SPECIAL EDUCATION LEGAL ALERT

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As a service to CASE members, this monthly legal alert focuses on two recent cases, one including the intersection of child find and RTI under the IDEA and the other concerning the IDEA remedies for stay-put violations. For automatic e-mailing of future legal alerts, sign up at **perryzirkel.com**; this website also provides free downloads of various related articles, including those specific to the complaint procedures avenue under the IDEA.

In *M.G. v. Williamson County Schools* (2018), the Sixth Circuit Court of Appeals addressed three successive claims of the parents of a child who had neurological problems with muscle tone and coordination. The district had conducted an evaluation in preschool determining that the child was not eligible under the IDEA and another evaluation three years later with the same result. During the interim, the district provided the student first with RTI and other general education interventions and two years later, upon receiving a medical prescription from the child's doctors, a 504 plan that included the requested occupational therapy (OT) consultations. The parents claimed that the district (a) violated child find under the IDEA, (b) denied FAPE by failing to provide written notice in response to their intervening initial requests for a second evaluation, and (c) violated Section the IDEA or Section 504/ADA by failing to provide direct OT services. The Sixth Circuit upheld the rulings in favor of the district with the following conclusions:	
For the child find claim, the district's effective efforts, including RTI, in the wake of the first evaluation negated the requisite reasonable suspicion for an earlier initiation of the second evaluation.	Cautioning against overgeneralization of this unofficially published federal appeals court decision, both child find and RTI—as evidenced in the case law articles on my website—warrant an "it depends," rather than an absolute, approach.
The lack of written notice in response to the parental requests was a procedural violation, but it did not result her in a loss to the parents (due to their continued active participation) or to the child (due to his ultimate ineligibility under the IDEA).	As a matter of proper compliance, the district should have provided the required written notice (with the accompanying procedural safeguards notice), but this ruling serves as a reminder of the prevailing two-step analysis of procedural claims under the IDEA. See, e.g., the second Publications item under FAPE on my website.
The lack of direct OT services did not violate the IDEA because the school personnel's assessments outweighed those of the child's physicians and did not violate Section 504 or the ADA because the RTI and 504 plan fulfilled their requirements.	Again with due caution against overgeneralization, school personnel should not under-value their own expert opinion, as compared to that of physicians with regard to the need for special education or the resulting nature of appropriate services.

In a case where the court ultimately ruled that the IEP at issue was appropriate but the district violated stay-put by not continuing to fund the related services at the private placement as agreed in the prior IEP, two successive decisions in *Doe v. East Lyme Board of Education* (2015, 2017) spelled out the remedial consequences.	
First, in 2015, the Second Circuit Court of Appeals held that the district owes reimbursement for the amount the parent expended for the related services plus compensatory education to fill the gap of required services that the parent had not arranged. The Second Circuit sent the case back to the lower court to determine the remainder of the remedy, including the compensatory education portion and whether its scope should be limited to the related services in the stay-put IEP or, given the six years since then, analogous services appropriate to the child's current needs.	This decision was officially published, giving it high precedential weight in combination with its federal appellate level. The actual order in this case was reimbursement only for the period up until the date of this appellate decision, amounting to $97.4K. However, the ultimate cost to the defendant district, the binding effect in stay-put cases within the three states of the Second Circuit (CT, NY, and VT), and the potentially persuasive effect on courts in other jurisdictions are much more significant

Next, in 2017, the federal district court in Connecticut addressed the additional reimbursement owed due to the remaining period plus the compensatory education portion for the entire period.

- Ruling that the reimbursement includes the full out-of-pocket costs for the specified services, including Orton-Gillingham tutoring and transportation, the court awarded an additional $36.5K plus interest.
- Distinguishing stay-put from FAPE, the court rejected the *Reid* qualitative approach for compensatory education and ruled that, instead, the analogous services approach applied, meaning services that benefit the child based on his current needs. Based on the parent's expert witness, the court concluded that, given that the child would be attending college after one more year and that his needs will likely continue during college, the court ordered the district to establish an escrow account for $203.5K for use during the next six years for the originally specified services plus, by extension, assistive technology, college disability-related courses, and college support services to the extent they continue to be necessary and beneficial for this current needs.

And, the case is not finished. It is back on appeal to the Second Circuit, and the issue of attorneys' fees is also not yet resolved.

The total cost to the defendant district, in addition to the outlay for its own attorneys, was approximately $331K plus the parents' attorneys' fees, which must be considerable. Because this decision was officially published but at a lower court level, it has a less weighty precedential effect but it potentially provides the answer to various issues not previously addressed in many jurisdictions. Here are leading examples:

- Does compensatory education extend during postsecondary education and, if so, to any college courses or services? Based on the particular facts and posture of this case, they court provided a qualified yes, limited to certain analogous services.
- When does compensatory education equitably warrant an award in dollars rather than hours and, if dollars, via an escrow account arrangement? Again, tailored to the specific situation, the court said yes in this case, while adding a potential limitation in terms of the continued need and benefit of the permissible services.

Finally, this decision serves as a reminder of the regrettable transaction costs of adjudicative dispute resolution, particularly in cases that reach the appellate level; in this case, the stay-put IEP was in 2008-09 when the student was in grade 3, and the most recent decision as at the end of AY 2016-17, when he was in grade 11.