

*A Major New Court Decision: Are Blurred Boundaries Worth the Price on the Eligibility Side?*<sup>1</sup>

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-Abstract -

Legally, the ultimately crucial criterion for eligibility under the IDEA is whether the child needs special education. A new decision by the Ninth Circuit Court of Appeals seems to suggest that providing various interventions and accommodations in general education may well mean that a child, who meets the criteria for any IDEA classification and receives such services, is eligible for an IEP. The scope of this new decision and the relationship between special and general education are subject to several questions, but the institution of various individualized approaches in general education, including but not at all limited to RTI, may well be worth the limited risk of a judicially reversed eligibility determination.

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Decades after the 1975 passage of what is now known as the Individuals with Disabilities Act (IDEA), leading scholars in the field are still discussing and debating the meaning of special education (e.g., Bateman, Lloyd, Tankersley, & Brown, 2015; Kame'enui, 2015; Kaufman & Hallahan, 2005; Pullen & Hallahan, 2015). Indeed, a long line of articles and chapters has specifically addressed, either with regard to specific disability classifications (e.g., Fuchs & Fuchs, 1995; Kirk, 1953; Landrum, Tankersley, & Kauffman, 2003; Vaughn & Thompson, 2016) or on an overall basis (e.g., Cook & Schirmer, 2003; Detterer & Thompson, 1997; Lord, 1952; Scruggs & Mastropieri, 1995, 2015), the question of what is special about special education?

Starting with the regular education initiative in the mid-1980s and culminating most recent with the response to intervention movement, various voices have advocated a unified system that provides a multi-tiered continuum of interventions and services for all children (e.g., Gartner & Lipsky, 1987;

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Sailor & McCart, 2014). One of the consequences of this integration is blurring the line between special and general education (e.g., Fuchs, Fuchs, & Stecker, 2010).

The legal meaning of special education is intrinsic to not only the central obligation under the IDEA for a free appropriate public education (FAPE) but also the threshold determination of eligibility. The definitional boundaries in relation to general, or regular, education, are not necessarily clear. On the FAPE side, for example, the administering agency of the IDEA issued a policy letter in opposition to some districts' purported refusal to include certain practices in IEPs, responding that “[just because] some . . . services may also be considered ‘best teaching practices’ or ‘part of the district’s regular education program does not preclude [them] from meeting the definition of special education” (Letter to Chambers, 2012, p. \*2). On the eligibility side, per a long-standing two-pronged conception, the IDEA regulations (2014) defines a child with disability in terms of (a) meeting the criteria for one or more listed classifications, and (b) “by reason thereof,” needing special education (§ 300.8[a][1]). In turn, the regulations define “special education” as “specially designed instruction,” which means “adapting . . . the content, methodology, or delivery of instruction—(i) To address the unique needs of the child that result from the child’s disability; and (ii) To ensure access of the child to the general curriculum . . .” (§ 300.39).

The bridge between these two essential prongs, which is part of the classification criteria of the listed classifications, implicitly for SLD and explicitly for all the rest, is an adverse effect on educational performance. However, the second prong gives meaning to this bridging factor by ultimately showing the requisite extent of the adverse effect—so much that the child requires special education. Finally, systematic analyses of the case law reveal that this second prong is, in the majority of the court decisions determinative as to the child’s eligibility under various common classifications, such as OHI, ED, and SLD (Zirkel, 2013a, 2013b, 2015).

A recent eligibility case that the Ninth Circuit Court of Appeals ultimately decided re-visits the

perennial issue of the IDEA meaning of special education, re-examining the relationship with general education. The following sections of this article provide the facts of the case; the successive decisions of the hearing officer, federal district court, and the Ninth Circuit; and the practical implications for special education leaders.

### **Factual Findings**

L.J. is a fifth grader in general education in a school district in California. He has a history of behavioral issues in school and at home, where he lives with his mother and stepfather. The district has instituted a multi-tiered support system for behavioral interventions based on a response to intervention (RTI) model. For general education students, the model uses a variety of tools, including behavior intervention plans (BIPs) and behavioral support staff.

In grade 2 (2010–11), L.J. had 14 instances of discipline, resulting in a three-day suspension. Near the end of the year, in response to being verbally disciplined by his teacher for bullying other students, L.J. told her that he wanted to die. School staff called L.J.'s mother, and mental health staff prepared an emergency suicide evaluation that resulted in referral to the district's counseling center, where mental health providers issued diagnoses of ADHD, oppositional defiant disorder (ODD), and bipolar disorder. A physician prescribed Adderall. The center provided him with for counseling services to address his anger issues and lack of self-control. These services were approximately once per week for L.J., mostly during lunchtime. His end-of-year report card showed satisfactory academic grades but the need for behavioral improvement.

In grade 3 (2011–12), his behavioral problems persisted. As the result of a student study team (SST) meeting in September, Dr. C. who was in charge of the district's behavioral support services and also the coordinator for psychological and special education services, developed a behavior intervention plan (BIP) for him. However, after a few months of monitoring the situation, she concluded that the teacher was not implementing the BIP with fidelity. In early March 2012, Dr. C developed a second

BIP for L.J., which targeted impulse control and refusal to follow directions, each recorded as occurring on a daily basis. The impulsive behaviors included calling out, tipping over his desk, throwing the contents of the desk on the floor, getting out of his seat, making noises, leaving the classroom without permission, and pushing and grabbing other students. These behaviors had resulted in four suspensions totaling ten school days. Later in March 2012, the district recommended transferring L.J. to a general education behavior class of six other African American students with severe behavior problems. However, L.J.'s mother objected and retained legal counsel. Upon mediation, the parties agreed to a general education non-behavior class at a different elementary school and a 1:1 aide. The agreement also provided for an independent educational evaluation (IEE), including a functional behavioral analysis (FBA), followed by multi-disciplinary team meeting to determine special education eligibility. Dr. C promptly fine-tuned the BIP for L.J.'s new classroom, intensifying a structured reward system, and trained both the teacher and aide on its implementation. They implemented the BIP with fidelity, and the rest of grade 3 went well, with a dramatic improvement in L.J.'s school behavior. Although the aide remained, he was able to "fade," or reduce, his behavioral coaching role. The teacher also provided various classroom accommodations to L.J., including additional time to complete classwork or tests, shortened assignments, and the option to complete classwork or tests in other rooms or with the aide. L.J.'s final report card showed academic mastery in all areas, except two limited sub-skills in math in which L.J. was making progress toward mastery, and satisfactory grades in citizenship and social growth. However, his problematic behavior continued at home, including a visit to the emergency room in April when he wrapped a belt around his neck, said he wanted to die, and rolled around on the ground uncontrollably.

At the end of May 2012, the school psychologist completed and submitted her IEE report. It included average-range scores for the Test for Auditory Perception Skills III, the Developmental Visual Test of Visual Motor Integration V, the NEPSY, and the Wechsler Individual Achievement Tests III.

Her FBA did not recommend a BIP, because she did not find learning-impeding behaviors; however, her recommendations included fading back the 1:1 behavioral coaching. Her conclusion was that L.J. was not eligible for special education under the only IDEA category she considered—emotional disturbance (ED). She characterized him as a bright and happy child who was verbally expressive and clearly experiencing impulsivity in the school environment" and anger management issues in the home.

Promptly upon receiving the report, the team scheduled its meeting for May 30. On the day before the meeting, L.J.'s parents had him admitted to a psychiatric hospital due to his persisting behaviors at home, which included wild tantrums, throwing and breaking things, and saying that he hated people and wished he would die. He remained at the hospital for approximately one week. Just before the meeting, his parents informed the principal that he was in the hospital, but the team did not know at the meeting that the hospitalization was for psychiatric reasons. The team concluded that L.J. was not eligible under the IDEA under the classifications of ED, other health impairment (OHI), or specific learning disability (SLD).

On July 27, 2012, the parents filed for a due process hearing, which resulted in another mediation. During that summer, L.J. was hospitalized two more times for threats of harm to himself or others. The hospital issued a diagnosis of Mood Disorder, not otherwise specified, following these hospitalizations, and L.J. began taking several new medications. In late August, as a result of the mediation, the parties agreed to place L.J. at yet another elementary school, pending the district's review of L.J.'s psychiatric hospitalization records and the school psychologist's updating of her report.

In grade 4 (2012–13), the principal of the designated elementary school assigned him to a general education teacher who had special education experience. L.J. did not have an aide or BIP, although the teacher put in place his own individualized intervention plan, which included short breaks from the classroom when he felt himself starting to lose control. The teacher also extended the classroom accommodations for L.J. In late September, L.J. received a two-day suspension for throwing

rocks at, and saying he was going to kill, the principal. His behavior was otherwise without major incident. During the same month, the outside psychologist conducted a second assessment of L.J., including a class observation and an interview with the social worker who had been intermittently seeing him and his family on an as needed basis after his hospitalizations. Her report, issued in early October, concluded that L.J. still did not qualify as ED. She found that (a) L.J. had limited insight into his past behavior problems and showed a tendency to minimize his actions; (b) he "has not yet mastered strategies for dealing with his anger, nor is he able to self-soothe or deescalate when angry"; and (c) his behavior problems were more prevalent at home than at school. She attributed these problems to ADHD and ODD.

On October 9, 2012, the multidisciplinary team met, with L.J.'s grandmother participating on behalf of his parents. The fourth-grade teacher reported that L.J. was on grade level for all academic subjects and working as hard, behaving slightly less well, and appearing to be as happy as his peers. The team again determined that L.J. did not qualify for an IEP. However, the team concluded that he needed to develop self-soothing strategies, referring him again for weekly the district's mental health center.

On October 12, the parents filed an amended complaint for a due process hearing. The parties agreeing that the dispute included both the May and October 2012 eligibility determinations.

### **Hearing Officer Decision**

On May 23, 2013, after conducting the hearing sessions on April 9–11, 2013, the hearing officer issued a decision in the district's favor (*Pittsburg Unified School District*, 2013). She concluded that L.J. was not eligible under the IDEA because (a) he did not meet the criteria for ED, OHI, or SLD and (b) even if he did, the parents had not shown an adverse effect on educational performance that would require special education. The hearing officer refused to allow admission of e-mails allegedly showing that L.J.'s behavior had escalated six months after the October 2012 meeting, reasoning that the

multidisciplinary team did not know or have reason to know of this information at the time of their eligibility determination.

### **District Court Decision**

The parents filed an appeal with the federal district court. On May 14, 2014, in an unpublished decision, the court ruled in favor of the district (*L.J. v. Pittsburg Unified School District*, 2014). However, the court analyzed the two prongs for IDEA eligibility, where are classification and special education need, with a significant difference. For the first prong, the court ruled that the hearing officer erred by failing to take into account the “crucial” effect of the accommodations and interventions that L.J. had received in general education. More specifically, the court concluded that L.J. qualified for the criteria of SLD, OHI, and ED upon discounting their ameliorating effect. However, for the second prong, which was the resulting need for special education, the court deferred to the hearing officer’s conclusion because L.J. was succeeding in general education upon discounting the only intervention the court considered probably to constitute special education—the 1:1 aide. More specifically, the court reasoned:

While the one-on-one in-class aide was significant and likely constitutes a non-general education accommodation . . . , the aide had “faded back considerably” by May 30. . . . In other words, even if the one-on-one aide was special education, the record supports a finding that Student’s behavior remained under control when subject to mere general education accommodations. (p. \*16)

Additionally, the court did not find determinative for the second prong L.J.’s psychiatric hospitalizations because “Plaintiffs provide no authority for the proposition that a school agency must provide special education support where the student is succeeding in the school environment yet struggling with his behavior at home” (p. \*17). Finally, the court did not find the hearing officer’s

exclusion of the evidence of subsequent behavior, reasoning that “even if the Student’s condition has deteriorated, that does not change the fact that at the time of the relevant [determinations], the Student was, overall, performing well socially, behaviorally, and academically” (p. \*17).

The parents appealed this decision to the federal appeals court for the Ninth Circuit.

### **Ninth Circuit Decision**

In an officially published decision on September 16, 2016, the Ninth Circuit Court of Appeals reversed the previous rulings, instead deciding the eligibility issue in favor of the parents (*L.J. v. Pittsburg Unified School District*, 2016). At this point, the parties stipulated that L.J. met the criteria for the classifications of SLD (based on severe discrepancy), OHI (based on ADHD) and ED (based on bipolar disorder, ODD, and/or mood disorder). Thus, the issue was whether L.J. demonstrated a resulting need for special education.

First, to answer this question the Ninth Circuit validated the chronological point of reference that the hearing officer and the lower court had used. More specifically, the appeals court extended its so-called “snapshot” rule from FAPE cases to eligibility cases, ruling that the applicable reference point is “the time of the child’s evaluation and not from the perspective of a later time with the benefit of hindsight” (p. 1175).

However, the Ninth Circuit found two sources of clear error in the lower court’s adjusted application as to prong two. First, the Ninth Circuit identified four services for L.J. that were specific to special education, not general education, students:

- (a) mental health counseling. The fatal flaw in the lower court’s determination, according to the Ninth Circuit, was that his services were “specially-designed for him” (p. 1176), including two features only available to special education students: (a) referral from Dr. C, and (b) mental health assessments.
- (b) one-on-one aide. The corresponding flaw was that not only were such services not available

to general education students but also the considerable fade-back finding was inaccurate because “the paraeducator continued to assist L.J. throughout the third grade” (p. 1176).

(c) extensive behavior specialist interventions. The critical difference here was the extent of such services. Acknowledging that for this school district “it is not unusual for a behavior specialist to offer support to a general education teacher” (p. 1177), the Ninth Circuit observed that here Dr. C did much more in terms of designing successive BIPs that included “adapting the method and delivery of L.J.’s instruction” (p. 1177); developing a nine-hour training session for the aide; and closely supervising him for fidelity in implementing the BIPs.

(d) various accommodations. The difference here, although less distinctive, was in the amount and nature of the accommodations in general education, including “persistent teacher oversight, additional time to complete classwork or tests, shortened assignments, discretion to leave the classroom at will, or the option to complete classwork or tests in other rooms or with one-on-one support . . . [and] a teacher with special education experience like L.J.’s fourth grade teacher” (p. 1177).

Second, the Ninth Circuit faulted the district court for not sufficiently taking into account academically relevant behaviors during the snapshot period. More specifically, the appeals court focused on L.J.’s psychiatric hospitalizations and his continuing in-school problem behaviors prior to the October eligibility meeting. For the hospitalizations, the lower court’s error was dismissing the precipitating behavior as not arising in school. “His teachers,” the Ninth Circuit pointed out, “all reported that L.J.’s classroom absences, due to psychiatric hospitalizations, hurt his academic performance” (p. 1178). For the continuing problems, the appeals court found in addition to the rock throwing suspension a school bus suspension, frequent acting out at school, and ongoing problems with L.J.’s medication management.

## Practical Implications

This California school district provided many of the strategies and interventions recommended for a proactive general education program, including (a) RTI, (b) SST, (c) behavior support services, (d) mental health counseling, and (e) classroom accommodations. Indeed, the district even fused special and general education functions in the duties of Dr. C's position. Although the particular services and interventions at issue in this case did not extend to them, other such practices include differentiated instruction, multi-tiered system of supports, and positive behavioral interventions & supports, this district's menu for general education appears to bridge the silo-like walls of special education. However, it also blurs the boundaries between general and special education.

In addressing the eligibility question as it did, the Ninth Circuit decision raises more questions than it answers. The threshold ruling is not the problem. Extending the snapshot approach from FAPE to evaluation is entirely logical, and this decision is the first time that a federal appellate court has established this application (Zirkel, 2011).

The questions at the macro level start with the weighting of the two identified sources that led to reversal of the lower court's ruling. Would the four enumerated features have been determinative in the absence of the recalibrating of the behavioral effects, and vice versa? The questions also abound within each of these two sources.

## The Four Features

Do the four features that the Ninth Circuit enumerated amount to special education? The first item, mental health counseling, is clearly questionable. Given its availability in general education in the district, is not individual counseling, by its very nature, specialized designed for the student client? Moreover, even if such individualization puts this service within the scope of the IDEA, does it not fit the separable definition in the IDEA regulations for related services (§ 300.34[a]) rather than the aforementioned critical criterion of "adapting . . . the content, methodology, or delivery of instruction"?

If so, unless state law unusually provides otherwise, the IDEA regulations also make clear that related services alone is not sufficient for eligibility (§ 300.8[a][1]).

The second item, the one-on-one aide, is similarly, if not as strongly, subject to question. Is it clear that aides are not available in the district's general education program except for such mediated agreements? If so, do aides constitute specially designed instruction or do they fit within the separable scope of related services (§ 300.34[a]) or supplementary aids and services (§ 300.42)? Did the purposeful fading, even if not entirely considerable, mean that part-time aides signal the need for special education? And finally, was the aide necessary in light of the lack of one at the time of the second eligibility evaluation, when L.J.'s behavior remained at an improved level?

The third item, extensive behavioral interventions, suggests an underlying emphasis on degree more than kind. Although the BIP likely extended to adapting the method or delivery of a broad meaning of instruction, the court relied as well on the extent of training and fidelity monitoring. Would the BIP alone have sufficed for this particular feature, particularly when there was none at the time of the second eligibility evaluation? And are not training and supervision necessary practices for quality instruction generally?

The fourth item, special classroom accommodations, is entirely questionable. Are not such identified items, such as additional time to complete classwork or tests and shortened assignments, not simply flexible, common sense teaching? Even when they are formalized in Section 504 plans, court often consider such accommodations to be part of general education (e.g., *Hood v. Encinitas Union School District*, 2007; *R.E. v. Brewster Central School District*, 2016). And are not teachers with special education experience increasingly common and beneficial in general education?

Finally, are all of these four features in combination necessary? More specifically, is any one of them the critical factor? If not, would the same outcome apply if the case had presented only two or three of them? Instead, is the critical criterion the seeming commonality among the four features—a

service or adjustment that is not generally available in regular education in terms of individualization and/or extent? If so, how does this criterion square with the regulatory criterion of “adapting . . . the content, methodology, or delivery of instruction”?

### **Behavioral-Effects Metric**

The difference between the two lower levels and the Ninth Circuit for this second source of reversible error in this case is much less significant. It appears to be largely a matter of the difference of opinion among impartial but ultimately subjective adjudicators. The Ninth Circuit did not hold that the eligibility decision must be based on behaviors at home. Instead, the appellate panel, probably as a matter of result-oriented thinking, assigned more weight to the L.J.’s continuing, albeit improved, behaviors and the attendance effects of his May 2012 hospitalization. We are left with smaller but not insignificant questions, such as (a) whether the effect of a one-week absence is of major import, and, on wider consideration, (b) whether L.J.’s continuing behaviors materially affected his learning? The latter question dovetails with the unsettled question of whether “educational performance” in the context of IDEA eligibility is a matter of academics or broader considerations, such as interaction with others?

### **Conclusions**

In any event, the primary or key question in the wake of the Ninth Circuit’s decision is whether, as a policy matter, its approach serves as a disincentive for school district’s to develop a more integrated system of services, thus in effect representing the cynical proposition that no good deed goes unpunished? Time will tell, with refinement forthcoming in the legal system via judicial interpretations of the Ninth Circuit’s approach not only in other jurisdictions, where its decision is not binding, but also by the lower courts in its jurisdiction, which will face the aforementioned questions. These questions are distinguishable from the obverse, FAPE side of the “blurring” controversy—the long-standing debate about whether an inclusive model erodes the integrity and appropriateness of the

special education services for eligible students (e.g., McLaughlin, 1995; Zigmond, Kloo, & Volonino, 2009).

In the interim, although school officials need to be cognizant of this new, major decision, they must recognize its judicial limitations and unresolved questions. Moreover, they need to not only maintain legal currency with other relevant developments, but also remain attuned to the multiple other considerations for more effective schools, including the economic, political, and community dimensions. In my view, the institution of individually more diverse and responsive services and strategies in general education is well worth the risk of losing an occasional child find or eligibility case. Various issues in special education law are, like Venn diagrams, more a matter of overlaps than mutual exclusions. And more generally, effective education is a portrait that includes blurred, not just bright, lines.

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