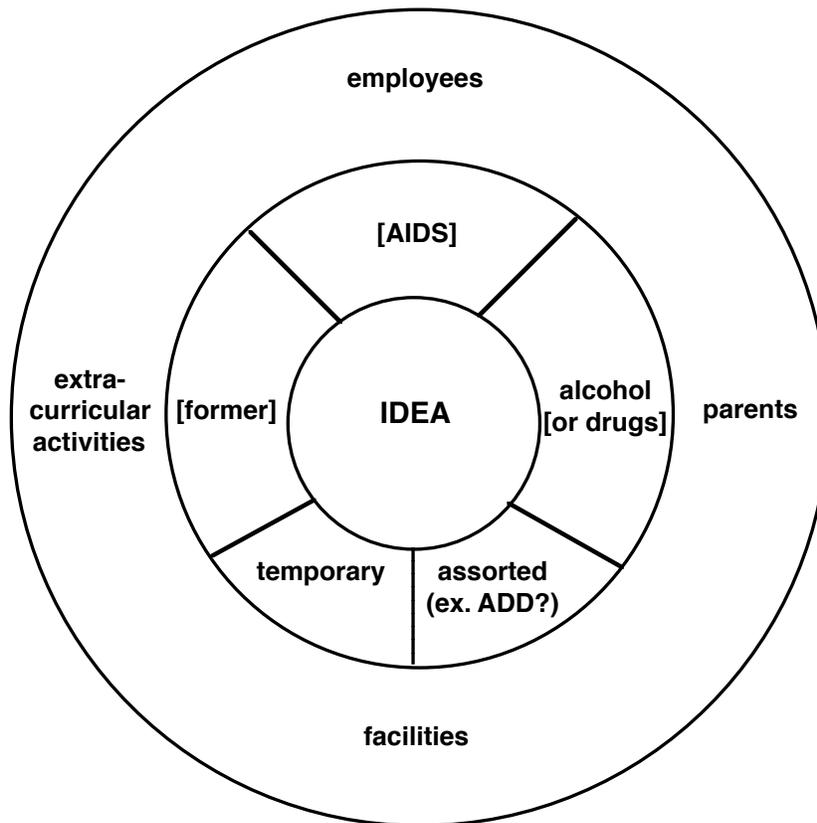


# NATIONAL UPDATE OF CASE LAW UNDER THE IDEA AND § 504/A.D.A.<sup>1</sup>

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## Notes:

- **P** = Parent won; **S** = School district won; ( ) = Inconclusive
- supra = cross reference to earlier full citation
- Cases from Wisconsin or the Seventh Circuit are in **bold 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

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<sup>1</sup>A long version of the Zirkel National Update, which extends back to 1998, is available as a free download at [perryzirkel.com](http://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** Northfield City Bd. of Educ. v. K.S., 847 F. App'x 130, 78 IDELR ¶ 181 (3d Cir. 2021)
- rejected **child find** claim of student with PTSD who had been hospitalized for suicidal thoughts in grade 4, ruling that district only knew when she started middle school that she had history of trauma and took affirmative responses to what appeared to be emotional, not academic problems (though subsequently found eligible as ED) [compensatory education case]
- P** D.C. v. Klein Indep Sch. Dist., 860 F. App'x 894, 79 IDELR ¶ 4 (5th Cir. 2021)
- upheld **child find** violation concluding that (a) the district had reasonable suspicion based on student's failure to improve low standardized test scores despite ongoing 504 plan for dyslexia and (b) the six-month delay until initiating the evaluation, even with intervening summer, was unreasonable
- S/(P)** J.N. v. Jefferson Cnty. Sch. Dist., 12 F.4th 1355, 79 IDELR ¶ 151 (11th Cir. 2021)
- ruled that district violated **child find** for middle-school child with ADHD but was not entitled to compensatory education (or attorneys' fees) because the parent did not meet her burden of proof of a resulting denial of FAPE, including lack of proof that the general education interventions that the teachers provided were substantively different from what she subsequently received under an IEP
- S** Leigh Ann H. v. Riesel Indep. Sch. Dist., 18 F.4th 788, 80 IDELR ¶ 3 (5th Cir. 2021)
- rejected **child find** claim based on implicitly district-deferential analysis, including lack of showing of connection between behavior and ED criteria
- S** Crofts v. Issaquah Sch. Dist. No. 411, \_\_\_ F.4th \_\_\_, 80 IDELR ¶ 61 (9th Cir. 2022)
- concluded that initial evaluation determining SLD was appropriate even though it did not specifically instead target **dyslexia**

**II. APPROPRIATE EDUCATION (INCLUDING ESY)<sup>2</sup>**

- S* A.B. v. Abington Sch. Dist., 841 F. App'x 392, 78 IDELR ¶ 1 (3d Cir. 2021)
- ruled that that a district's obligation to offer a FAPE for a **privately enrolled student** with a disability is not triggered unless the parent requests it specifically, as objectively understood [tuition reimbursement case]
- S* Amanda P. v. Copperas Cove Indep. Sch. Dist., 838 F. App'x 104, 78 IDELR ¶ 92 (5th Cir. 2021)
- brief affirmance of lower court decision that district's reevaluation, including subsequent **dyslexia** screening/testing qualification and services, was not a procedural or substantive denial of FAPE and that the student's IEP met the four-part test in the Fifth Circuit for substantive FAPE
- S* KB v. Katonah Lewisboro Union Free Sch. Dist., 847 F. App'x 38, 78 IDELR ¶ 93 (2d Cir. 2021)
- upheld substantive appropriateness of two successive IEPs for high school student with ED, including determination that she did not need ESY [tuition reimbursement case]
- S* J.B. v. Frisco Indep. Sch. Dist., 528 F. Supp. 3d 614, 78 IDELR ¶ 137 (E.D. Tex. 2021)
- ruled that IEP for third grader with **autism** and OHI (ADHD) provided FAPE in the LRE, per Fifth Circuit's four-factor analysis, despite belated FBA-BIP [tuition reimbursement case]
- P* Perkiomen Valley Sch. Dist. v. R.B., 533 F. Supp. 3d 233, 78 IDELR ¶ 222 (E.D. Pa. 2021)
- ruled that proposed transition services in the most recent two IEPs for 20-year-old with ID and SLI were not appropriate due to focus on one vocation that was no longer the student's interest and failure to provide for community-based independent living skills [tuition reimbursement case]
- S* Esposito v. Ridgefield Park Bd. of Educ., 856 F. App'x 367, 78 IDELR ¶ 241 (3d Cir. 2021)
- brief affirmance that grade 12 IEP for student with language impairment met the Andrew F. standard and that the limitations period only applied to that **KOSHK** year

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

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.

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** M.D. v. Colonial Sch. Dist., 539 F. Supp. 380, 78 IDELR ¶ 246 (E.D. Pa. 2021)
- ruled that district denied FAPE by not having IEP in place at start of school year after (a) student attended district and had IEP for a few years, (b) parents voluntarily placed student in private school for two years, (c) parents reenrolled student in district in April for year at issue; and (d) with timely notice parents unilaterally placed student in more intensive private school [tuition reimbursement case]
- P** Doe v. Newton Pub. Schs., 474 F. Supp. 3d 434, 78 IDELR ¶ 253 (D. Mass. 2021)
- ruled that (a) district's first proposed IEP, which was 80% in general education, was not sufficient in light of the severe mental health needs and very recent crisis of high school student with **autism** but (b) the next two IEPs, which were for private day placement in grade 12, were sufficiently therapeutic except they did not take into consideration the disruptive effect of changing from his residential placement [tuition reimbursement case]
- P** Wake Cnty. Bd. of Educ. v. S.K., 541 F. Supp. 3d 652, 78 IDELR ¶ 279 (W.D.N.C. 2021)
- ruled that the IEP denied FAPE to child with **autism** and various other disabilities by failing to provide small school small class setting that child needed [tuition reimbursement case]
- S** Leigh Ann. H. v. Riesel Indep. Sch. Dist. (*supra*)
- upholding substantive appropriateness of two successive IEPs of high school student with SLD based on "capacious" interpretation of "**special education**" (here applying to special education teacher's consulting services to general ed teachers for various adaptations) and relaxed approach to transition services
- S** Capistrano Unified Sch. Dist. v. S.W., 21 F. 4th 1125, 80 IDELR ¶ 31 (9th Cir. 2021)
- ruled that IEP goals for first grader with **autism** were adequate, including measurement; IEP team considered recommendations of parents' experts; and districts are not required to develop an IEP for a child in private school in the absence of parental request [tuition reimbursement case]
- S** Crofts v. Issaquah Sch. Dist. No. 411 (*supra*)
- upheld substantive appropriateness of IEP for second grader with **dyslexia** based on the child's progress with the multisensory reading program even though it was not specifically the Orton-Gillingham methodology that the parent requested
- S** Lamar Consol. Indep. Sch. Dist. v. J.T., \_\_ F. Supp. 3d \_\_, 80 IDELR ¶ \_\_ (S.D. Tex. 2021)
- ruled that district failed to **implement** the IEP, including the BIP, but it engaged in remedial efforts and, more importantly, met the **Andrew F.** standard for FAPE for the proper measuring frame of a year, not a semester

### III. MAINSTREAMING/LRE

- P* Knox Cnty. v. M.Q., 535 F. Supp. 3d 750, 78 IDELR ¶ 255 (M.D. Tenn. 2021)
- ruled that absence of general education teacher from IEP team was harmless error in this case, 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 three-part test - LRE as separate from substantive FAPE
- S* Rabel v. New Glarus Sch. Dist., 79 IDELR ¶ 71(W.D. Wis. 2021)
- upheld IHO decision that the continued placement for the child with autism in virtual instruction from the private therapeutic school (due to the pandemic) for the majority of the school day and the behavioral support in the child's home for the other part of the day met the Seventh Circuit's benefit standard for LRE rather than the parents' preference for virtual instruction from the school district, for which the child's peers had opted for in-person instruction under the district's policy for the 2021–22 school year

### IV. RELATED SERVICES

- S* Hills & Dale Child Development Ctr. v. Iowa Dep't of Educ., 968 N.W.3d 238, 80 IDELR ¶ 1 (Iowa 2021)
- ruled that the IEP team has the authority to determine whether to grant an excuse for a outside provision of **ABA therapy** by a private agency upon a physician's order

### V. DISCIPLINE ISSUES

- S* Leigh Ann. H. v. Riesel Indep. Sch. Dist. (*supra*)
- upholding manifestation determination despite **procedural** violation due to lack of substantive harm (re-done opportunity within a month and progress in alternative setting)

### VI. ATTORNEYS' FEES

- S* Oskowis v. Sedona Oak-Creek Unified Sch. Dist., 855 F. App'x 421, 79 IDELR ¶ 91 (9th Cir. 2021)
- brief ruling upholding award of attorneys' fees to school district where pro se parent brought **frivolous** claims for **improper purpose** of harassing school district with increased litigation costs

## VII. REMEDIES

### A. TUITION REIMBURSEMENT

*P* Perkiomen Valley Sch. Dist. v. R.B. (*supra*)

- ruled that (a) transition program at a university was not primarily postsecondary and, thus, was not disqualified, and (b) parent was entitled to full reimbursement, including the equities of parental participation and the expenses for the residential component and travel as necessary for FAPE

*P/S* M.D. v. Colonial Sch. Dist. (*supra*)

- awarded parents one of two years of \$80,000 tuition reimbursement upon concluding that the unilateral placement was appropriate but the parents did not cooperate sufficiently

*P/S* Doe v. Newton Pub. Schs. (*supra*)

- awarded reimbursement for the three years of tuition, but not the travel and boarding costs of the unilateral residential placement, because student needed therapeutic but not residential placement

*P* Wake Cnty. Bd. of Educ. v. S.K. (*supra*)

- awarded full reimbursement (\$66K+ \$160K in attorneys' fees) for private school that did not offer special education but met the child's needs for small setting and particular accommodations

### B. COMPENSATORY EDUCATION<sup>3</sup>

[None]

### C. OTHER REMEDIES (INCLUDING IEE REIMBURSEMENT)<sup>4</sup>

*S* L.C. v. Alta Loma Sch. Dist., 849 F. App'x 678, 78 IDELR ¶ 271 (9th Cir. 2021)

- ruled that district did not engage in unnecessary delay in relation to parents' request for IEE reimbursement until filing for impartial hearing

*S* Heather H. v. Nw. Indep. Sch. Dist., 529 F. Supp. 3d 636, 78 IDELR ¶ 199 (E.D. Tex. 2021)

- ruled that district's evaluation was appropriate under the IDEA and, thus, that the parent was not entitled to an IEE at public expense

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<sup>3</sup> 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. For the difference between the quantitative and qualitative approaches, see, e.g., Perry A. Zirkel, "The Two Competing Approaches for Calculating Compensatory Education under the IDEA: An Update," West's Education Law Reporter, 2017, v. 339, pp. 10–22.

<sup>4</sup> 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, 2017, v. 341, pp. 555–563.

## VIII. OTHER IDEA ISSUES

- S** J.T. v. de Blasio, 500 F. Supp. 3d 137, 77 IDELR ¶ 252 (S.D.N.Y. 2020)<sup>5</sup>
- dismissed national class action spaghetti-style suit (including stay-put) on behalf of students with disabilities on jurisdictional grounds with the partial exception of those in N.Y.C., who were subject to the exhaustion prerequisite of IDEA due process hearings
- P/S** Dervishi v. Dep't of Special Educ., 653 F. App'x 55, 78 IDELR ¶ 62 (2d Cir. 2021)
- interpreted settlement agreement for district's reimbursement of ABA services by a qualified provider to apply only to services provided by BCBA, not those by the parents (7,000 hours=\$400,000) or the YMCA
- S** Borishkevich v. Springfield Pub. Schs. Bd. of Educ., 541 F. Supp. 3d 969, 78 IDELR ¶ 277 (W.D. Mo. 2021)
- dismissed spaghetti-style suit against district's reentry plan, which only gradually provided for full in-person instruction, including the IDEA and § 504/ADA claims for lack of exhaustion
- P** E.E. v. Norris Sch. Dist., 4 F.4th 866, 79 IDELR ¶ 32 (9th Cir. 2021)
- rejected asserted public-policy exception to stay-put for cases in which the parent challenges the then current placement as a failure to offer FAPE – the stay-put is the last implemented, not the future proposed, IEP
- P** A.R. v. Conn. State Bd. of Educ., 5 F.4th 155, 79 IDELR ¶ 34 (2d Cir. 2021)
- ruled that the IDEA exception for providing FAPE to age 21 (here interpreted as until the student's 22<sup>nd</sup> birthday), which is where the state does not provide “public education” beyond age 18, does not apply where the state provides adult education for that period

## IX. SECTION 504/ADA ISSUES

- S** Aponte v. Pottstown Sch. Dist., 842 F. App'x 806, 78 IDELR ¶ 31 (3d Cir. 2021)
- rejected parent's § 504 claim that district personnel's child abuse and child neglect reports was retaliation for her advocacy of FAPE for her child—lack of causal link
- (P)** R.D. v. Lake Washington Sch. Dist., 843 F. App'x 80, 78 IDELR ¶ 61 (9th Cir. 2021)
- preserved for trial issue of whether district failed to implement 504 plan of student with medical condition that provided for indoor supervised gross motor activity when classmates went outside for recess and, if so for damages, whether this failure amounted to deliberate indifference

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<sup>5</sup> This case is on appeal at the Second Circuit, and the same law firm has initiated similar class action suits in at least two other states.

- P** E.P. v. Twin Valley Sch. Dist., 517 F. Supp. 3d 347, 78 IDELR ¶ 69 (E.D. Pa. 2021)
- ruled the district violated **child find** for gifted student with various physical and mental diagnoses from late kgn. through grade 3, resulting in order for IEE at district expense to determine the extent and nature of compensatory education
- S** Harrison v. Klein Indep. Sch. Dist., 856 F. App'x 480, 78 IDELR ¶ 212 (5th Cir. 2021)
- affirmed summary rejection of § 504/ADA failure-to-accommodate and hostile educational environment claims of elementary school student with multiple cognitive and physical disabilities for lack of **deliberate indifference**
- (P)** Round Rock Indep. Sch. Dist. v. Amy M., 540 F. Supp. 3d 679, 78 IDELR ¶ 285 (W.D. Tex. 2021)
- denied dismissal of § 504/ADA claims of h.s. student with TBI and OHI, finding requisite showing of **gross misjudgment or bad faith** in district's successive actions of refusing to adjust her IEP, subjecting her parent to truancy charges, and ultimately disenrolling her, and also finding that parent made sufficient showing of retaliation (same case has separate pending district appeal of tuition reimbursement ruling in favor of parent)
- S** A.C. v. Owen J. Roberts Sch. Dist., \_\_\_ F. Supp. 3d \_\_\_, 79 IDELR ¶ 94 (E.D. Pa. 2021)
- ruled that district's unilateral removal of 504 plan (and change in homebound services) for gifted student with complex medical conditions did not amount to denial of FAPE under § 504 in the absence of proof of connection between the removal and the student's progress or absences, although deliberate indifference is not required for injunctive relief in this jurisdiction
- S** Csutoras v. Paradise High Sch., 12 F.4th 960, 79 IDELR ¶ 152 (9th Cir. 2021)
- rejected § 504/ADA peer harassment (i.e., bullying) claim for money damages of student w. 504 plan, concluding that **deliberate indifference** standard foreclosed the 4-factor test in OCR guidance
- (P)** R.K. v. Lee, \_\_\_ F. Supp. 3d \_\_\_, 80 IDELR ¶ 43 (M.D. Tenn. 2021); G.S. v. Lee, \_\_\_ F. Supp. 3d \_\_\_, 79 IDELR ¶ 159 (W.D. Tenn. 2021)<sup>6</sup>
- granted TRO under § 504/ADA for students with disabilities against governor's executive order requiring parental opt-out for any school district **mask** mandate
- (S)** E.T. v. Paxton, 19 F.4th 760, 80 IDELR ¶ 1 (5th Cir. 2021)
- granted stay of enforcement of lower court's preliminary injunction, based on § 504/ADA, against governor's ban of district **mask** mandates – standing, exhaustion, and availability of reasonable accommodations, including vaccination and social distancing

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<sup>6</sup> The Sixth Circuit denied a stay for enforcement of such decisions pending final determinations. M.B. v. Lee, 80 IDELR ¶ 32 (6th Cir. 2021); G.S. v. Lee, 89 IDELR ¶ 5 (6th Cir. 2021).

- (P) C.G. v. Saucon Valley Sch. Dist., \_\_\_ F. Supp. 3d \_\_\_, 80 IDELR ¶ 11 (E.D. Pa. 2021)
- granted preliminary injunction, based on § 504/ADA, for access of **service animal** for student with disabilities – substantial likelihood of the dog meeting the criteria of a service animal
- S Reinoehl v. St. Joseph Cnty. Health Dep't, \_\_\_ N.W.3d \_\_\_, 80 IDELR ¶ 51 (Ind. Ct. App. 2021)
- dismissed § 504/ADA challenge to order to switch back to partial remote instruction due to COVID-19 on behalf of two **children with 504 plans** – failure to show **intentional discrimination and lack of reasonable accommodation**
- (S) Doe 1 v. Upper St. Clair Sch. Dist., \_\_\_ F. Supp. 3d \_\_\_, 80 IDELR ¶ \_\_\_ (W.D. Pa. 2022)
- denied preliminary injunction for § 504/ADA challenge to school district change from universal to optional **masking** – alternative grounds of standing (lack of concrete risk due to alternative mitigation measures), exhaustion (Fry criteria), and unreasonable accommodation (as compared to available alternatives)
- S Disability Rights S.C. v. McMaster, \_\_\_ F.4th \_\_\_, 80 IDELR ¶ \_\_\_ (4th Cir. 2022)
- vacating preliminary injunction, based on § 504/ADA, against governor's order prohibiting school districts from mandating **masks** – lack of standing (including conclusion that order allows for district exceptions)
- (P) ARC of Iowa v. Reynolds, \_\_\_ F.4th \_\_\_, 80 IDELR ¶ \_\_\_ (8th Cir. 2022)
- modifying preliminary injunction, based on § 504/ADA, against governor's order prohibiting school districts from mandating **masks** – limiting the relief to the schools and districts attended by the plaintiff students

### 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
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)

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