

SPECIAL EDUCATION LEGAL ALERT

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As a service to CASE members, this latest monthly legal alert summarizes two recent officially published federal court decisions that respectively illustrate (a) a novel issue under the IDEA, and (b) a set of continuing issues, including procedural FAPE (e.g., parental participation), substantive FAPE (e.g., *Andrew F.*), and eligibility for extended school year (ESY). The layout follows the usual format of a two-column table, with key rulings on the left and practical implications on the right. 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 FAPE-parental participation.

In *M.L. v. Smith* (2017), the Fourth Circuit Court of Appeals addressed the novel issue of whether school district’s FAPE obligation extends to religious and cultural instruction. The particular child in this case was a member of the Orthodox Jewish faith and eligible under the IDEA classification of intellectual disability. Upon his enrollment in the public schools in Montgomery County, Maryland, his parents rejected the proposed IEP because it did not provide functional instruction to prepare him for life in the Orthodox Jewish community. They sought tuition reimbursement and prospective placement at a private special education program serving this religious community. The Fourth Circuit ruled in favor of the school district.

First, based on the definition of FAPE in the IDEA, the Fourth Circuit concluded that religious and cultural instruction does not fit within the school district’s duty to provide access to the general curriculum or the scope of the child’s “other educational needs.”

Although binding only in the five states in the Fourth Circuit (MD, NC, SC, VA, and WV), the reasoning of this decision, which is limited to the IDEA and which is not specific to any particular religion, appears to be persuasive for the remaining jurisdictions.

Second, acknowledging that the Supreme Court in *Andrew F.* refined the substantive standard for FAPE “progress appropriate in light of the child’s circumstances,” the Fourth Circuit concluded that “[t]he relevant circumstance here is that [this child has a disability], not that he is of the Orthodox Jewish faith.”

The scope of the relevant “circumstances” under *Andrew F.* is still otherwise subject to question, but its non-extension to a child’s religious and cultural identity seems now relatively settled. In any event, the preliminary finding in the May 2016 Legal Alert that the effect of *Andrew F.* is undramatic continues to be the case.

Finally, the Fourth Circuit found it unnecessary to reach any issues under the First Amendment’s establishment clause or free exercise clause.

Although strictly adhering to the IDEA, the Fourth Circuit (a) noted that the district provided reasonable accommodations for the child’s religious preferences and (b) avoided addressing the limited case law that found tuition reimbursement under the IDEA not to violate the establishment clause.

***F.L v. Board of Education of Great Neck U.F.S.D. (2017)* is one of the latest in a long line of FAPE-related court decisions in New York. The child in this case was a teenager with ADHD and various specific learning disabilities. The successive IEPs at issue were for ninth grade (2012–13), tenth grade (2013–14), and eleventh grade (2014–15). The hearing officer ruled in favor of the parents’ procedural FAPE, substantive FAPE, and ESY claims, ordering relief that included reimbursement for the IEE and Lindamood Bell courses. The review officer reversed the hearing officer’s decision, and the parents appealed to federal district court.**

For the statute of limitations under the IDEA, the court concluded that the parents’ attendance at the 5/24/12 IEP meeting established the date that they knew or should have known about the denial of ESY for summer 2012; thus, their filing for due process on 6/24/14 covered the previous two years but not summer 2012 ESY.

The overlapping issues of determining the so-called KOSHK (knew or should have known) date and its application of this date are not clearly settled. For more information about the key case law to date, see, e.g., the 2015 “Of Mouseholes and Elephants” article that is available at perryzirkel.com under in the “Due Process Hearings” section of “Publications” at perryzirkel.com

For procedural FAPE, the court rejected the parental participation claim, concluding that the district actively had sought the parents’ meaningful participation at IEP meetings, including “discuss[ing] and consider[ing] each of their concerns.”

Although recognizing the central and special significance of parental participation for procedural FAPE, the court applied a relatively relaxed standard representative of the case law more generally—see the 2015 “Parental Participation” article in the “FAPE” section of “Publications” at perryzirkel.com

For substantive FAPE, the court cited *Andrew F.* and blended it with various previous Second Circuit and New York court rulings to uphold the three successive IEPs. Here are two examples of the court’s conclusions:

- “a school district does not deny FAPE by developing an IEP that is the same as a prior year’s IEP so long as it ‘enables [the child] to ... make progress”
- “an IEP need not ‘mention ... a particular teaching methodology’ to be substantively adequate”

As with procedural FAPE, the court’s application of the substantive standard, although illustrative of the general judicial trend, is clearly distinct from the norms of professional best practice for both avoidance of litigation and achievement of excellence. Moreover, the illustrative conclusions, along with the court’s express deference to districts’ educational personnel for programming decisions, should not be overgeneralized. Finally, the court relied on subjective and objective evidence of progress within the “snapshot” of what the IEP team knew or had reason to know at the time of their meeting.

For ESY, the court concluded that the parents failed to fulfill their burden of proof for the regression-recoupment criteria for eligibility.

As with substantive FAPE, the key for this ruling was the evidence available to the IEP team upon making their timely eligibility determinations for the relevant two summers.