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The Legal Issues of Identification and Intervention for K–12 Students with Dyslexia

by Perry A. Zirkel

Fran Doe had some difficulties during the primary grades, especially in reading, but Fran's parents patiently attributed them to the individual developmental differences among young children. However, when these difficulties became more pronounced in fourth grade, Fran's parents consulted with a private educational psychologist. After administering a battery of tests, the psychologist issued a report that diagnosed Fran with dyslexia and recommended the Orton-Gillingham approach. The psychologist told the parents that Fran would be eligible for this particular approach on an individualized basis under the Individuals with Disabilities Education Act (IDEA) or, because they expressed ambivalence about the label of special education, Section 504 of the Rehabilitation Act (§ 504).

After consulting various sources on the Internet and via informal contacts, Fran's parents decided that the IDEA would likely provide stronger services. They formally requested an IDEA eligibility evaluation, providing a copy of the private psychologist's report and requesting an individualized education program (IEP) that provided for Orton-Gillingham instruction.

After securing the parents' consent, a district school psychologist administered an IQ test, a reading diagnostic inventory, a parental checklist, and other evaluations. A school team, including the parents, reviewed the results along with Fran's school records, including report cards and teacher anecdotal reports. To the consternation of Fran's parents, the team concluded that Fran did not qualify for an IEP because one of the key criteria was the need for special education. The school members insisted that regardless of whether Fran had dyslexia, the interventions that the school's student assistance team had put in place during the interim, which included supplemental small-group work with the reading teacher, were adequately addressing Fran's reading problems; thus, in their view, Fran did not need special education.

After receiving an IDEA procedural safeguards notice, Fran's parents contacted the principal and the special education teacher to express their mutual judgment that the other members of the team had made up their minds before the meeting and were obviously predisposed against dyslexia and the private report. Fran's guidance counselor called them the next day and offered a 504 plan. At a meeting with Fran's mother later that week, the counselor agreed to list extra time on tests as an accommodation in the plan and—reluctantly, only as an accommodation—the supplemental reading services that Fran was already receiving. Flatly dismissing Orton-Gillingham instruction or any other individualized special education, the counselor was adamant that the specified accommodations were reasonably calculated to benefit Fran. After consulting and contracting with a local general-practice attorney, Fran's parents filed suit in federal court, claiming that the district had violated not only § 504 but also, alternatively, the IDEA.

This case scenario illustrates the prevailing issues of K–12 students enrolled in public schools and diagnosed with dyslexia who seek legal eligibility for specialized individual instruction. The two primary sources for identification and intervention are the IDEA and § 504, although a handful of states have laws that have special provisions specific to dyslexia. The first part of this article provides an overview of these federal and state laws, along with an illustrative sample of the pertinent court decisions; for an annotated outline providing a much more comprehensive listing of the pertinent legal citations, see Zirkel (2012b). The concluding section of this article analyzes Fran's case in light of this legal information from an impartial, not a parent or district advocate's, perspective.

Basic Steps in the IDEA Eligibility Process

1. Parent or district referral or *child find* (that is, district personnel had reason to suspect that the child may meet the two criteria for eligibility)
2. Written parental consent for the multi-disciplinary team evaluation
3. Multi-disciplinary team evaluation, with the members (e.g., parents) and timeline prescribed under the IDEA and, if any, state law
4. Eligibility determination by the required team, including the parent, and according to the two criteria: one or more of the recognized classifications, such as SLD, and a resulting need for special education
5. If the determination is that the child is eligible, development by a specified team, including the parent, of a proposed IEP
6. Written notice to the parent of the proposed IEP, including placement, for the child with a request for consent

Note: At any point in the process, typically upon failure to proceed with the evaluation, determination that the child is not eligible, or proposal of an IEP that the parent does not perceive to be appropriate, the parent may file for an impartial hearing (often called a "due process hearing") and/or initiate the state education agency's complaint resolution process, which each may include mediation.

The IDEA

Identification

Eligibility under the IDEA, characterized as identification via a multi-disciplinary team's evaluation, amounts to a two-pronged definition of disability: a) meeting the criteria of one or more specified classifications, such as specific learning disability (SLD) and b) "by reason thereof," needing special education (IDEA regulations, § 300.8[a]). Although other IDEA

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classifications, such as other health impairment (OHI), are possible, SLD is the most likely because a) its IDEA definition lists dyslexia as one of the basic psychological processes (§ 300.8[c][10][i]) and b) a student may qualify in any one of eight specific areas, including basic reading, reading comprehension, and reading fluency (§ 300.209([a][a]). As a result of the 2004 amendments of the IDEA, each state chose either a) to permit school districts to use a new approach called "response to intervention" (RTI) or the traditional severe aptitude-achievement discrepancy to help determine whether the child has SLD or b) replace severe discrepancy with RTI for this purpose. The minority—approximately a dozen states—opted for the mandatory RTI approach (Zirkel & Thomas, 2010). However, regardless of the approach, the student still must meet the second essential ingredient—the need for special education.

The case law concerning SLD eligibility is extensive, but that concerning the diagnosis of dyslexia is rare. Districts have won the clear majority of IDEA hearing/review officer and court decisions concerning eligibility under the severe discrepancy approach (e.g., Zirkel, 2006), and those under the RTI approach have been negligible to date (e.g., Zirkel, 2012a). In a rare published case where the dyslexia diagnosis played a major role, the Eleventh Circuit Court of Appeals ruled that the district misevaluated the student, resulting in the denial of free appropriate public education (FAPE) (*Draper v. Atlanta Independent School District*, 2008).

FAPE

More generally, students who meet the two criteria for eligibility under the IDEA are entitled to FAPE, which consists of specially designed instruction and, if needed, related services, as documented in an individualized education program (IEP). In its landmark decision in *Board of Education v. Rowley* (1982), the Supreme Court established a two-sided standard for FAPE: a) procedural compliance and b), on the substantive side, an IEP reasonable calculated to yield benefit. The *Rowley* Court interpreted Congressional intent as emphasizing the procedural dimension, based on the analogy to the door of access, thus leaving a relatively low "floor" in terms of the substantive standard. However, the lower courts that applied *Rowley* in the many cases in the subsequent decades developed a two-step approach for alleged procedural violations: a) does the evidence support the allegation that the district violated one or more of the various procedural requirements under the IDEA, such as completing the evaluation within the prescribed period and having the required members on the IEP team; and, if so, b) did the procedural violation result in educational loss to the child or was it instead only harmless error? In the 2004 amendments of the IDEA, Congress codified the harmless-error type approach with one possible exception. Except where the district significantly impeded the opportunity for parental participation, the procedural violation must result in loss of educational benefit to amount to a denial of FAPE (§ 1415[f][3][E]). Moreover, the Supreme Court has interpreted the IDEA as putting the burden of proof at the impartial hearing in FAPE cases on the challenging party, that is, the parent (*Schaffer v. Weast*, 2005). Finally, the lower courts have applied the concluding dicta in *Board of Education v. Rowley* about leaving the choice of "educational method … to state and local educational agencies" (p. 207) as generally establishing deference to districts when the substantive FAPE issue is methodology.

Not surprisingly, districts have won the clear majority of FAPE cases in recent years, including but not limited to those where the child has dyslexia. Similarly, in cases where the Orton-Gillingham approach was at issue, a systematic study revealed that parents won, either partially or completely, only 23% of the hearing/review officer and court decisions (Rose & Zirkel, 2007). Moreover, it is not uncommon for parents of students with dyslexia to seek the high-stakes remedy of tuition reimbursement after unilaterally placing their child at a specialized private school. Due to the multistep analysis for this remedy, which substantively starts with proving that the district failed to meet the less than optimal standards for FAPE, the odds of prevailing are not in these parents' favor. It is only occasionally that the parents of students with dyslexia secure a court ruling for tuition reimbursement. For example, in *C.B. v. Special School District No. 1* (2011) the Eighth Circuit Court of Appeals ordered the district to reimburse the parents for the tuition of their private school placement of a fifth grader with dyslexia. At the first step, the court upheld the impartial hearing officer's and lower court's conclusion that, in light of his slight progress in reading, the school district's IEP for a fifth grader with dyslexia was not reasonably calculated to yield educational benefit. Next, the court ruled in the parents' favor in terms of the appropriateness of the private placement and the equities, that is, reasonableness of the parties' conduct, including the parents' provision of timely notice to the district.

Multistep Process for Adjudication of Whether the Parent Is Entitled to Tuition Reimbursement under the IDEA

1. Did the parent provide timely notice of unilaterally placing the student in a private placement?
2. If so, did the district's proposed IEP provide the student with FAPE?
3. If not, did the parent's private placement provide the student with FAPE?
4. If so, does the balance of the equities, that is, the reasonableness and fairness of the conduct of each side, warrant reducing or eliminating the reimbursement?

Section 504

Identification

The other and generally broader but less detailed applicable federal law is Section 504 of the Rehabilitation Act and its sister statute, the Americans with Disabilities Act (ADA). Both of these statutes have the same definition of disability, which

usually but not always provides a broader eligibility for FAPE than does the IDEA. More specifically, the three essential elements for this eligibility are a) a mental or physical impairment, b) substantially limiting and c) one or more major life activities. The relevant regulations for § 504 (§ 104.3[j][2][i]) and the ADA (§ 35.104) are rather clear that dyslexia qualifies for the first of these three elements. Moreover, as a result of the 2008 amendments of the ADA, "reading"—as compared to the broader and previous related example of "learning"—is explicitly one of the listed examples of major life activities (e.g., Zirkel, 2009). Nevertheless, eligibility for a student with dyslexia is not automatic; the key question is whether the extent of the impairment—when compared to the average student in the general population and without mitigating measures, such as assistive technology, learned behavioral or adaptive neurological modifications, and reasonable accommodations—is substantial.

The pertinent case law under § 504 thus far is sparse and district friendly. More specifically, the only published eligibility case was not in favor of the student with dyslexia (*Janet G. v. State of Hawaii Department of Education*, 2005), but it arose before the broadening effect of the 2008 ADA amendments.

FAPE

A student who meets the three criteria described above for eligibility under § 504 is entitled to FAPE, which consists of "regular or special education and related aids and services" (§ 104.35[a]). The standard again has a procedural and a substantive side. In practice, however, it is not uncommon to find school districts that treat § 504 plans as consolation prizes and that limit them to accommodations in regular education.

Thus far, the few published FAPE cases under § 504 where the student had dyslexia and the parent sought a particular instructional approach have been in the district's favor. For example, in *Campbell v. Board of Education* (2003), the Sixth Circuit Court of Appeals ruled that the district's provision of Project Read, rather than Orton Gillingham, did not violate § 504.

State Laws

Under the concept of "cooperative federalism" (*Evans v. Evans*, 1993, p.1223), it is generally understood that state laws may add to, not take away from, the individual student's rights under these federal laws. Thus far, a handful of states have enacted legislation or issued regulations specific to K–12 students with dyslexia. These state laws vary in their strength and specificity. At the weakest end, Virginia, in its special education regulations, defines *dyslexia* but merely use the term, akin the IDEA, solely in the context of SLD. A bit stronger, the Colorado and Washington laws have limited provisions for state education department dyslexia training and technical assistance. On the stronger side, a band of four successively connected states provide for more substantial, mandatory provisions. Mississippi requires pilot programs, and New Mexico requires an RTI-type three-tiered approach of research-based interventions. In this cluster of states, Louisiana and Texas stand out, each having a set of laws plus related guidelines that provide for systematic identification and interventions with regard to students with dyslexia. However, none of these state laws has the prescriptive force, including individual enforcement mechanisms, of the IDEA or § 504.

Thus, it is no surprise that litigation based on such state laws or the common law doctrine of negligence has been inconsequential. For example, as part of a long line of court decisions rejecting various theories of educational malpractice, Alaska's highest court rejected the parents' claim of negligent identification of and intervention for their child's dyslexia (*D.S.W. v. Fairbanks North Star Borough School District*, 1981).

Conclusion

Thus far, the law of students with dyslexia is a short story with an anticlimactic ending. For those who see law as an effective instrument for appropriately identifying and effectively remediating the academic difficulties of students with dyslexia, the needed next chapter largely amounts to more specific and strong provisions in the IDEA, § 504, or comparable individually enforceable rights in state laws. The remainder is a more selective, creative, and supported use of not only adjudication but also the alternative enforcement mechanisms of the IDEA and § 504—specifically, the procedurally rigorous complaint resolution process of the state education agencies and the Office for Civil Rights (OCR), respectively (Zirkel & McGuire, 2010).

In contrast, for those who favor a more informal process for partnering with and educating educators about best practices for identification of and interventions for students with dyslexia, lobbying for more federal and state resources is the limited avenue for law. If nothing more, this objective canvassing of the legislation, regulations, and case law to date provides a sobering awareness and realistic expectation of the prevailing limits of law.

The threshold problem with the suit filed on Fran's behalf is the so-called "exhaustion" doctrine. The court will grant the district's motion to dismiss the case because the parents did not exhaust the available administrative remedies—specifically, an impartial hearing under the IDEA for both of their statutory causes of action. As a result, Fran's parents have several options.

First, if they file for an IDEA hearing, they should formally ascertain at the prehearing stage whether the hearing officer has jurisdiction for their § 504 claims; if the hearing officer rules against jurisdiction, they should consider with their attorney filing a request with the school district for an impartial hearing under § 504, which will, in effect, give them two bites at the apple. At the IDEA hearing, their strongest procedural claim is "predetermination"—that is, that the district personnel made up their minds before the meeting, thus depriving the parents of the opportunity of meaningful participation in the decision-making process. Based on the judicial precedents, the odds of this and other procedural arguments, such as claiming that the team failed to fulfill the IDEA requirement that the members "consider" the Independent Educational Evaluation (IEE), succeeding depends on the preponderance of the evidence and is far from assured. On the substantive side, the parents' best bet—whether the district legally used the traditional severe discrepancy or the emerging RTI approach—

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would be to attack the district's broad brush analysis rather than focusing on each of the three IDEA-recognized areas of SLD eligibility: reading comprehension, basic reading (i.e., decoding), or reading fluency. Indeed, they could point out that the district's § 504 plan effectively represented a determination that Fran's dyslexia substantially limited the major life activity of reading, thus arguably showing that the severity and scope of the impairment necessitated special education. If they succeed on their eligibility claim, the hearing officer will order the development of an IEP, and, possibly, the remedy of compensatory education, with the entitlement of attorneys' fees left for private settlement or judicial proceedings. However, the prospects of obtaining a prospective order for the methodology that they seek are very low.

Second, as an alternative or additional legal avenue for challenging the district's IDEA eligibility determination, the parents should consider, especially if they seek stricter scrutiny of alleged procedural violations, resorting first to the state education agency's complaint resolution process under the IDEA. If they also file for an IDEA hearing, they should do so after completing the complaint resolution process; otherwise, the state education agency will simply defer to the simultaneous impartial hearing process. If the parent completes the state complaint resolution process before or instead of filing for an impartial hearing and if the agency's investigation finds procedural violations, the resulting correction action plan might include compensatory education but not likely an IEP provision for a specific methodology.

Third, in addition or as an alternative to the aforementioned impartial hearing option under § 504, the parents have the option of filing a complaint with the regional office of OCR, which has a parallel investigatory process to that of the state education agency's complaint resolution process but using the regulations of § 504 rather than those of the IDEA. Based on the facts of the scenario, the parents appear to have viable claims that the district's procedural violations of the § 504 regulations included a) not conducting an eligibility determination by a team knowledgeable about the child, the evaluation data, and the placement options; b) failing to have such a knowledgeable team determine Fran's FAPE under § 504; c) not providing a § 504 procedural safeguards notice to the parents upon the FAPE determination; and d) failing to consider special education and related services, treating § 504 FAPE as limited to accommodations. However, if OCR found against the district, the likely remedy in this case would be revised policies and staff training; the parents would probably not obtain the sought-after Orton-Gillingham instruction except perhaps via a settlement).

The parents' specific course of legal action and the formal outcome will depend on various factors, including the more particular, nuanced facts of the case and the strength of any applicable state law. Moreover, the cost-benefit of pursuing one or more of these formal avenues of dispute resolution requires careful consideration in light of the dyslexia-specific legal developments canvassed in this article. Finally, the parents should consider the trade-offs of substitution or supplementation via other approaches, such as lobbying at the federal or state legislatures, working with state education agencies, contributing collectively to public awareness and professional best practice, and individually collaborating at the local school level.

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