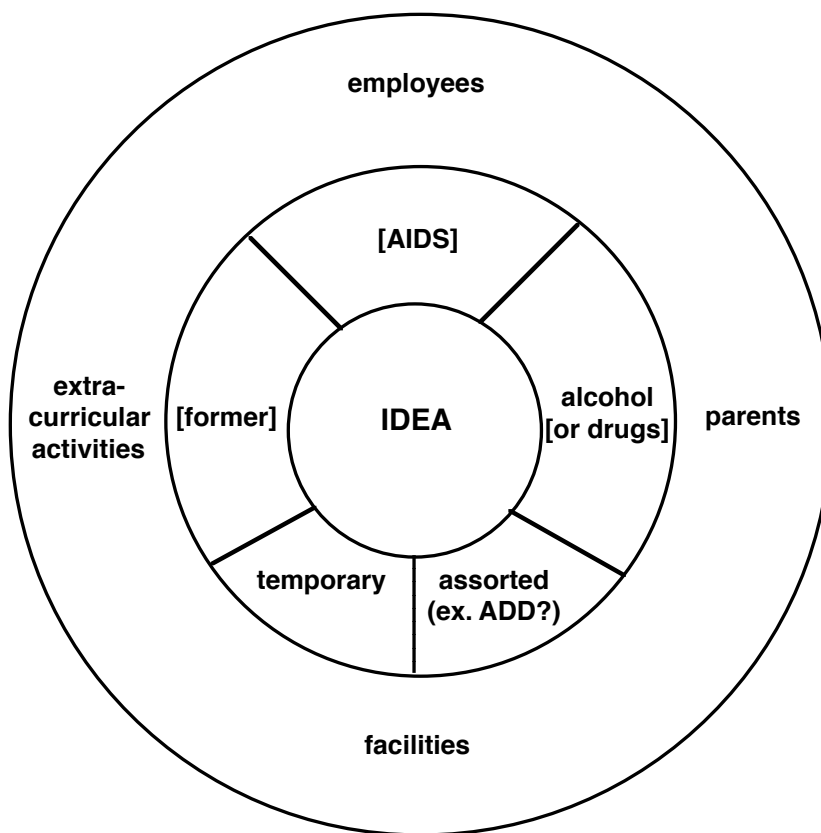


NATIONAL UPDATE OF CASE LAW UNDER THE IDEA AND § 504/A.D.A.¹

Perry A. Zirkel
University Professor Emeritus of Education and Law
Lehigh University
[\[perryzirkel.com\]](http://perryzirkel.com)

© 2023



NOVEMBER 2023

Notes:

- **P** = Parent won; **S** = School district won; () = Inconclusive
- supra = cross reference to earlier full citation
- Published decisions in Tennessee or the Sixth Circuit are cited in **bold font**.
- Unpublished decisions in Tennessee or the Sixth Circuit are included but designated by smaller font.
- Court decisions or component concepts for initial discussion are highlighted in yellow.
- Decisions for particular attention are in shaded in blue-green.
- The acronyms are listed in a glossary on the last page of this document

¹A long version of the Zirkel National Update, which extends back to 1998, is available as a free download at perryzirkel.com. The coverage of both this document and the long-term version is limited to officially published decisions (and those in the Federal Appendix).

I. IDENTIFICATION (INCLUDING CHILD FIND)

- S** D.O. v. Escondido Union Sch. Dist., 59 F.4th 394, 82 IDELR ¶ 125 (9th Cir. 2023)
- ruled that district's 4-month delay in **evaluating** student for reasonably suspected additional classification of autism was not a procedural violation in the circumstances of this case and, even if it were, did not result in a substantive denial of FAPE
- S** Phillips v. Banks, 656 F. Supp. 3d 469, 82 IDELR ¶ 178 (S.D.N.Y. 2023)
- ruled that district's **evaluation** of 20-year-old with multiple disabilities relied on sufficient multiple sources of clinical information regardless of whether the student also qualified as TBI
- S** Ja. B. v. Wilson Cnty. Bd. of Educ., 61 F.4th 494, 82 IDELR ¶ 191 (6th Cir. 2023)
- ruled that district did not violate **child find** for middle school student who moved from another state, had escalating behavior problems during 4-month period, and received 504 plan and RTI services before and after parents disenrolled him (tuition reimbursement case)
- (P)** G.E. v. Williamson Cnty. Bd. of Educ., 2023 U.S. Dist. LEXIS 57353 (Mar. 31, 2023)
- remanded to the ALJ her decision that the district did not violate IDEA in determining middle school child was **not eligible** as ED or OHI (or § 504 child find), which the magistrate's R&R proposed to affirm, because the ALJ's factual findings and legal conclusions were "lifted almost verbatim from the Defendant's filings"
- S** Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 64 F.4th 569, 83 IDELR ¶ 1 (4th Cir. 2023)
- upheld district's **evaluation** that child was **not eligible** under the classification for autism and ruled that the 20-day delay in completing it was procedural violation that did not result in denial of FAPE
- S** B.D. v. Eldred Cent. Sch. Dist., ___ F. Supp. 3d ___, 83 IDELR ¶ 31 (S.D.N.Y. 2023)
- ruled that eighth grader's **eligibility classification** as OHI did not amount to denial of FAPE, despite his undisputed autism, because his IEP took into account his individualized needs and would not have changed with the asserted reclassification
- (P)** Matthew B. v. Clarksville Montgomery Cnty. Sch. Sys., 2023 WL 4633905 (M.D. Tenn. July 19, 2023) (R&R)
- proposed remand to the ALJ his decision that the district evaluated **all areas of suspected disability** in grades 9–10 for student who had IEP since grade 1 with a change in grade 9, after reevaluation that included diagnosis of dyslexia, from OHI to SLD classification – KOSHK date was upon parents' receipt of the reevaluation, which the ALJ's decision had not determined or discussed, and the ALJ should consider all of the IEPs previous to grade 9 to decide whether the failure to earlier identify dyslexia caused a substantive denial of FAPE

II. APPROPRIATE EDUCATION (INCLUDING ESY)²

- S** AAA v. Clark Cnty. Sch. Dist., 643 F. Supp. 3d 1153, 82 IDELR ¶ 94 (D. Nev. 2022)
- ruled that even if the 122-day delay after IEE in revising IEP of student with hearing impairment was a procedural violation, it did not result in requisite loss to the student or parents
- P/S** M.G. v. McKnight, 643 F. Supp. 3d 1153, 82 IDELR ¶ 128 (D. Md. 2023)
- upheld ALJ ruling the district's proposed IEP for high school student with ED, which was for an in-district social-emotional program that included general education classes, was FAPE in the LRE under Andrew F., but concluded that the procedural violation of the three-month delay in developing the proposed IEP resulted in a substantive loss to the student in the absence of sufficient proof that the parents would not have moved him back at the mid-year time the IEP was due [tuition reimbursement case]
- S** Phillips v. Banks (*supra*)
- upheld appropriateness of unchanged IEP goals for 20-year-old with multiple disabilities
- S** R.S. v. Lower Merion Sch. Dist., ___ F. Supp. 3d ___, 82 IDELR ¶ 194 (E.D. Pa. 2023)
- ruled that district's proposed therapeutic private placement of disruptive 12th grader with ED (bipolar disorder) was FAPE (Andrew F.) in the LRE (Oberti) [tuition reimbursement case]
- S** L.J.B. v. N. Rockland Cent. Sch. Dist., ___ F. Supp. 3d ___, 83 IDELR ¶ 13 (S.D.N.Y. 2023)
- ruled that IEP for continued placement in private school of student with multiple disabilities provided FAPE, including its provision for assistive technology and its lack of an FBA
- P** District of Columbia Int'l Charter Sch. v. Lemus, ___ F. Supp. 3d ___, 83 IDELR ¶ 19 (D.D.C. 2023)
- ruled that two successive IEPs for seventh grader with ID, including various amendments, did not meet did not meet Andrew F. standard [compensatory education case]

² 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2):

(ii) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--

(I) Impeded the child's right to a FAPE;

(II) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(III) Caused a deprivation of educational benefit.

(iii) Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

- P** Pierre-Noel v. Bridges Pub. Charter Sch., ___ F. Supp. 3d ___ (D.D.C. 2023)
- ruled that district's failure to **amend** the IEP to provide an in-person aide for first grader who was unable to attend school due to his physical disabilities after having ample notice of the situation amounted to denial of FAPE
- S** B.D. v. Eldred Cent. Sch. Dist. (supra)
- ruled that proposed IEP for eighth-grader with OHI (**autism**, ADHD, and chronic kidney disease) provided reasonable steps, via **safety plan** (despite lack of formal IEP meeting and amendment), to address bullying [tuition reimbursement case]
- P** Steckelberg v. Chamberlain Sch. Dist., 77 F.4th 1167 (8th Cir. 2023)
- ruled, briefly, that district's failure to consider private BCBA's BIP of h.s. student with severe neuropsychiatric conditions and its change in his placement to home instruction w/o adjusted and adequate academic support violated **Endrew F.** [tuition reimbursement case]
- S** M.B. v. Fairfax Cnty. Sch. Bd., ___ F. Supp. 3d ___ (E.D. Va. 2023)
- ruled that IEP for eighth grader with ADHD, which provided full-time special education services, met the **Endrew F.** standard, including proactive behavior steps and supports [tuition reimbursement case]
- S** E.S. v. Clarksville Montgomery Cnty. Sch. Sys., 2023 WL 6213722 (W.D. Tenn. Sept. 25, 2023)
- upheld ALJ's decision that use of isolation and restraints met **Endrew F.** in the individual circumstances of the case and that single violation of 10-day notice requirement did not result in loss to the student or parents
- S** Edward M.-R. v. District of Columbia, ___ F. Supp. 3d ___ (D.D.C. 2023)
- ruled that two successive IEPs for middle school child with **autism** and ADHD met **Endrew F.** standard and PRR provision – also the IEP goals were measurable

III. MAINSTREAMING/LRE

- P** Knox Cnty. v. M.Q., 62 F.4th 978, 82 IDELR ¶ 214 (6th Cir. 2023)
- ruled that present year's general education teacher on IEP team at the meeting on last day of the school year was not a procedural violation, but the placement of the kindergarten child with **autism** largely in a self-contained class was not the LRE based on the **Sixth Circuit's approach – LRE upon two competing placements both providing substantive FAPE**
- S** R.S. v. Lower Merion Sch. Dist. (supra)
- agreed with IHO that district's proposed placement in private therapeutic day school met the step 1 **Oberti** factors for LRE

IV. RELATED SERVICES

- S** Pierre-Noel v. Bridges Pub. Charter Sch. (*supra*)
- ruled that the entitlement to **transportation** on IEP of first grader who was medically fragile, nonverbal, and wheelchair-bound does not extend to travel from the school bus to the door of his apartment building or up the stairs to his apartment as either a related or supportive service under the IDEA

V. DISCIPLINE ISSUES

- (P)/S** K.C. v. Reg'l Sch. Unit 73, 616 F. Supp. 3d 63, 81 IDELR ¶ 93 (D. Me. 2022)
- ruled that district's (a) written notice w/o oral explanation of parent's consent rights for change in placement, (b) use of IAES for supposed special-circumstances seriously disruptive conduct that was manifestation of multiple behavioral disabilities of fifth grader, and (c) out-of-district placement proposal were not violations of IDEA, but the district's unilateral change of the IEP's first determination of the IAES did violate IDEA and, based on the undisputed additional denials of FAPE, remand to the IHO for an appropriate compensatory education award
- P** Petition of State, 294 A.3d 243, 82 IDELR ¶ 96 (N.H. 2022)
- ruled that state law that requires district to conduct a manifestation determination review before filing a juvenile delinquency petition incorporates this IDEA procedure but not its 10-day exemption, thus applying to this child even though it was in the wake of a short-duration suspension

VI. ATTORNEYS' FEES

- P** Bellflower Unified Sch. Dist. v. Arnold, 586 F. Supp. 3d 1010 (C.D. Cal. 2022)
- awarded full requested amount of \$76k as reasonable and adequately documented
- P/S** H.C. v. N.Y.C. Dep't of Educ., 71 F.4th 120 (2d Cir. 2023)
- upheld 50% reduction in lodestar for parents' attorneys' fees, concluding that the complexity of the case may factor into whether the rate and also the hours are reasonable and that even if the district unreasonably protracted the litigation does not prevent the reduction of unreasonable rates, but ruled that the court may reduce, but not eliminate, travel expense with attorneys' fees
- S** J.S. v. N.Y.S. Dep't of Corr. & Cmty. Supervision, 76 F.4th 32 (2d Cir. 2023)
- ruled that student (with requisite status under IDEA) who successfully sues on his own behalf qualifies as prevailing party

- (P) A.B. v. Brownsburg Cmty. Sch. Corp., 80 F.4th 805 (7th Cir. 2023)
- ruled that the parents qualified for prevailing party status in the wake of IHO order, in conjunction with prehearing dismissal after district's draft stipulation, that child was eligible under the IDEA and that the IEP team should meet to develop an IEP

VII. REMEDIES

A. TUITION REIMBURSEMENT

- (P) A.C. v. Henrico Cnty. Bd. of Educ., 610 F. Supp. 3d 857, 82 IDELR ¶ 3 (E.D. Va. 2022); Navarro-Villanueva v. Puerto Rico, 628 F. Supp. 3d 326, 81 IDELR ¶ 253 (D.P.R. 2022)
- denied dismissal of parent's appeal of IHO decision that found denial of FAPE but rejected tuition reimbursement at appropriateness step for private school – aggrieved party
- P/S M.G. v. McKnight (*supra*)
- ruled that the unilateral **residential placement** did not meet the Fourth Circuit's necessary, intertwined test parents but that parents were entitled to five-months (one semester) of reimbursement of education and clinical portion of residential placement cost based on its disqualified part and the insensitivity of an April return
- S R.S. v. Lower Merion Sch. Dist. (*supra*)
- ruled that the parent's 1:1 **private placement** was not appropriate due to its lack of sufficient emotional, as compared to academic, supports and services
- P Steckelberg v. Chamberlain Sch. Dist. (*supra*)
- ruled that the **out-of-state school**, which focused on behavioral issues, was appropriate for the student with severe psychiatric conditions in light of his evident academic progress—and the travel costs related to his placement were presumptively reimbursable
- S M.B. v. Fairfax Cnty. Sch. Bd. (*supra*)
- ruled, in the alternative or as dicta, that the **unilateral placement** was not appropriate, including it having a more restrictive approach than necessary for this student

B. COMPENSATORY EDUCATION³

- P/S District of Columbia Int'l Charter Sch. v. Lemus (*supra*)
- rev'd and remanded compensatory education award for not meeting qualitative and **non-delegation** standards, although upholding order for IEE to help determine the appropriate amount

³ For the latest treatment, see Perry A. Zirkel, "Compensatory Education under the IDEA: The Latest Annotated Update of the Law," West's Education Law Reporter, 2020, v. 376, pp. 850–863.

C. OTHER REMEDIES (INCLUDING IEE REIMBURSEMENT)⁴

- (P) A.C. v. Henrico Cnty. Sch. Bd., 610 F. Supp. 3d 857, 81 IDELR ¶ 98 (E.D. Va. 2022)
- denied dismissal of claim of student with various disabilities based on IHO's denial of reimbursement or other relief upon finding substantive denial of FAPE⁵
- (P) C.B. v. Bd. of Educ. of Chi. Dist. 299, 624 F. Supp. 3d 898, 81 IDELR ¶ 184 (N.D. Ill. 2022)
- declined dismissal of § 1983 IDEA claim for money damages against district and individual school officials based on uncertain effect of 7th Circuit's 2015 decision in Stanek
- S Bouabid v. Charlotte-Mecklenburg Schs. Bd. of Educ., 62 F.4th 851, 82 IDELR ¶ 216 (4th Cir. 2023)
- upheld IHO's prospective order as remedy for LRE violation as non-delegation – "[The IHO] instead precisely identified where [student's] IEP had fallen short and instructed [the district] as to how to properly cure the deficiency"

VIII. OTHER IDEA ISSUES

- (P) Perez v. Sturgis Pub. Schs., 143 S. Ct. 859, 82 IDELR ¶ 213 (2023)
- held that exhaustion under the IDEA does not apply to claims under another federal statute (e.g., § 504) that, premised on denial of FAPE, seek money damages (or any other remedy not available under the IDEA)
- S Simpson-Vlach v. Mich. Dep't of Educ., 2023 WL 3347497 (6th Cir. May 10, 2023)
- upheld dismissal of multi-pronged (including IDEA) J.T.-type challenge to COVID-19 closure of schools based on standing and mootness (including settlement of due process hearings)
- (P) Q.T. v. Pottsgrove Sch. Dist., 70 F.4th 663 (3d Cir. 2023)
- reversed IHO's dismissal for lack of standing, ruling instead that cousin who assumed all responsibility for school requirements and provided both home and support not just during the school year was acting in place of the natural parent, thus qualifying under one of the multiple options in the statutory definition of the statutes and triggering Chevron deference for the narrower IDEA regulation
- S Roe v. Healey, 78 F.4th 11 (1st Cir. 2023)
- upheld dismissal of multi-pronged (including IDEA) J.T.-type challenge to COVID-19 closure of schools based on standing, mootness, and exhaustion

⁴ For a useful checklist of IHO analysis of IEEs at public expense, see Perry A. Zirkel, "Independent Educational Evaluation Reimbursement: The Next Update," West's Education Law Reporter, 2022, v. 402, pp. 23–40.

⁵ In a subsequent, unpublished decision, the court declined to dismiss the district's counterclaim that challenged the IHO's adverse ruling regarding FAPE. A.C. v. Henrico Cnty. Sch. Dist., 82 IDELR ¶ 3 (E.D. Va. 2022).

S Davis v. District of Columbia, 80 F.4th 321 (D.C. Cir. 2023)

- ruled that **stay-put** is not applicable where the reason for unavailability is beyond the school district's control, here being the residential placement discharging the student because it was no longer an appropriate placement and the 19 other residential placements that the district diligently sought all denying admission to the student

(S) J.L. v. Williamson Cnty. Bd. of Educ., 2023 U.S. App. LEXIS 23453 (6th Cir. Sept. 1, 2023)

- rejected preliminary injunction that, via **stay-put**, would have reversed ALJ's incidental ruling that stay-put did not entitle middle-school student with IEP, who had history of violent outbursts, to placement in the middle school after two years that included settlements for instruction in the home and unilateral private school placements

IX. SECTION 504/ADA ISSUES

- (P) L.E. v. Superintendent of Cobb Cnty. Sch. Dist., 55 F.4th 1296, 82 IDELR ¶ 79 (11th Cir. 2022)
- reversed and remanded denial of preliminary injunction to parents of students with disabilities § 504/ADA claim for mandatory **masking** and other pandemic safety procedures upon return to in-person instruction – failure to focus on in-person schooling rather than education in general and to address Olmstead unjustified isolation claim, which is independent of disparate treatment
- (P/S) **Doe v. Knox Cnty. Bd. of Educ., 56 F. 4th 1076, 82 IDELR ¶ 103 (6th Cir. 2023)**
- remanded, after denying exhaustion defense and requested preliminary injunction, for determining whether magnet school’s neutral policy and 504 plan for student with **misophonia** was a reasonable accommodation under § 504/ADA and, if not, whether parents’ proposed accommodation of ban on chewing food and gum in all classrooms was reasonable
- S Baker v. Bentonville Sch. Dist., 75 F.4th 810 (8th Cir. 2023)
- upheld rejection of liability lawsuit challenging formulation and implementation of 504 plan for kindergartner with vision problems – lack of **gross misjudgment or bad**
- P **Sanders v. Shelby Cnty. Bd. of Educ., 2023 WL 5690291 (W.D. Tenn. July 28, 2023)**
- denied motions for renewed judgment as a matter of law, new trial, or amended judgment in wake of jury’s \$350k compensatory damages verdict under § 504/ADA that district did not intentionally discriminate against wheelchair-bound high school student with IEP for seizures and other physical disabilities but failed to provide reasonable accommodation, including “Read Aloud” assistance and reliable elevator access (currently on appeal at 6th Circuit)
- S J.W. v. Paley, 81 F.4th 440 (5th Cir. 2023)
- rejected § 504 intentional discrimination and failure-to-accommodate claims of 11th grader with ID and ED in wake of school resource officer’s use of taser (and handcuffs) to stop him from leaving school
- S **Torres v. Stewart Cnty. Sch. Sys., 2023 WL 30393 (M.D. Tenn. Sept. 28, 2023)**
- ruled that failure to provide manifestation determination for high school senior with autism and other diagnoses (but without an IEP based on parents’ refusal) did not violate § 504 when the extent of the discipline was at most 4 days of removal to an alternative learning center and the discipline was removed from his record upon district’s reversal of initial determination of sexual harassment
- S Lartigue v. Northside Indep. Sch. Dist., __ F.4th __ (5th Cir. 2023)
- ruled that IDEA substantive FAPE ruling did not preclude ADA FAPE failure-to-accommodate claim for money damages due to different standards and relief

Glossary of Acronyms and Abbreviations

ADA	Americans with Disabilities Act
ADHD	attention deficit hyperactivity disorder
BCBA	board certified behavior analyst
BIP	behavior intervention plan
C.F.R.	Code of Federal Regulations
ED	emotional disturbance
ESY	extended school year
FAPE	free appropriate public education
FBA	functional behavior analysis
IAES	interim alternative educational setting
ID	intellectual disabilities
IDEA	Individuals with Disabilities Education Act
IEE	independent educational evaluation
IEP	individualized education program
IHO	impartial hearing officer
LRE	least restrictive environment
OHI	other health impairment
PRR	peer-reviewed research
§ 504	Section 504 of the Rehabilitation Act
SLD	specific learning disability
SLI	speech and language impairment
<u>supra</u>	cross reference to earlier, full citation
TRO	temporary restraining order
U.S.C.	United States Code (i.e., federal legislation)

REDISTRIBUTION OF THIS OUTLINE WITHOUT PRIOR WRITTEN PERMISSION FROM PROFESSOR ZIRKEL, AS COPYRIGHT OWNER, IS PROHIBITED.

THIS OUTLINE IS INTENDED TO PROVIDE PARTICIPANTS WITH A SUMMARY OF SELECTED JUDICIAL DECISIONS. THE PRESENTER IS NOT RENDERING LEGAL ADVICE TO THE PARTICIPANTS; CONSULTATION WITH LOCAL LEGAL COUNSEL IS RECOMMENDED FOR THIS PURPOSE.