SPECIAL EDUCATION LEGAL ALERT

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As a service to CASE members, this monthly legal alert provides, as a two-column table, highlights (on the left) and practical implications (on the right) of major new legal developments. This one summarizes a recent published, federal appellate court decision that is significant for its multiple issue rulings.

In *M.C. v. Antelope Valley Unified School District* (2017), the Ninth Circuit Court of Appeals made several rulings that were completely or partially against the defendant district that appear to have notable implications for special education practice and litigation. Although not at all limited to these particular facts, the child in this case was a high school student who had a genetic disorder that rendered him blind and with a host developmental delays in all academic areas. This decision is binding only in the nine states in the Far West that encompass the Ninth Circuit. However, it is not unusual for published federal appellate decisions to have a radiating, persuasive effect on other jurisdictions. Some of these rulings are much more likely than others to "stick" in jurisdictions beyond the Ninth Circuit.	
In the first ruling, the appellate court held that the district's unilateral change to the proposed IEP (in this case correcting a mistake in the itinerant services from 240 minutes per month to 240 minutes per week), without either notifying the parents and obtaining their consent or re-opening the IEP process is was a fatal procedural violation of the IEP process for two independent reasons—depriving parents right to participate in (a) the formulation of the IEP and, separately, (b) the enforcement of the IEP. According to the court, the correction in the child's favor, which in this case was even more so because the district alleged providing 300 minutes of these services per week, also resulted in a loss to the student, because the resulting uncertainty caused him and his parents to incur unnecessary legal expenses to resolve this issue.	Although the facts of this case are a mix of possible good intent (namely the successive corrections in favor of increased services) and seemingly bad practice (burying the amended IEP in the various documents at the hearing without prior notification to the parents), the lesson for district personnel is rather obvious: don't change the IEP, even to increase services, without either obtaining consent from the parent or holding another IEP meeting that shows proposed revision. The other, less obvious significance of this ruling is that the court reached it by treating the IEP as a contract. Among the possible implications of such treatment is that it may (a) strengthen the standard for denials of FAPE that are based on failure to implement the IEP, and (b) support the "four corners" approach for FAPE cases more generally, which causes the formation and implementation of IEPs to be lengthier, while diminishing the value of other FAPE evidence.

Second and similarly, the Ninth Circuit ruled that the IEP's failure to specify the assistive technology (AT) devices and services that the child needed and was receiving, at least where the parents did not know these specifics, was a procedural violation that seriously infringed on the parents' participation to monitor implementation.	This ruling relied on a California law providing that when a child needs particular AT devices or services, the IEP must specify them. Without such a state law, it may be argued the more general IDEA regulatory requirements for the IEP to state the supplementary aids and services extends to specifying the particular AT devices and services.
The third ruling in *M.C.* was that the district's failure to respond to the parents' due process complaint put the parents at a disadvantage; in such cases, the Ninth Circuit held that the hearing officer must (a) stop the hearing for the district to provide its answer, and (b) allocate the cost of the delay to the district regardless of which party ultimately prevails.	This ruling, unlike the previous two, was not necessarily fatal to the district in this case; the appellate court sent the case back for a determination of the harm to the parents and "an award of appropriate compensation." It is unclear what the Ninth Circuit specifically meant in terms of said compensation not only in this case but also for the "cost of delay" under its required procedure for hearing officers in other such cases.
The fourth ruling was that when the parents, as a result of the first and second procedural violations (above), do not know the specific services being provided to the child, the burden of proof for substantive FAPE shifts from the parents to the district.	Such a burden-shifting analysis is unusual under the IDEA, particularly for burden of persuasion (i.e., who wins in a close case) as contrasted with burden of production (i.e., who must go first in presenting the evidence). Although creative, this shift would seem to be overkill in light of the denial-of-FAPE rulings for this same IEP except to the extent that it may affect the nature and scope of the remedy.
The final ruling was to remand the issue of substantive FAPE, including other alleged inadequacies (e.g., mobility services), back to the lower court to reconsider its ruling, which was in favor of the district, in light of the new, refined standard in the Supreme Court's recent *Endrew F*. decision.	As shown in the May legal alert, the reconsideration in light of *Endrew F.* Court's refinement of the *Rowley* substantive standard is not surprising. However, the Ninth Circuit's translation of *Endrew F.* is controversial and questionable because it approximates the commensurate-opportunity standard that *Endrew F.* rejected. In any event, this interpretation illustrates the inkblot-like nature of this new Supreme Court decision at least for the near future.