387 Ed. Law Rep. 17

West's Education Law Reporter
April 29, 2021

Education Law into Practice
Perry A. Zirkel, Ph.D., J.D., LL.M.[aa1]

"SPECIALLY DESIGNED INSTRUCTION" UNDER THE IDEA: IS IT SOMETHING SPECIAL?[a1]

The fulcrum of the Individuals with Disabilities Education Act (IDEA) ultimately is specially designed instruction (SDI).[1] Both the threshold issue of eligibility and the consequent entitlement of "free appropriate public education" (FAPE) are predicated on SDI. Eligibility requires not only meeting the criteria of one or more of the designated classifications, such as specific learning disabilities (SLD) and other health impairment (OHI), but also a resulting need for special education.[2] For FAPE, the required documentation in the individualized education program (IEP) requires a specific statement of this special education.[3] Finally, the IDEA defines special education as "[SDI] ... to meet the unique needs of a child with a disability."[4]

What then is the meaning of SDI in the IDEA, including its resulting role in the case law? The answer starts with the following definition in the IDEA regulations:

> [SDI] means adapting, as appropriate to the needs of an eligible child under this part, 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, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.[5]

***18** The core components of this definition, subject to the two specified purposes, are adaptations in "content, methodology, or delivery of instruction."[6]

The remainder of this article examines the express role of SDI in the extensive and expanding judicial case law under the IDEA.[7] Part I focuses on this case law specific to identification, which starts with child find and culminates in eligibility.[8] In turn, Part II moves the focus to the substantive dimension of FAPE,[9] as most recently and specifically enunciated in *Endrew F. v. Douglas County School District RE-1*.[10]

Since *Endrew F.*, which the Supreme Court issued on March 17, 2017, approximately 200 court decisions have expressly mentioned SDI, but more than 90% have done so merely in the background framework explaining the IDEA. The focus in

the next two parts of the paper is on the limited remainder, where the court's opinion explicitly refers to SDI in its discussion section, in which the court identifies and explains its ruling(s).

I. Identification

The majority of the relatively few court decisions in which SDI appeared in a non-background role concerned the threshold issues of child find and eligibility or the connecting category of evaluation, which is at their overlap.[11]

Child Find

The express role of SDI in child find cases thus far has been limited to serving as a substitute label for special education in determining whether various indicators amounted to reasonable suspicion of eligibility sufficient to warrant an evaluation. For example, in a Pennsylvania case, the court found no violation of the district's ongoing child find obligation based, in the SDI-specified part, on teachers' testimony that the student's declining grades and ***19** escalating behavioral problems were typical of middle schoolers, thus not specifically indicating a unique need.[12]

Similarly, in an Ohio case in which the district initiated the process of obtaining consent for an evaluation upon finding a note from a fifth-grade student that contained a plan to shoot five of her classmates, the court rejected the parents' child find claim for the previous period. The SDI basis was in the teachers' testimony of the student's high academic performance and her nonproblematic behaviors. More specifically, the court concluded that “even [the one teacher], who thought that [the student] might be on the ‘very low end’ of the autism spectrum, did not think she needed any [SDI].”[13]

Evaluation

The express role that SDI has played in case law specific to IDEA evaluations is limited to one court decision that went a step beyond its treatment as a surface substitute reference to special education. The added step was designed to reach the three definitional components of SDI. In this Alabama case, the court concluded that the district's evaluation was insufficient because it did not properly assess whether the child, a seventh grader with post-traumatic stress disorder and conversion disorder, needed SDI. The court found the evaluation team, which had determined the child was not eligible under the IDEA, failed to understand the unusual nature and severity of the child's diagnosis. The court reasoned that the team had sufficiently ruled out only her need for individualized content or methodology, but not for delivery, of instruction. Without deciding eligibility, the court affirmed the hearing officer's order for the district evaluation team to seek more specialized information about the student's trauma-based profile and reconsider whether she needed SDI.[14]

Eligibility

The appearances of SDI have been more frequent in the eligibility cases, with the level of analysis occasionally reaching beyond the surface of the label to its components, but not to a consistent and nuanced extent. For example, in a California case, the Ninth Circuit ruled that a fifth grader who indisputably met the criteria of more than one classification under the IDEA, including emotional disturbance (ED), also qualified for the resulting need for SDI based on the combination of (a) mental health counseling, (b) a 1:1 aide, (c) extensive behavioral interventions, and (d) various classroom accommodations in general education. Without considering the relative weight of ***20** any of the items, the court reasoned that (a) the first two were not generally available to general education students, thus being specially designed for him, and (b) the third item extended to adapting the method and delivery of his instructional services, thus further signaling SDI.[15]

Similarly, partially addressing the components of SDI, a federal court in New Jersey focused on the second, or need, prong to reject IDEA eligibility of a high school student who had a 504 plan for school phobia. More specifically, the court ruled that

the student was not eligible as ED because (1) although SDI may, inferably based on the delivery component of its definition, extend to a change in the learning environment, the student's absenteeism was not a manifestation of his anxiety disorder, and (2) he had above-average standardized test scores and grades in higher-level classes, for which his parents had waived any provision for adapted content.[16]

In a more recent New Jersey case, the federal court similarly reached the components of SDI to only a limited extent. In this case, the court recited the full definition of SDI but upheld the school district's determination of non-eligibility based on the lack of persuasive weight of the opinion of the parents' expert.[17] Although acknowledging that the case law provides limited guidance and clarity on the meaning of SDI and the need for it, the court observed that the parents did not focus on these issues, instead concentrating on the weight of their expert's testimony.[18]

Finally, a case in Texas illustrated the fuzzy boundaries and non-nuanced analysis of SDI in the context of IDEA eligibility. In this case the issue was whether a second grader continued to be eligible under the classification of SLD. The district had exited him, concluding that he no longer needed special education. After remand from the Fifth Circuit Court of Appeals to focus on this need prong for eligibility, the federal district court concluded that the student continued to qualify because, even accepting the district's contention that his academic performance had been satisfactory, he received (a) daily dyslexia services (e.g., Wilson Reading Program) in the general education setting; (b) extra time to complete assignments; (c) an opportunity to repeat and explain instructions; and (d) all material, except reading class passages, read to him, including oral administration of assignments, tests, and phonics instruction. More specifically, after reciting the IDEA regulations' definitional specification of the components of SDI, the court reasoned: "Given the [IDEA] definition of 'special education' ... and the manner in which the District adapted the content, methodology, and delivery of instruction to specifically address the unique needs of [the student], it cannot be said that these accommodations and modifications were minor, nor merely a 'related service.'"[19] The Fifth Circuit affirmed this decision without directly ***21** referring to SDI or its definitional components, while also agreeing that the district's exiting action in this case did not amount to a denial of FAPE.[20] The reason was that the district had continued his IEP services and, in doing so, the district met the Fifth Circuit's multi-factor approach to FAPE.[21]

II. FAPE

Serving as a transition from the direct role of SDI in the eligibility context to that in the FAPE context, the Eighth Circuit ruled in favor of the child find and eligibility claims of a high-performing gifted high school student, based on her non-paradigmatic need for special education. The relevant part was the following FAPE dicta: "This '[SDI]' ... must be 'reasonably calculated to enable [her] to make progress' and 'appropriately ambitious in light of [her] circumstances.'"[22] This language is largely a restatement of the substantive standard for FAPE that the Supreme Court rather recently refined in *Endrew F. v. Douglas County School District RE-1*.[23]

In its *Endrew F.* opinion, the Court repeatedly referred to SDI but without any identification or application of its aforementioned[24] definitional core components.[25] Instead the Court used the stated "unique needs" purpose of the SDI definition to reinforce the ad hoc nature of the refined substantive standard for FAPE.[26]

The post *Endrew F.* cases have rarely directly referred to SDI and then mostly only on a cursory basis. For example, in ruling that the IDEA IEP requirement of "supports for school personnel" does not extend to preparatory time for curricular modifications in light of *Endrew F.*, a federal district court in Tennessee commented: "So long as the students receive the [SDI] described therein, the IEPs are not rendered defective simply because they fail to include a single sentence describing the amount of time that must be spent preparing classroom materials."[27] As another example of such peripheral use, a federal court merely mentioned, in tandem with the framework standard of *Endrew F.*, that SDI is achieved via an IEP.[28] As an odd final example of such cursory treatment, a federal court in Pennsylvania reinforced ***22** its application of *Endrew F.*'s substantive standard by

treating SDI as if it were a quantitative unit to establish FAPE.[29] More specifically, in upholding the substantive appropriateness of an IEP for a ninth grader with autism, the court included in its list of supporting evidence that the IEP "included over thirty [SDIs] and service modifications."[30]

The limited exceptions include two federal magistrate judges' recommended decisions that applied the regulatory definition of SDI[31] in the conclusions leading to their FAPE rulings, although the respective courts adopted each decision overall without specifically discussing these SDI conclusions. In the first recommended decision, a magistrate judge in the District of Columbia concluded that the definition of SDI "does not suggest that in order to provide [SDI] an educator must know any specific methodology."[32] In adopting the overall ruling that the use of a general, rather than special education, teacher to implement the IEP did not equate to a per se violation of substantive standard for FAPE, the federal district court did not mention SDI, probably because it was not the target of any of the plaintiff-parents' objections to the recommended decision.[33] Second, in her recommended ruling that the latest IEP for a child with dyslexia was substantively inadequate due to its failure to include the reading instruction specified in previous IEPs but only continuing for this child as part of the general education program for at-risk students, a federal magistrate in New York concluded that this reading instruction met the IDEA definition of SDI based on the teacher's testimony that she had modified its content and delivery to meet the child's unique needs.[34] The federal district court adopted her proposed decision in a very brief opinion that responded to the plaintiff-parents' unspecified objections by stating "I agree with [the magistrate judge's] comprehensive and well-reasoned [recommended decision] and adopt it as the opinion of the Court."[35]

Finally, in another even more limited exception, the Ninth Circuit concluded that the parents' requested testing accommodations and emergency health protocol compliance did not fit within the definition of SDI.[36] This conclusion was part of the court's ultimate ruling that the parents did not have to exhaust their Section 504 and ADA claims under the IDEA, thus indirectly addressing FAPE.[37]

*23 Conclusion

This review of relatively recent case law reveals that the courts have not delved into the definitional components of SDI to establish its specific scope, demarcating the outer boundary with general education. In contrast with the nuances of professional specialists, such as school psychologists and special education teachers, and the interests of parents and schools, the courts have generally done little more than use SDI synonymously with special education in referring to its integral role both for identification and FAPE. In the relatively few cases that courts have referred to the definitional components of SDI in the IDEA regulations, the line-drawing for eligibility and, even less so, substantive FAPE has neither been clear nor consistent. Thus, SDI may well be special in both theory and practice,[38] but thus far is has not played a particularly central and specific role in judicial decision making.

Footnotes

a1 *Education Law Into Practice* is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 387 Ed. Law Rep. [17] (April 29, 2021).

aa1 Dr. Zirkel is University Professor Emeritus of Education and Law at Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.

1 For the IDEA legislation in relation to P-12 education, see 20 U.S.C. §§ 1401-1419 (2018). For the corresponding IDEA regulations, see 34 C.F.R, §§ 300.1-300.646 (2019).

2 20 U.S.C. § 1401(3)(A) (2018); 34 C.F.R. § 300.8(a) (2019).

3 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2018); § 300.320(a)(4) (2019).

4 20 U.S.C. § 1401(29) (2018); § 300.39(a)(2) (2019). In light of the frequent use of the encompassing term of "special education," the other express references in the IDEA are limited. 20 U.S.C. § 1412(d)(1)(B)(iv)(I) (2018); 34 C.F.R. § 300.321(a)(4) (2019) (requiring the district's representative on the IEP team to be qualified to provide or supervise the provision of SDI); 34 C.F.R. § 300.43(b) (2019) (clarifying that transition services may be SDI).

5 34 C.F.R. § 300.39(b) (2019).

6 This characterization does not negate the dual extensions, or directionality, to the disability-based "unique needs" and general education "access" of the eligible child.

7 For the upward trajectory of the IDEA litigation, see Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 Ed. Law Rep. 1 (2011).

8 *E.g.*, Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 Ed. Law Rep. 30 (2018).

9 The substantive standard is central to FAPE because it is the ultimate criterion of the procedural dimension and the framework for the implementation dimensions. *See, e.g.*, Perry A. Zirkel, *An Adjudicative Checklist of the Four Criteria for FAPE under the IDEA*, 346 Ed. Law Rep. 18 (2018) (outlining the four dimensions of FAPE).

10 *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017). In this decision, the Court held that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999 and 1002. For an illustrative analysis, see Perry A. Zirkel, *The Supreme Court's Decision* in Endrew F. v. Douglas County School District RE-1: *A Meaningful Raising of the Bar?* 341 Ed. Law Rep. 545 (2017).

11 For a visual organizer that shows the intersection of child find and eligibility at evaluation, see Perry A. Zirkel, *Child Find Under the IDEA: An Updated Empirical Analysis of the Judicial Case Law*, 48 Communiquié 14, 14 (June 2020). For the case law more generally on evaluation, see Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 368 Ed. Law Rep. 594 (2019).

12 *H.D. v. Kennett Consol. Sch. Dist.*, 75 IDELR ¶ 94 (E.D. Pa. 2019).

13 *Dougall ex rel. A.D. v. Copley-Fairlawn City Sch. Dist.*, 75 IDELR ¶ 271, at *19 (N.D. Ohio 2020).

14 *Hoover City Bd. of Educ. v. Leventry ex rel. K.M.*, 75 IDELR ¶ 32 (N.D. Ala. 2019).

15 *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 341 Ed. Law Rep. 60 (9th Cir. 2017).

16 *M.S. v. Randolph Bd. of Educ.*, 75 IDELR ¶ 103 (D.N.J. 2019), *reconsideration denied*, 77 IDELR ¶ 110 (D.N.J. 2020).

17 *J.M. v. Summit City Bd. of Educ.*, 77 IDELR ¶ 224 (D.N.J. 2020).

18 *Id.*

19 *William V. v. Copperas Cove Indep. Sch. Dist.*, 75 IDELR ¶ 124, at *7 (W.D. Tex. 2019).

20 *William V. v. Copperas Cove Indep. Sch. Dist.*, 826 F. App'x 374, 383 Ed. Law Rep. 138 (5th Cir. 2020).

21 *Id.* at 379-82. Although neither the district court nor the Fifth Circuit addressed why the district had continued the student's IEP services, the likely reason is either the IDEA's stay-put requirement or his separate, undisputed eligibility under the category of speech impairment.

22 *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1082, 377 Ed. Law Rep. 539 (8th Cir. 2020).

23 137 S. Ct. 988, 999-1000 (2017). The "largely" qualifier is attributable to the "appropriately ambitious" language, which is more a matter of dicta than holding with regard to this substantive standard. More specifically, it appears after the generalized standard

in explaining the differentiated application of the *Rowley* grade-advancing standard for "a child not fully integrated in the regular classroom and not able to achieve on grade level." Id. at 1000.

24 *Supra* note 6 and accompanying text.

25 *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. at 994, 999, 1000.

26 *Id.* at 999, 1000.

27 *M.C. v. Knox Cty. Bd. of Educ.*, 72 IDELR ¶ 91, at *8 (E.D. Tenn. 2018).

28 *E.g., Irish J. v. E. Stroudsburg Area Sch. Dist.*, 2020 WL 4530724, at *3 (E.D. Pa. Aug. 6, 2020); *see also Bd. of Educ. of Wappingers Cent. Sch. Dist. v. D.M.*, 831 F. App'x 29, 30 (2d Cir. 2021); *Holman v. District of Columbia*, 78 IDELR ¶ 17 (D.D.C. 2020); *cf. Clarfeld v. Dep't of Educ.*, 78 IDELR ¶ 42 (D. Haw. 2021) (mentioning SDI in background for appropriateness of a unilateral private placement).

29 *C.F. v. Radnor Twp. Sch. Dist.*, 74 IDELR ¶ 48 (E.D. Pa. 2019).

30 *Id.* at *9.

31 *Supra* note 5 and accompanying text.

32 *J.B. v. District of Columbia*, 2018 WL 10399853, at *13 (D.D.C. May 8, 2018), *adopted*, 325 F. Supp. 3d 1 (D.D.C. 2018).

33 *J.B. v. District of Columbia*, 325 F. Supp. 3d 1, 358 Ed. Law Rep. 350 (D.D.C. 2018).

34 *Bd. of Educ. of Uniondale Union Free Sch. Dist. v. J.P.*, 2019 WL 4315975, at *10 (E.D.N.Y. Aug. 23, 2019).

35 *Bd. of Educ. of Uniondale Union Free Sch. Dist. v. J.P.*, 75 IDELR ¶ 98 (E.D.N.Y. 2019)

36 *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 910, 382 Ed. Law Rep. 487 (9th Cir. 2020).

37 *Id.* at 914-17. The court's ruling was based on *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017), which requires exhaustion of an IDEA due process hearing if the crux of the claim(s) is FAPE.

38 *See, e.g.*, Laura L. Hedin et al., *Specially Designed Instruction in Middle and High School Co-Taught Classrooms*, 93 Clearing House 298 (2020); Pamela DeMartino & Phillip Specht, *Collaborative Teaching Models and Specially Designed Instruction in Secondary Education*, 62 Preventing School Failure 266 (2018); Paul Riccomini at al., *Big Ideas in Special Education: Specially Designed Instruction, High-Leverage Practices, Explicit Instruction, and Intensive Instruction*, 50 Teaching Exceptional Children 20 (Sept./Oct. 2017).

387 WELR 17

End of Document