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SPECIAL EDUCATION LAW 101 FOR ALJS: CHILD FIND, ELIGIBILITY, AND FAPE UNDER THE IDEA

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Under the Individuals with Disabilities Education Act (IDEA),[1] the key issues primarily amount to three successive issues.[2] The first pair consists of the overlapping[3] threshold issues of child find and eligibility.[4] The subsequent and central issue is the school district obligation to provide "free appropriate public education" (FAPE).[5]

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[1] 20 U.S.C. §§ 1400 *et seq*. (2014).

[2] *E.g.,* Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components,* 38 TEACHER EDUC. & SPECIAL EDUC. 263 (2015).

[3] The intersection of these two overlapping components of the IDEA is the required evaluation. For the applicable regulations and case law, see, e.g., Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 297 EDUC. L. REP. 637 (2013).

[4] Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, __ EDUC. L. REP. __ (in press).

[5] Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE under the IDEA*, 346 EDUC. L. REP. 18 (2017).

Intended primarily but not exclusively for impartial hearing officers (IHO), including ALJs,[6] under the IDEA, this checklist provides a snapshot of the current adjudicative criteria and applicable authority for each of these successive components. Similar to the corresponding checklists for the subsequent remedies component, upon denial of FAPE,[7] it is organized in flowchart-type sequence. For each of the three successive issues, or components, the checklist provides the current criteria, along with citations of illustrative court decisions and the author's secondary sources.[8]

[6] The number of states that use ALJs, almost entirely via central panels, has gradually but steadily risen from six in 1991 to approximately twenty in 2018. Jennifer Connolly, Perry Zirkel, *State Due Process Hearing Systems under the IDEA*, __ J. DISABILITY POL'Y STUD. __ (under review).

[7] Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Two Primary Remedies under the IDEA*, __ EDUC. L. REP. __ (2018).

[8] For a much more wide-ranging synthesis of legal sources specific to hearing officers un the IDEA, see PERRY A. ZIRKEL, IMPARTIAL HEARINGS UNDER THE IDEA: LEGAL ISSUES AND ANSWERS (2018), http://www.nasdse.org/Publications/tabid/577/Default.aspx

I. Child Find[9]

A. Did the school district have reasonable suspicion that the child might be eligible under the IDEA?[10]

B. If so, did the district initiate the evaluation of the child within a reasonable period of time?[11]

[9] For the latest case law specific to the two dimensions of this ongoing affirmative obligation of school districts under the IDEA, see Perry A. Zirkel, *Child Find under the IDEA: An Empirical Analysis of the Judicial Case Law*, 45 COMMUNIQUÉ 4 (May 2017). For prior case law, see, e.g., Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014).

[10] *E.g.*, Perry A. Zirkel, *The "Red Flags" of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015) (finding that courts typically only find reasonable suspicion upon a combination of various indicators and then in only about one in three cases). For one of the recently controversial indicators, Perry A. Zirkel, *Response to Intervention and Child Find: A Legally Problematic Intersection?,* 84 EXCEPTIONAL CHILD. 368 (2018).

[11] *E.g.,* Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 EDUC. L. REP. 576 (2015) (finding that the prevailing judicial range, depending on the circumstances, is 1–2 months).

II. Eligibility

A. Is the proof preponderant that the child meets the IDEA criteria for one or more of the recognized classifications?[12]

B. If so, is the proof preponderant that the result is an adverse effect on educational performance?[13]

C. If so, is the proof preponderant that the classification results in the need for special education?[14]

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[12] Subject to additions in corollary state special education laws, the IDEA specifies ten classifications, such as emotional disturbance (ED), other health impairments (OHI), and specific learning disabilities (SLD), and allows states to add, within ages 3–9, the classification of developmental delay. 20 U.S.C. § 1401(3). The IDEA regulations add the combined classifications of deaf-blindness multiple disabilities. 34 C.F.R. §§ 300.8(a)(1). The regulations also, by way of definition, set forth the criteria for each classification. *Id*. § 300.8(c)(1)–(13). For the case law specific to some of the most litigated classifications, see PERRY A. ZIRKEL, THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY (2008); Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability: The Latest Case Law*, 46 COMMUNIQUÉ 14 (May 2018); Perry A. Zirkel, *Checklist for Identifying Students As Eligible under the IDEA Classification of Emotional Disturbance: An Update*, 286 EDUC. L. REP. 7 (2013); *cf*. Perry A. Zirkel, *RTI and Other Approaches to SLD Identification under the IDEA: A Legal Update,* 40 LEARNING DISABILITY Q. 165 (2017); Perry A. Zirkel, *ADHD Checklist for Identification under the IDEA and Section 504/ADA*, 293 EDUC. L. REP. 15 (2013).

[13] This bridging criterion is actually part of the classification step, being expressly specified in the regulatory definition of each non-combined one except SLD, which implicitly incorporates it. For the split of judicial interpretations of the scope of "educational performance, *compare*, *e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2015) (broadly extending to social skills), *with C.B. v. Dep't of Educ*., 322 F. App'x 20 (2d Cir. 2009) (academics only).

[14] 20 U.S.C. § 1401(3)(A)(ii) ("by reason thereof, needs special education and related services"). For a recent example of the causal criterion, see *Durbrow v. Cobb Cty. Sch. Dist.,* 887 F.3d 1182 (11th Cir. 2018). More generally, as the aforementioned case law analyses reveal, the primary decisional criterion most often is the need for special education. *See supra* note 12. For other recent examples, *compare M.G. v. Williamson Cty. Sch.,* 720 F. App'x 280 (6th Cir. 2018); *D.L. v. Clear Creek Indep. Sch. Dist.,* 695 F. App'x 733 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1439 (2018) (finding lack need for special education), *with L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2017) (finding need for special education). For a discussion of the blurry scope of this critical criterion, see, e.g., Perry A. Zirkel, *A New Major Court Decision: Are Blurred Boundaries Worth the Price on the Eligibility Side?* 25 EXCEPTIONALITY 1 (2018*)*.

III. FAPE[15]

A. Procedural FAPE[16]

1. Did the district violate IDEA (and corollary state law) procedural requirements?[17]

    a. Is there an applicable procedural requirement?

    b. If so, is the proof preponderant that the district violated it?

2. If so, did the violation(s) result in the requisite loss?[18]

    a. Was there a deprivation of educational benefits to the student? OR

    b. Did the violation significantly impede the parents' opportunity for participation in the IEP process?

[15] For the landmark case that elaborated the procedural and substantive dimensions of FAPE, see *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). For the Supreme Court's recent refinement of the substantive standard, see *Endrew F. v. Douglas County School District RE*-1, 137 S. Ct. 988 (2017).

[16] For an empirical analysis of judicial application of this multi-part test, see Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?* 83 EXCEPTIONAL CHILD. 219 (2016).

[17] *E.g.*, *Bd. of Educ. v. Rowley*, 458 U.S. at 206.

[18] 20 U.S.C. § 1415(f)(3)(E)(ii). In the absence of such loss, the hearing officer still has authority to order prospective procedural relief. *E.g.*, *Dawn G. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (citing 20 U.S.C. § 1415(f)(3)(E)(iii)).

B. Substantive FAPE[19]

Is the IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances?[20]

a. If the child is in an integrated setting, is the IEP reasonably calculated at least to enable the child to achieve passing marks and advance from grade to grade?

b. If the child is in a self-contained setting, is the IEP appropriately ambitious, including challenging objectives, even if the same advancement through the general education curriculum is not a reasonable prospect?

[19] For applying this standard, most of the circuits have adopted the "snapshot approach," which the Supreme Court seemed to reinforce in its recent decision. See, e.g., Perry A. Zirkel, *The "Snapshot" Standard under the IDEA*, 269 EDUC. L. REP 455 (2011).

[20] *Endrew F. v. Douglas Cty. Sch. Dist. RE*-1, 137 S. Ct. at 999 and 1002. For initial analyses of this decision and its aftermath, see, e.g., Perry A. Zirkel, *The Aftermath of* Endrew F. *One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP .448 (2018); Perry A. Zirkel, Endrew F. *after Six Months: A Game-Changer?*, 348 EDUC. L. REP. 585 (2017) ; and Perry A. Zirkel, *The Supreme Court's Decision in* Endrew F. v. Douglas County School District RE-1*: A Meaningful Raising of the Bar?* 341 EDUC. L. REP. 545 (2017).

C. Failure to Implement: Three Competing Approaches[21]

1. Per se: Is the failure more than de minimis? OR

2. Materiality: Is the failure significant or substantial? OR

3. Materiality/Benefit: Is the failure not only significant or substantial but also resulting in deprivation of benefit?

D. Capacity to Implement[22]

Is the school capable (in terms of staffing and facilities, for example) of implementing the proposed IEP?

[21] *E.g.*, Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IDEA Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409 (2016). Only a minority of the federal circuit courts of appeal has adopted one of these approaches. For the materiality approach, see, e.g., *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007). For the materiality/benefit approach, see *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). For the per se approach, which no circuit has yet adopted, see *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d at 827 (Ferguson, J., dissenting).

[22] *E.g., Y.F. v. N.Y.C. Dep't of Educ.*, 659 F. App'x 3 (2d Cir. 2016); *B.P. v. N.Y.C. Dep't of Educ.*, 634 F. App'x 845 (2d Cir. 2015); *S.T. v. Howard Cty. Pub. Sch. Sys.*, 627 F. App'x 255 (4th Cir. 2015); *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236 (2d Cir. 2015); *G.L. v. Saucon Valley Sch. Dist.*, 267 F. Supp. 3d 586 (E.D. Pa. 2017); *N.W. v. District of Columbia*, 253 F. Supp. 3d 5 (D.D.C. 2017). For the Second Circuit, which is the predominant source of this dimension of FAPE, the intersecting evidentiary issue is the qualified four-corners approach adopted in *R.E. v. New York City Department of Education*, 694 F.3d 167, 186 (2d Cir. 2012).