

## EDUCATION LAW INTO PRACTICE

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### ORTON-GILLINGHAM APPROACH FOR STUDENTS WITH DISABILITIES: CASE LAW UPDATE UNDER THE IDEA\*

by  
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The Orton-Gillingham (OG) approach to reading has various distinguishing features, including “(a) direct, systematic, incremental, and cumulative lessons; (b) cognitive explanations; (c) diagnostic and prescriptive methods; (d) linguistics-based instruction; and (e) multisensory engagement.”<sup>1</sup> Although sometimes used narrowly to refer to its original specific form, it is also used generically to refer to various branded, or commercially available, adaptations and extensions, including Wilson, Lindamood-Bell, and Project Read.<sup>2</sup> Generally regarded as signature reading methodologies,<sup>3</sup> the various forms of the OG approach have a relatively limited research base.<sup>4</sup>

The case law concerning OG has also been relatively limited. In the only previous comprehensive analysis of the OG case law under the IDEA, Rose and Zirkel canvassed the thirty-year period from the passage of the Individuals with Disabilities Education Act (IDEA)<sup>5</sup> to December 31, 2005.<sup>6</sup> Due to

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1. Kristin L. Sayeski et al., *Orton Gillingham: Who, What, and How*, 51 TEACHING EXCEPTIONAL CHILD. 240, 241 (2018).

2. *Id.* at 245; Kristen D. Ritche & Jennifer L. Goeke, *Orton Gillingham and Orton-Gillingham-Based Reading Instruction: A Review of the Literature*, 40 J. SPECIAL EDUC. 171, 172 (2006).

3. *E.g.*, Sayeski et al., *supra* note 1, at 241 (“considered by many as the signature approach for addressing reading disabilities,” although of varying accessibility among public schools).

4. Ritche & Goeke, *supra* note 2, at 180 (reporting that as of 2006 only twelve stud-[472]

ies compared an OG-based method to one or more comparison reading approaches, with OG found more effective for all outcomes in only five of these studies); *cf.* DAVID A. KILPATRICK, *ESSENTIALS OF ASSESSING, PREVENTING, AND OVERCOMING READING DIFFICULTIES* (2015) (concluding that OG insufficiently addressed advanced phonemic awareness); Inst. Educ. Sci. What Works Clearinghouse, *Unbranded Orton-Gillingham-Based Interventions* (2010), <https://ies.ed.gov/ncee/wwc/EvidenceSnapshot/528> (finding no study available as of July 2010 that met its research standards, thus declining to provide any conclusion on the effectiveness of OG).

5. 20 U.S.C. §§ 1401–19 (2018).

6. Tessie E. Rose & Perry A. Zirkel, *Orton-Gillingham Methodology for Students with Reading Disabilities: 30 Years of Case Law*, 41 J. SPECIAL EDUC. 171 (2007). For an earlier analysis limited to reading methodology decisions for the subset of years 1989–98, see Preetha Bhat, Mary Jane Rapport, & Cynthia C. Griffin, *A Legal Perspective on the Use of Specific Reading Methods for Students with Learning Disabilities*, 23

## THE ORTON-GILLINGHAM APPROACH: A CASE LAW UPDATE

the limited number of cases for that period at the court level, which averaged slightly less than one per year,<sup>7</sup> they extended their scope to hearing officer decisions available in the Individuals with Disabilities Education Law Report (IDELR).<sup>8</sup> Their findings included the following: (1) the frequency of cases formed a rather steep upward trajectory;<sup>9</sup> (2) the most frequently requested relief was tuition reimbursement;<sup>10</sup> and (3) the outcomes clearly favored school districts.<sup>11</sup> In their discussion of the results, they identified the possibly significant future impact of the 2004 IDEA amendment, which had not yet appeared in the relevant case law, requiring that the child's special education and related services be "based on peer-reviewed research to the extent practicable."<sup>12</sup>

### Method

The purpose of this article is to provide a brief, empirically styled update of the Rose and Zirkel 2007 analysis. The period for this update is from January 1, 2006 to May 1, 2020. The method was basically the same, using a Boolean search with the various generally recognized names within the broad OG rubric<sup>13</sup> in combination with the IDEA<sup>14</sup> in two databases—Westlaw and SpecialEdConnection®.<sup>15</sup> The scope was limited to cases that included a substantive FAPE ruling that either included one or more of these OG methods on the district's side and/or—often via a unilateral private placement in a private school that specialized in OG—on the parents' side. Although the boundary was rather broad, resulting in inclusion of some marginal cases,<sup>16</sup> the exclusions encompassed court decisions in which the

LEARNING DISABILITY Q. 283 (1997) (identifying and analyzing six court decisions and twenty-one hearing officer decisions in which the parents requested a language-based multisensory methodology).

7. They found twenty-nine court decisions for the thirty-year period, with most of them during the most recent ten-year segment. *Id.* at 175–80.
8. They identified an additional twenty-five decisions at the hearing officer level in IDELR for the thirty-year period. *Id.*
9. More specifically, the most recent ten-year segment accounted for 77% of all the decisions. *Id.* at 181. For the court decisions, the number for each of the six successive five-year intervals, starting with 1976–1980, was as follows: 1, 1, 0, 3, 12, and 12. *Id.* at 175–80.
10. Prospective placement at a specialized private school overlapped with reimbursement in some of these cases, and the Kildonan School accounted for ten of the fifty-four cases. *Id.*
11. Specifically, the outcomes distribution was as follows: completely in favor of the district—76%; inconclusive—2% (one deci-

sion); and partially or completely in favor of parents—23%. *Id.* at 181.

12. *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)(i)(IV)).
13. Per the prior analysis, the search terms included Alphabetic Phonics, Herman, Lindamood–Bell, Orton–Gillingham, Preventing Academic Failure, Project Read, Slingerland, Spalding, SPIRE, and Wilson. The two limited additions were Recipe for Reading, per Sayeski et al., *supra* note 1, and the Gow School's "Reconstructive Language" approach in light of its overlap with OG in Rose & Zirkel, *supra* note 6.
14. The search included the full title of the Act, the acronym, and the broad alternative of "student with disabilities."
15. Whereas Westlaw is generic in its judicial coverage, SpecialEdConnection® is largely homogeneous to special education, with the judicial coverage encompassing the aforementioned IDELR.
16. This inevitable inexactitude primarily arose in determining whether the identified OG method(s) played an entirely incidental role in the court's treatment, which in turn was largely attributable to the court's pre-

## EDUCATION LAW REPORTER

mention of OG was either (a) limited to IDEA eligibility<sup>17</sup> or attorneys' fees,<sup>18</sup> Section 504,<sup>19</sup> or other non-IDEA grounds;<sup>20</sup> or (b) solely as a tertiary or incidental background matter.<sup>21</sup> The outcome, within the three-category classification,<sup>22</sup> was based on the relevant ruling in the latest court decision that addressed the OG-related FAPE issue.

### Results

The search and selection process resulted in 65 OG court decisions,<sup>23</sup> which the Appendix lists in alphabetical order. Figure 1 traces the trend in the frequency of these decisions per successive five-year intervals. The bar representing the most recent five-year interval includes a straight-line projection for the remaining limited segment.<sup>24</sup>

vailing cursory attention to methodology factor and to the flowchart-type analysis for tuition reimbursement (and compensatory education) cases.

17. *C.M. ex rel. Jodi M. v. Dep't of Educ., Haw.*, 476 Fed.Appx. 674, 283 Ed.Law Rep. 850 (9th Cir. 2012).

18. *E.g., Bristol Warren Reg'l Sch. Comm. v. DaSilva*, 2007 WL 951570 (D.R.I. Mar. 27, 2007).

19. *E.g., O.R. v. Clark Cty. Sch. Dist.*, 72 IDELR ¶ 4 (D. Nev. 2018).

20. *E.g., Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 436 F. Supp. 2d 1181, 211 Ed.Law Rep. 236 (D.N.M. 2006) (rejecting claims under the Constitution and Title VI).

21. *E.g., A.D. ex rel. E.D. v. Sch. Dist. of New York City*, 690 F. Supp. 2d 193, 209, 256 Ed.Law Rep. 746 (S.D.N.Y. 2010) (listing L-B as one of many curricular elements of the unilateral private placement).

22. As a refinement of Rose and Zirkel, *supra* note 11, the outcome classification was based on the more precise unit of analysis of the issue-category ruling rather than

the entire case, yielding the following three categories: conclusively in favor of the plaintiff-parents; inconclusive (e.g., remand for further proceedings to determine the issue conclusively); and conclusively in favor of the defendant-district. For previous uses of this outcome approach, see, for example, Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities*, 361 Ed. Law Rep. 491 (2019); Mark A. Paige & Perry A. Zirkel, *Teacher Termination Based on Performance Evaluations*, 300 Ed. Law Rep. 1 (2014); Perry A. Zirkel, *The Use of Time-Out and Seclusion for Students with Disabilities*, 48 COMMUNIQUÉ 22 (May 2020); Perry A. Zirkel & Richard Fossey, *Liability for Student Suicide*, 354 Ed. Law Rep. 628 (2018).

23. In the Results, in the Introduction and Method sections, "OG" is generic herein, referring to the umbrella of the generally recognized variations and extension of this approach.

24. Said segment amounted to the eight-month period from May 1, 2020 to December 31, 2020.

## THE ORTON-GILLINGHAM APPROACH: A CASE LAW UPDATE

FIGURE 1: FREQUENCY TREND OF OG CASES

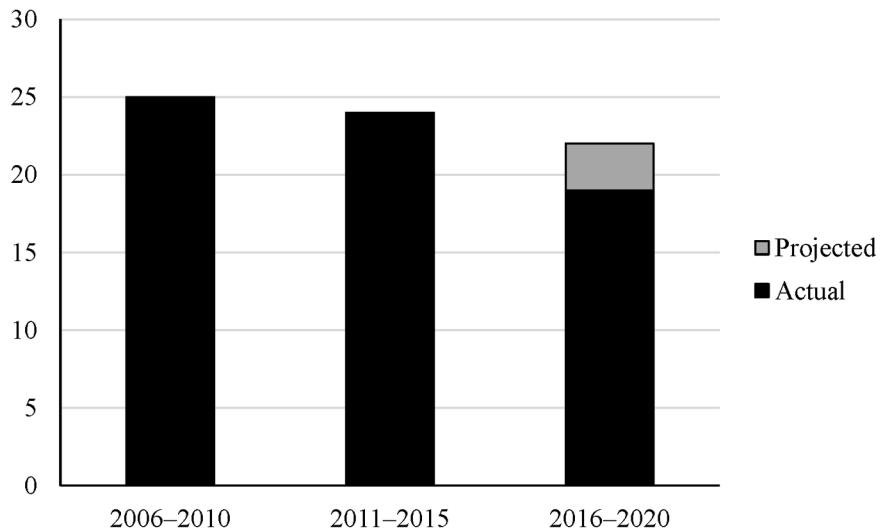


Figure 1 shows that the number of OG related cases has remained at a relatively high and possibly declining plateau in comparison to the judicial trend during the prior thirty-year period.<sup>25</sup>

Table 1 summarizes the outcomes trend for the relevant rulings in the sixty-four cases according to the aforementioned<sup>26</sup> three categories.

TABLE 1: OUTCOMES DISTRIBUTION OF THE OG COURT RULINGS

	Conclusively for Parent	Inconclusive	Conclusively for District
2006–2010 (n=25)	8% (n=2)	4% (n=1)	88% (n=22)
2011–2015 (n=24)	8% (n=2)	0% (n=0)	92% (n=22)
2016–5/1/20 (n=19)	26% (n=5)	5% (n=1)	68% (n=13)
Total Period (n=68)	13% (n=9)	3% (n=2)	84% (n=57)

Review of Table 1 reveals a strongly district-favorable outcomes pattern for the overall period,<sup>27</sup> with possible tempering during the most recent but still incomplete interval.<sup>28</sup>

Analyzing the rulings on a more qualitative basis reveals a few prominent trends. First, contrary to the usual association of OG methods with

25. *Supra* note 9. Whether the decline is de minimis or significant depends, in notable part, on the extent that the projection for the remaining limited period proves to be accurate.

26. *Supra* note 22 and accompanying text.

27. Depending on whether and how one counts the relatively few inconclusive rul-

ings, the ratio favored districts within the range of 5:1 to almost 7:1.

28. The lower as well as incomplete number for the final interval leaves the reduced pro-district ratio in question, but even if it does not change, the ratio still favors districts on approximately a 3:1 basis.

## EDUCATION LAW REPORTER

dyslexia or at least specific learning disability (SLD),<sup>29</sup> in a notable minority of the cases the student had a combination of diagnoses that often did not include dyslexia or SLD.<sup>30</sup> Second, the most frequent identified OG method in these cases was Wilson,<sup>31</sup> its preponderance was neither dominant nor precise because in several of the cases more than one method was at issue and, even more generally, the courts did not engage in fine-grained examination and differentiation.<sup>32</sup> Third and most significantly, the courts' generally cursory treatment of OG was due to various contributing factors, including (a) the relatively relaxed substantive standard for FAPE;<sup>33</sup> (b) the overlapping generally holistic approach to the IEP and the services provided within its framework;<sup>34</sup> (c) the marked deference to school authorities,<sup>35</sup>

**29.** *E.g.*, *G.W. v. Rye City Sch. Dist.*, 61 IDELR ¶14, at \*3 n.2 (S.D.N.Y. 2013) (citing *Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 384 n.12 (S.D.N.Y. 2006) for the definition of OG as “a specialized, multisensory teaching method designed to educate students with dyslexia and other learning disabilities”); Sayeski et al., *supra* note 1, at 241 (“OG is an approach to teaching individuals with dyslexia to read . . .”); Ritchey & Goeke, *supra* note 2, at 172 (“[OG is] commonly accepted and frequently delivered . . . for students with reading disabilities.”).

**30.** *E.g.*, *Ms. M. v. Falmouth Sch. Dep’t*, 847 F.3d 19, 339 Ed.Law Rep. 619 (1st Cir. 2017) (ADHD and Down Syndrome); *D.B. v. Esposito*, 675 F.3d 26, 278 Ed.Law Rep. 716 (1st Cir. 2012) (dysarthria, seizure disorder, and verbal apraxia); *M.B. v. Hamilton Se. Sch.*, 668 F.3d 851, 277 Ed.Law Rep. 60 (7th Cir. 2011) (communicative disorder and traumatic brain injury); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 252 Ed.Law Rep. 585 (1st Cir. 2010) (intellectual disability, orthopedic impairment, and speech/language impairment); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 256 Ed.Law Rep. 22 (3d Cir. 2010) (intellectual disability and other health impairment); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 240 Ed.Law Rep. 555 (4th Cir. 2009) (multiple disabilities, including autism); *Ringwood Bd. of Educ. v. K.H.J. ex rel. K.F.J.*, 258 Fed.Appx. 399 (3d Cir. 2007) (ADHD, adjustment disorder, bipolar disorder, and SLD); *K.G. v. Cinnaminson Twp. Bd. of Educ.*, 73 IDELR ¶19 (D.N.J. 2018) (ADHD, autism, emotional disturbance, epilepsy, Kleffner Syndrome, and language disorder); *C.S. v. Yorktown Cent. Sch. Dist.*, 72 IDELR ¶7 (S.D.N.Y. 2018) (ADHD, Developmental Coordination Disorder, and Tourette Syndrome); *Damarcus S. v. D.C.*, 190 F. Supp. 3d 35, 338 Ed.Law Rep. 828

(D.D.C. 2016) (ADHD, intellectual disability, and ODD).

**31.** The approximate frequency was as follows for the most commonly identified methods: Wilson—27 cases, OG—24 cases, and L-B—18 cases.

**32.** For example, reference in the court opinions to the exact term “Orton–Gillingham” often was not sufficiently clear whether the intent was generic or, instead, specific to a particular variation or derivation, depending on what a closer examination would reveal about the method used by the private school, education organization, or individual expert in the case.

**33.** Prior to *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the controlling criterion for substantive FAPE rulings was the “reasonable calculation for . . . educational benefits” standard of *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 207 (1982), which the Court interpreted as “largely” subordinate to the procedural requirements of the IDEA. *Id.* at 206. For the most recent years, the *Endrew F.* Court’s progress-based refinement of the substantive standard has not resulted in a significant change in the pro-district skew of the judicial outcomes. *E.g.*, Perry A. Zirkel, *The Aftermath of Endrew F.: An Outcomes Analysis Two Years Later*, 363 Ed. Law Rep. 1 (2019) (finding for eighty-eight substantive FAPE rulings initially decided under *Rowley* and subsequently decided, upon appeal, under *Endrew F.*, for the seventy-five (85%) initially in favor of the district, the subsequent changes were limited to five remands and five reversals).

**34.** *E.g.*, *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 399, 283 Ed.Law Rep. 667 (5th Cir. 2012) (using a “holistic perspective” to reverse the district court’s substantive FAPE ruling in favor of the parents).

## THE ORTON-GILLINGHAM APPROACH: A CASE LAW UPDATE

especially for methodology<sup>36</sup> and staffing;<sup>37</sup> and (d) the posture of the case often identified OG solely on the parents' side, with the court not addressing it due to a threshold ruling that the district's IEP was appropriate.<sup>38</sup> As an overlapping matter, the courts have generally agreed that the IEP need not specify methodology.<sup>39</sup> At the same time, the courts have assessed the IEPs' appropriateness without limitation to the services identified in it,<sup>40</sup> largely attributable to the broadly applicable substantive standard<sup>41</sup> and the generally not careful differentiation between IEP and placement.<sup>42</sup> Moreover, the

**35.** *E.g., Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 270, 252 Ed.Law Rep. 585 (1st Cir. 2010). In some cases, this deference appeared in the court's weighting of the district's witnesses over the parents' expert. *E.g., M.B. v. Hamilton Sch. Sch.*, 668 F.3d 851, 862, 277 Ed.Law Rep. 60 (7th Cir. 2011). Alternatively, courts avowed deference to the hearing/review officer's decision, which was frequently in the district's favor. *E.g., K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 256, 358 Ed.Law Rep. 98 (3d Cir. 2017); *K.K. v. Alta Loma Sch. Dist.*, 60 IDELR ¶ 159, at \*3 (C.D. Cal. 2013).

**36.** *E.g., Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 455 F. Supp. 2d 1286, 1309, 214 Ed.Law Rep. 1046 (D.N.M. 2006); *A.S. v. Trumbull Bd. of Educ.*, 414 F. Supp. 2d 152, 174 (D. Conn. 2006). Conversely, courts have emphasized that parents do not have the right under the IDEA to dictate methodology. *E.g., W.R. v. Union Beach Bd. of Educ.*, 414 Fed.Appx. 499, 501, 267 Ed.Law Rep. 550 (3d Cir. 2009); *Wood v. Katy Indep. Sch. Dist.*, 163 F. Supp. 3d 396, 418, 334 Ed.Law Rep. 98 (S.D. Tex. 2015).

**37.** *E.g., C.H. v. Goshen Cent. Sch. Dist.*, 61 IDELR ¶ 19, at \*13 (S.D.N.Y. 2013); *Ganje v. Depew Union Free Sch. Dist.*, 60 IDELR ¶ 43, at \*16, adopted, 60 IDELR ¶ 74 (W.D.N.Y. 2012).

**38.** This posture was especially but not exclusively evident in tuition or tutoring reimbursement cases in which the court ruled that the district's proposed IEP was appropriate, thus not reaching the appropriateness step of the parents' unilateral OG placement. *E.g., K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 358 Ed.Law Rep. 98 (3d Cir. 2017); *Ms. M. v. Falmouth Sch. Dep't*, 847 F.3d 19, 339 Ed.Law Rep. 619 (1st Cir. 2017); *D.B. v. Esposito*, 675 F.3d 26, 278 Ed.Law Rep. 716 (1st Cir. 2012); *Fairfax Cty. Sch. Bd. v. Knight*, 261 Fed. Appx. 606, 231 Ed.Law Rep. 697 (4th Cir. 2008); *N.M. v. Sch. Dist. of Phila.*, 585 F.

Supp. 2d 657, 239 Ed.Law Rep. 591 (E.D. Pa. 2008), *aff'd*, 394 Fed.Appx. 920, 263 Ed.Law Rep. 61 (3d Cir. 2009); *M.F. v. Irvington Sch. Dist.*, 719 F. Supp. 2d 302, 261 Ed.Law Rep. 601 (S.D.N.Y. 2010); *Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366 (S.D.N.Y. 2006).

**39.** *E.g., Ms. M. v. Falmouth Sch. Dep't*, 847 F.3d 19, 27–28, 339 Ed.Law Rep. 619 (1st Cir. 2017); *Matthews v. Douglas Cty. Sch. Dist. RE 1*, 73 IDELR ¶ 42, at \*6 (D. Colo. 2018); *C.S. v. Yorktown Cent. Sch. Dist.*, 72 IDELR ¶ 7, at \*25 (S.D.N.Y. 2018).

**40.** This approach is a potential problem in the relatively few jurisdictions that have adopted some form of the four-corners approach to FAPE analysis, which excludes—with possible exceptions—evidence extrinsic to the specific contents of the IEP. In *M.C. v. Katonah/Lewisboro School District*, 58 IDELR ¶ 196 (S.D.N.Y. 2012), the court rejected the parents' four-corners argument, observing that the Second Circuit, unlike a few other cited circuits, had not adopted this approach. *Id.* at \*11. Later in the same year the Second Circuit adopted a qualified version of this approach, which only allows extrinsic evidence to explain or justify the contents of the IEP. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 186–87 (2d Cir. 2012). However, this argument did not surface in the subsequent OG cases in the Second Circuit or in those in other applicable jurisdictions, perhaps because the judicial trend in these cases has been to focus deferentially on general progress evidence rather than rigorously on the specific basis and fit of the methodology.

**41.** *Supra* note 33.

**42.** Exemplifying the usual lack of clear-cut and consistent differentiation, the Second Circuit, in a brief affirmance, used IEP and placement interchangeably for the first appropriateness step of tuition reimbursement in “substantially” agreeing with the underlying magistrate's *R & R. A.N. v. Bd. of Educ. of Iroquois Cent. Sch. Dist.*, 801 Fed.Appx.

## EDUCATION LAW REPORTER

aforementioned<sup>43</sup> added IDEA provision for peer reviewed research (PRR) has not had any notable impact on the pro-district outcomes trend in this lengthened line of OG cases.<sup>44</sup>

Finally, the relatively rare conclusive rulings in favor of the parents offer them only limited leverage for future OG cases. The majority of these rulings arose at the second appropriateness step of tuition reimbursement analysis,<sup>45</sup> in those cases that the district's proposed IEP was not appropriate and the parents' unilateral placement was an OG-based private school or tutoring service.<sup>46</sup> The remaining but more significant parent victories, because they were at the threshold appropriateness step regardless of the specific remedy, were largely based on uncharacteristically non-district-deferential judicial findings of improper implementation of OG.<sup>47</sup> An unusual but still circumscribed addition was an unpublished federal district court decision in which the court concluded that the school district engaged in predetermination by refusing to discuss methodology in proposing the in-district placement of a

35, 46 (2d Cir. 2020). Yet, the cited R & R very unusually concluded that the district's proposed placement was appropriate but its proposed IEP was not. *R.N. v. Bd of Educ. of Iroquois Cent. Sch. Dist.*, 2016 WL 11607329, at \*18–19 (W.D.N.Y. Nov. 15, 2016).

43. *Supra* note 12 and accompanying text.

44. E.g., *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 275–80, 280 Ed.Law Rep. 37 (3d Cir. 2012) (concluding in rejection of the parents' PRR claim for Wilson that the standard was for reasonable, not optimal, PRR with due deference for the flexibility of the IEP team); *Stanley C. v. M.S.D. of Sw. Allen Cty. Sch.*, 628 F. Supp. 2d 902, 962–66, 247 Ed.Law Rep. 251 (N.D. Ind. 2008) (similarly applying PRR deferentially to reject parents' challenge to Project Read); *William V. v. Copperas Cove Indep. Sch. Dist.*, 75 IDELR ¶ 124, at \*11 (W.D. Tex. 2019) (rejecting parents' PRR challenge to Wilson by concluding that the Fifth Circuit's multi-factor approach to substantive FAPE is controlling).

45. For a flowchart overview of this multi-step analysis, see Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed. Law Rep. 785 (2012).

46. For the converse and more frequent situation in which the court did not reach this step, see *infra* note 38. Moreover, in these second-step cases, the outcomes were mixed because the determination of the unilateral placement's substantive appropriateness included other needs of the individual child. *Compare Ringwood Bd. of Educ. v. K.H.J. ex*

*rel. K.F.J.*, 258 Fed.Appx. 399 (3d Cir. 2007); *A.W. v. Bd. of Educ. of Wallkill Cent. Sch. Dist.*, 68 IDELR ¶ 164 (N.D.N.Y. 2016); *M.M. v. Lafayette Sch. Dist.*, 68 IDELR ¶ 72 (N.D. Cal. 2016); cf. *Avaras v. Clarkstown Cent. Sch. Dist.*, 70 IDELR ¶ 129 (S.D.N.Y. 2017) (ruling for parents), with *Matrejek v. Brewster Cent. Sch. Dist.*, 293 Fed.Appx. 20, 239 Ed.Law Rep. 344 (2d Cir. 2008); *L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 296 Ed.Law Rep. 409 (S.D.N.Y. 2013); *Weaver v. Millbrook Cent. Sch. Dist.*, 812 F. Supp. 2d 514, 276 Ed.Law Rep. 84 (S.D.N.Y. 2011); *Davis v. Wappinger Falls Cent. Sch. Dist.*, 772 F. Supp. 2d 500 (S.D.N.Y. 2010); *Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F. Supp. 2d 529, 258 Ed.Law Rep. 231 (S.D.N.Y. 2010) (ruling for district).

47. *Preciado v. Bd. of Educ. of Clovis Mun. Sch.*, — F.Supp.3d —, — Ed.Law Rep. — (D.N.M. 2020) (including lack of sufficiently trained teacher); *Avaras v. Clarksstown Cent. Sch. Dist.*, 70 IDELR ¶ 129 (S.D.N.Y. 2017) (including too large a student:teacher ratio). Another conclusive parent victory was more narrowly based on the court's deference to the hearing officer's conclusion that the specific OG recommendations of the parents' experts, which the child's teachers supported, were critical to this particular child's reasonably calculated progress. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 566 n.7, 256 Ed.Law Rep. 22 (3d Cir. 2010) (observing that "we only are deciding that on this record the ALJ's conclusions with respect to remedial techniques and provisions for accommodations are unassailable and our opinion should not be read overly broadly").

## THE ORTON-GILLINGHAM APPROACH: A CASE LAW UPDATE

child who was in a private OG school.<sup>48</sup> However, carefully limiting its ruling to the factual circumstances of the case rather than requiring a discussion of methodology in IEP meetings generally, the court decided the case based on procedural FAPE, finding the requisite loss on the parental side.<sup>49</sup> In doing so, the court expressly avoided deciding the substantive FAPE issue, including any specialized assessment of OG or other reading methodology.<sup>50</sup>

### Discussion

Despite imprecision at the margins, the central conclusion is rather clear and unaffected.<sup>51</sup> In accordance with the more general distinction between the judicial orientation, which focuses on minimum legal requirements, and the professional orientation, which focuses on evidence-based best practices,<sup>52</sup> the courts have generally engaged in a rather cursory and district-deferential treatment of OG methodology. More specifically, the most recent fifteen-year period of judicial case law largely fits with the contours of the previous thirty-year period.<sup>53</sup> First, the overall frequency of the case law represents a higher, but plateau-like level in the volume of OG court decisions.<sup>54</sup> Second and likely serving as a contributing factor to the leveling off and possible limited decline in the frequency of the cases, the outcomes have become even more strongly skewed in favor of districts.<sup>55</sup> Other likely contributing factors

48. *P.C. v. Milford Exempted Vill. Sch.*, 60 IDELR ¶ 129 (S.D. Ohio 2013).

edges of the overall group and its rather broad subcategories.

49. *Id.* at \*7–8. Although the court relied on its jurisdiction’s predetermination ruling in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), the 2004 amendments of the IDEA codified the procedural FAPE analysis that culminates in a parental alternative for the requisite second-step loss. 20 U.S.C. § 1415(f)(3)(E)(ii) (2018).

52. For other examples of this distinction in the IDEA context, see Lauren W. Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements Professional Recommendations*, 19 J. POSITIVE BEHAV. INTERVENTIONS 180 (2017); Perry A. Zirkel, *An Analysis of the Judicial Rulings for Transition Services under the IDEA*, 41 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 136 (2018); Perry A. Zirkel, *Child Find: The Reasonable Period Requirement*, 311 Ed. Law Rep. 576 (2015).

53. Rose & Zirkel, *supra* note 6.

54. *Supra* notes 9 (prior period) and *supra* text accompanying note 25 (most recent period). The possible descending trajectory of the “plateau” is tentative due to not only the incompleteness of the most recent interval but also the imprecision of the OG variations and their role in the case law.

55. *Supra* notes 11 (prior period) and 27 (most recent period). The pro-district outcomes skew is more pronounced than it is for IDEA judicial rulings generally. *E.g.*, Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law: Frequency and Outcomes of Published Court Decisions 1998–2012*, 27 J. SPECIAL EDUC. LEADERSHIP 55, 58 (Sept. 2014) (finding an approximate 3:1 ratio of conclusive outcomes in favor of districts rather than parents).

## EDUCATION LAW REPORTER

include the cumulative effect of solidifying precedent regarding methodology,<sup>56</sup> the confirming rather than countering effect of both *Endrew F.*<sup>57</sup> and the IDEA's PRR amendment;<sup>58</sup> and the overall shift toward a more conservative ideology in the courts.<sup>59</sup>

Perhaps the courts are too congested and ill-equipped to gravitate toward fine-grained educational analysis, and the limited availability of specialized counsel<sup>60</sup> and experts<sup>61</sup> is insufficient to reverse the trend of cursory, relaxed, and district-deferential treatment of OG and other methodological issues.<sup>62</sup> If so, it is both advisable and preferable for parents and educators to resolve such matters via effective collaboration, communication, and compromise at the IEP table based on a shared normative orientation rather than resort to the mutually ponderous and costly process of litigation.

**56.** For a dramatic non-OG example of the resiliency of the traditional approach, see the reversal of the Ninth Circuit's seeming crack in the wall of judicial deference to district choices in methodology disputes under the IDEA. *R.E.B. v. Dep't of Educ., Haw.*, 870 F.3d 1025, 1029, 347 Ed.Law Rep. 134 (9th Cir. 2019) (requiring specification of methodology in the IEP where critical to the child), *on reconsideration*, 770 Fed.Appx. 796, 801, 367 Ed.Law Rep. 129 (9th Cir. 2019) (not requiring specification in the IEP so as to provide flexibility based on "the deference we owe to [the child's] teachers").

**57.** *Supra* note 33.

**58.** *Supra* text accompanying notes 41–42. The wider body of case law similarly has developed a generally relaxed interpretation of PRR. *E.g., Albright v. Mountain Home Sch. Dist.*, 926 F.3d 942, 367 Ed.Law Rep. 13 (8th Cir. 2019); *E.M. v. Lewisville Indep. Sch. Dist.*, 763 Fed.Appx. 361 (5th Cir. 2019); *Joshua A. ex rel. Jorge A. v. Rocklin Unified Sch. Dist.*, 319 Fed.Appx. 692, 245 Ed.Law Rep. 669 (9th Cir. 2009).

**59.** *E.g.*, Edwin Chemerinsky, *The Supreme Court and Public Schools*, 117 MICH. L. REV. 1107, 1118 (2019) (If, as I suggested, it all comes down to the ideology of the justices, what will it mean to have the most conservative Supreme Court since the mid-1930s?"); Geoffrey Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TULANE L. REV. 1533, 1544–45 (tracking the shift to the conservative composition in the Roberts Court) (2008); Rebecca Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO

ST. L.J. 255, 288 (2008) ("The Rehnquist Court replaced the Warren Court's activism with a harsher, more conservative activism 'protecting state governments from civil rights plaintiffs . . . .'").

**60.** *E.g.*, Kay H. Seven & Perry A. Zirkel, In the Matter of Arons: *Construction of the Lay Advocate's Provision Too Narrow?*, 9 GEORGETOWN J. POVERTY L. & POL'Y 193, 218–19 (2002) (finding limited availability of parent attorneys for IDEA disputes, particularly at a low cost).

**61.** *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (ruling that the IDEA does not provide for recovery of expert fees for prevailing parents).

**62.** Although the methodology cases in the relatively early IDEA cases focused on students with deafness (*e.g., Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 48 Ed.Law Rep. 105 (7th Cir. 1988)), during the more recent years, the focus in addition to OG has been on applied behavior analysis (ABA) cases for students with autism. *E.g.*, Bradley S. Stevenson & Vivian I. Correa, *Applied Behavior Analysis, Students with Autism, and the Requirement to Provide a Free Appropriate Public Education*, 29 J. DISABILITY POL'Y STUD. 206 (2019) (finding 67% in favor of districts on a two-category outcomes scale for twenty-seven ABA cases from 2005 to 2016); Janet Decker, *A Comprehensive Analysis of Applied Behavior Analysis (ABA) Trends for Students with Autism*, 274 Ed.Law Rep. 1 (2012) (finding 62% in favor of districts on a three category outcomes scale, with 13% inconclusive, for thirty-nine ABA cases from 1975 to 2009).

## THE ORTON-GILLINGHAM APPROACH: A CASE LAW UPDATE

### APPENDIX: LIST OF OG COURT DECISIONS FROM 1/1/06 TO 5/1/20

*Adrienne D. v. Lakeland Cent. Sch. Dist.*, 686 F. Supp. 2d 361, 255 Ed.Law Rep. 830 (S.D.N.Y. 2010).

*Amanda P. v. Copperas Cove Indep. Sch. Dist.*, 76 IDELR ¶ 154 (W.D. Tex. 2020).

*Avaras v. Clarkstown Cent. Sch. Dist.*, 70 IDELR ¶ 129 (S.D.N.Y. 2017).

*A.S. v. Trumbull Bd. of Educ.*, 414 F. Supp. 2d 152 (D. Conn. 2006).

*A.W. v. Bd. of Educ. of Wallkill Cent. Sch. Dist.*, 68 IDELR ¶ 164 (N.D.N.Y. 2016).

*Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 46 IDELR ¶ 102 (C.D. Ill. 2006).

*C.B. v. Pittsford Cent. Sch. Dist.*, 54 IDELR ¶ 149 (W.D.N.Y. 2010).

*C.H. v. Goshen Cent. Sch. Dist.*, 61 IDELR ¶ 19 (S.D.N.Y. 2013).

*C.S. v. Yorktown Cent. Sch. Dist.*, 72 IDELR ¶ 7 (S.D.N.Y. 2018).

*D.A. v. Fairfield-Suisun Unified Sch. Dist.*, 62 IDELR ¶ 17 (E.D. Cal. 2013).

*Damarcus S. v. D.C.*, 190 F.Supp.3d 35, 338 Ed.Law Rep. 828 (D.D.C. 2016).

*David G. v. Council Rock Sch. Dist.*, 2011 WL 7678685 (E.D. Pa. Dec. 23, 2011), *adopted*, 58 IDELR ¶ 254 (E.D. Pa. 2012).

*Davis v. Wappinger Falls Cent. Sch. Dist.*, 772 F. Supp. 2d 500, 269 Ed.Law Rep. 110 (S.D.N.Y. 2010), *aff'd*, 431 Fed.Appx. 12, 271 Ed.Law Rep. 814 (2d Cir. 2011).

*D.B. v. Esposito*, 675 F.3d 26, 278 Ed.Law Rep. 716 (1st Cir. 2012).

*D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F. Supp. 2d 435, 265 Ed.Law Rep. 154 (N.D.N.Y. 2010).

*DiRocco v. Bd. of Educ. of Beacon City Sch. Dist.*, 60 IDELR ¶ 99 (S.D.N.Y. 2013).

*D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 256 Ed.Law Rep. 22 (3d Cir. 2010).

*E.G. v. Great Valley Sch. Dist.*, 70 IDELR ¶ 3 (E.D. Pa. 2017).

*E.S. ex rel. B.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417, 264 Ed.Law Rep. 724 (S.D.N.Y. 2010), *aff'd on other grounds*, 487 Fed.Appx. 619 (2d Cir. 2012).

*Fairfax Cty. School Bd. v. Knight*, 261 Fed.Appx. 606, 231 Ed.Law Rep. 697 (4th Cir. 2008).

*F.L. ex rel. R.C.L. v. Bd. of Educ. of Great Neck UFSD*, 274 F.Supp.3d 94, 350 Ed.Law Rep. 956 (E.D.N.Y. 2017), *aff'd*, 735 Fed.Appx. 38 (2d Cir. 2018).

*Ganje v. Depew Union Free Sch. Dist.*, 60 IDELR ¶ 43, *adopted*, 60 IDELR ¶ 74 (W.D.N.Y. 2012).

*G.N. ex rel. J.N. v. Bd. of Educ. of Livingston*, 48 IDELR ¶ 160 (D.N.J. 2007), *aff'd*, 309 Fed.Appx. 542, 243 Ed.Law Rep. 635 (3d Cir. 2009).

*G.W. v. Rye City Sch. Dist.*, 61 IDELR ¶ 14 (S.D.N.Y. 2013), *aff'd*, 554 Fed.Appx. 56 (2d Cir. 2014).

**EDUCATION LAW REPORTER**

*Hailey M. v. Matayoshi*, 57 IDELR ¶ 124 (D. Haw. 2011).

*Jaccari J. v. Bd. of Educ. of Chi. Sch. Dist. No. 299*, 690 F. Supp. 2d 687, 256 Ed.Law Rep. 785 (N.D. Ill. 2010).

*J.G. v. Abington Sch. Dist.*, 51 IDELR ¶ 129 (E.D. Pa. 2009).

*J.G. v. Briarcliff Manor Union Free Sch. Dist.*, 682 F. Supp. 2d 387, 255 Ed.Law Rep. 647 (S.D.N.Y. 2010).

*J.N. v. S.W. Sch. Dist.*, 66 IDELR ¶ 102 (M.D. Pa. 2015).

*Kathryn F. v. W. Chester Area Sch. Dist.*, 62 IDELR ¶ 177 (E.D. Pa. 2013).

*K.C. v. Fulton Cty. Sch. Dist.*, 46 IDELR ¶ 39 (N.D. Ga. 2006).

*K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 358 Ed.Law Rep. 98 (3d Cir. 2017).

*K.G. v. Cinnaminson Twp. Bd. of Educ.*, 73 IDELR ¶ 19 (D.N.J. 2018).

*K.K. v. Alta Loma Sch. Dist.*, 60 IDELR ¶ 159 (C.D. Cal. 2013).

*Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 283 Ed.Law Rep. 667 (5th Cir. 2012).

*Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 252 Ed.Law Rep. 585 (1st Cir. 2010).

*L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 296 Ed.Law Rep. 409 (S.D.N.Y. 2013).

*Matrejek v. Brewster Cent. Sch. Dist.*, 293 Fed.Appx. 20, 239 Ed.Law Rep. 344 (2d Cir. 2008).

*Matthews v. Douglas Cty. Sch. Dist. RE 1*, 73 IDELR ¶ 42 (D. Colo. 2018).

*M.B. v. Hamilton Se. Sch.*, 668 F.3d 851, 277 Ed.Law Rep. 60 (7th Cir. 2011).

*M.C. v. Katonah/Lewisboro Sch. Dist.*, 58 IDELR ¶ 196 (S.D.N.Y. 2012).

*M.F. v. Irvington Sch. Dist.*, 719 F. Supp. 2d 302, 261 Ed.Law Rep. 601 (S.D.N.Y. 2010).

*M.H. ex rel. S.H. v. Pelham Union Free Sch. Dist.*, 168 F.Supp.3d 667, 334 Ed.Law Rep. 915 (S.D.N.Y. 2016).

*Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 455 F. Supp. 2d 1286, 214 Ed.Law Rep. 1046 (D.N.M. 2006), *aff'd on other grounds*, 565 F.3d 1232, 244 Ed.Law Rep. 528 (10th Cir. 2009).

*M.M. v. Lafayette Sch. Dist.*, 68 IDELR ¶ 72 (N.D. Cal. 2016).

*M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 240 Ed.Law Rep. 555 (4th Cir. 2009).

*Ms. M. v. Falmouth Sch. Dep't*, 847 F.3d 19, 339 Ed.Law Rep. 619 (1st Cir. 2017).

*N.M. v. Sch. Dist. of Phila.*, 585 F. Supp. 2d 657, 239 Ed.Law Rep. 591 (E.D. Pa. 2008), *aff'd*, 394 Fed.Appx. 920, 263 Ed.Law Rep. 61 (3d Cir. 2009).

*P.C. v. Milford Exempted Vill. Sch.*, 60 IDELR ¶ 129 (S.D. Ohio 2013).

*Porter v. Ill. State Bd. of Educ.*, 6 N.E.3d 424, 303 Ed.Law Rep. 476 (Ill. Ct. App. 2014).

#### THE ORTON-GILLINGHAM APPROACH: A CASE LAW UPDATE

*Preciado v. Bd. of Educ. of Clovis Mun. Sch.*, — F.Supp.3d —, — Ed.Law Rep. — (D.N.M. 2020).

*Rachel G. v. Downingtown Area Sch. Dist.*, 57 IDELR ¶ 4 (E.D. Pa. 2011).

*Ravenswood City Sch. Dist. v. J.S.*, 870 F. Supp. 2d 780, 286 Ed.Law Rep. 377 (N.D. Cal. 2012).

*Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 Ed.Law Rep. 37 (3d Cir. 2012).

*Ringwood Bd. of Educ. v. K.H.J. ex rel. K.F.J.*, 258 Fed.Appx. 399 (3d Cir. 2007).

*Rosaria v. Madison City Board of Education*, 325 F.R.D. 429, 355 Ed.Law Rep. 1081 (N.D. Ala. 2018).

*R.N. v. Bd of Educ. of Iroquois Cent. Sch. Dist.*, 2016 WL 11607329 (Nov. 15, 2016), adopted, 74 IDELR ¶ 163 (W.D.N.Y. 2019), *aff'd sub nom. A.N. v. Bd. of Educ. of Iroquois Cent. Sch. Dist.*, 801 Fed.Appx. 35 (2d Cir. 2020).

*Sauers v. Winston-Salem/Forsythe Cty. Bd. of Educ.*, 72 IDELR ¶ 10 (M.D.N.C. 2018).

*Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F. Supp. 2d 529, 258 Ed.Law Rep. 231 (S.D.N.Y. 2010).

*Souderton Area Sch. Dist. v. J.H.*, 52 IDELR ¶ 6 (E.D. Pa. 2009).

*Stanley C. v. M.S.D. of Sw. Allen Cty. Sch.*, 628 F. Supp. 2d 902, 247 Ed.Law Rep. 251 (N.D. Ind. 2008).

*T.L. v. Lower Merion Sch. Dist.*, 68 IDELR ¶ 12 (E.D. Pa. 2016).

*T.M. ex rel. S.M. v. Gwinnett Cty. Sch. Dist.*, 2010 WL 1152701 (N.D. Ga. Dec. 20, 2010), *aff'd mem.*, 447 Fed.Appx. 128 (11th Cir. 2011).

*Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366 (S.D.N.Y. 2006).

*Weaver v. Millbrook Cent. Sch. Dist.*, 812 F. Supp. 2d 514, 276 Ed.Law Rep. 84 (S.D.N.Y. 2011).

*William V. v. Copperas Cove Indep. Sch. Dist.*, 75 IDELR ¶ 124 (W.D. Tex. 2019).

*Wood v. Katy Indep. Sch. Dist.*, 163 F.Supp.3d 396, 334 Ed.Law Rep. 98 (S.D. Tex. 2015).

*W.R. v. Union Beach Bd. of Educ.*, 414 Fed.Appx. 499, 267 Ed.Law Rep. 550 (3d Cir. 2009).