Literacy Instruction and IDEA

Are IEPs required to specify research-based literacy tools?

By Perry A. Zirkel

Literacy instruction is a major focus of the Every Student Succeeds Act (ESSA), as it was for its predecessor federal legislation, the No Child Left Behind Act. It is also an ongoing focus of the nation's schools. Yet litigation regarding literacy instruction is largely limited to the Individuals With Disabilities Education Act (IDEA) in light of its specific substantive and procedural requirements, including the provision to each eligible student of an individualized "free appropriate public education" (FAPE) and the right to adjudication, starting with a due process hearing.

The following case provides an example of the recent relevant litigation. The accompanying question-and-answer discussion illustrates the related case law issues and judicial outcomes concerning literacy instruction for students eligible under the IDEA, including but not limited to those with dyslexia who need special education.

The Case

During the 2011–2012 school year, O.M. began attending Falmouth Elementary School in Maine as a first-grader. After an evaluation that determined that she was eligible under the IDEA based on various diagnoses, including Down syndrome and attention deficit hyperactivity disorder, the IDEA-required team developed an IEP that went into effect in October 2011.

In response to the mother's repeated concerns regarding O.M.'s literacy instruction, the proposed IEP for grade 3 (which was scheduled to go into effect in October 2013) included a provision for a structured reading program. Ms. M was not satisfied and sent emails demanding to know if the proposed program was based on scientific research and if the teachers had appropriate instructional qualifications; she also asked how the school proposed to measure O.M.'s reading progress. As a result, on October 31, the IEP team met again and proposed to provide O.M. with a specific structured reading program called Specialized Program Individualizing Reading Excellence (SPIRE).

The resulting written notice to Ms. M proposed 60 minutes per day of SPIRE instruction. Ms. M immediately responded by filing for a due process hearing, asserting that the SPIRE program did not meet the IDEA requirement that the specially designed instruction be "based on peer-reviewed research to the extent practicable." Two days later, the district sent Ms. M the new IEP, which specified, without any mention of SPIRE, only eight hours and 45 minutes of "Specially Designed Instruction [in] Literacy & Math" per week. At a resolution meeting in December, Ms. M and the special education director agreed that two experts would evaluate the new IEP. Ms. M then withdrew her hearing request. Although the meeting and the resulting agreement did not address SPIRE, Ms. M assumed that it was the referenced specially designed instruction in literacy.

However, when the IEP team met in late March to discuss the outside evaluations, Ms. M found out that the district had ceased providing O.M. SPIRE instruction upon receiving her objection in early November. Moreover, although one of the outside evaluators recommended the Lindamood Phoneme Sequencing (LiPS) program and Ms. M requested it, the district refused to implement it at the IEP meeting, instead offering only to recommence SPIRE instruction upon the start of grade 4.

In June, after notifying the district that she was arranging for private tutoring by a trained LiPS instructor, Ms. M filed for another due process hearing, seeking reimbursement and any other appropriate remedies. In the resulting decision, the hearing officer decided that the written notice specifying SPIRE instruction was part of the IEP and the district's failure to provide it was a procedural violation that did not result in substantive harm to O.M., thus not amounting to a denial of FAPE.

Ms. M filed an appeal in federal court. The court agreed that the written notice was part of the IEP, but that the lack of implementation was a material failure, thus amounting to denial of FAPE. The court awarded reimbursement for the LiPS tutoring sessions. Falmouth filed for appeal with the First Circuit.

What do you think was the First Circuit's ruling in this case?
In *Ms. M v. Falmouth School District* (2017), the First Circuit Court of Appeals ruled that the relevant contents of the IEP were sufficiently clear in light of the definition of specially designed instruction in Maine's regulations and the IDEA that the IEP *may,* not *must,* include methodology. Thus, the written notice served as a more specific proposal that was not binding (in the presence of objection rather than consent) and, in this case, evidence to clarify ambiguity. Consequently, the court reversed the award of tuition reimbursement.

Would the outcome have been different if the student's classification was a specific learning disability based on a diagnosis of dyslexia and the issue was whether the IEP was substantively appropriate?
Possibly, although not at all certainly. For example, in *I.S. v. Town of Munster* (2014), a federal district court in Indiana ruled that although the IEPs for a student with dyslexia were substantively appropriate for grades 1 and 2, those for grades 4 and 5 were not. For grade 4, the court deferred to the hearing officer's finding that the Read 180 program's focus on reading fluency not only failed to advance, but also damaged the student's reading skills due to his primary need for decoding instruction. For grade 5, the court similarly rooted its conclusion on the use of a literacy program not individually appropriate to the particular child. More specifically, the court reasoned: "Because it failed to specify an appropriate methodology or exclude the Read 180 program, which would have produced no benefit, [this student's] fifth-grade IEP was not tailored to his unique needs or likely to produce progress instead of regression."

If, instead, the school provided him with the balanced literacy program, and the parent unilaterally placed him in a private school that used exclusively the Wilson Reading System, would the parent be entitled to tuition reimbursement based on the aforementioned "peer-reviewed" provision of the IDEA?
It depends on the more specific evidence in the individual case, but the odds generally would not favor the district, because the courts have not been particularly rigorous in interpreting the peer-reviewed provision. For example, in *A.G. v. Board of Education of Arlington Central School District* (2017), a federal district court in New York relied on the resource room teachers' testimony that the balanced literacy program was "research-based," without addressing and applying the differential meaning of "peer-reviewed research."

Is the Supreme Court's recent decision in *Endrew F. v. Douglas County School District RE-1* (2017) likely to change the trend of these literacy instruction cases under the IDEA?
Not necessarily. The *Endrew F.* court revised the substantive standard for FAPE originally established in *Board of Education v. Rowley* (1982), but the revision was more a matter of nuanced refinement than dramatic enhancement. More specifically, *Endrew F.* changed the *Rowley* formulation from "reasonably calculated to enable the child to receive educational benefits" to "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." In the 20 cases that have applied the new substantive standard in the immediate wake of *Endrew F.,* the outcome's change has been relatively limited, but the ad hoc nature of the standard and the rather cryptic commentary in the court's opinion leave a lot of room for varying interpretations and applications unless and until the relevant case law becomes clearly settled.

Would Section 504 and/or the Americans With Disabilities Act (ADA) provide a viable alternative for these reading-method claims?
Although Section 504 and its fraternal twin, the ADA, provide overlapping coverage for students with IEPs, the added hurdle of proving bad faith or gross misjudgment skews the outcome odds in favor of districts. For example, in *Campbell v. Board of Education* (2003), the Sixth Circuit upheld the summary rejection of the parents' claim that the district's provision of Project Read, rather than the Orton-Gillingham program, violated Section 504.

Conclusion

Although various methods of literacy instruction continue to be subject to research, development, and ESSA accountability, litigation remains largely limited to the scope of the IDEA, under its substantive standard for FAPE. Given the individualized nature of this legislative framework and its refined substantive standard under *Endrew F.*, the issue of which reading program is appropriate, including, but not limited to, the qualified requirement for a basis in peer-reviewed research, inevitably has an "it depends" answer, with the specific needs of the individual eligible child as the key factor.

Nevertheless, the general understandings are that the IEP need not specify methodology, but if the child's needs include literacy instruction, such instruction must be reasonably calculated to enable the child to make appropriate progress in light of the circumstances. Of course, as a matter of best practice in general education, (a) carefully and systematically matching children's specific needs to research-based literacy interventions, with continuous progress monitoring and differentiated tiers, and (b) effective communication and collaboration with parents, go a long way toward mitigating the need for both special education and costly litigation. P

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