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CHALLENGES BASED ON LACK OF SUFFICIENT SPECIALIZED TRAINING OF SPECIAL EDUCATION TEACHERS UNDER THE IDEA[a1]

Although more acute and obvious during the COVID-19 pandemic,[1] the shortage of special education teachers is a perennial problem.[2] A recent article canvassed the case law in which parents claimed that their child's special education teacher lacked full state certification under the Individuals with Disabilities Education Act (IDEA).[3] This follow up article examines the case law in which the claims were that the child's special education teacher lacked specialized training beyond state certification.[4] Like its predecessor article, its scope is limited to the IDEA, thus not extending to rulings for training claims on other grounds.[5] Moreover, its scope within the IDEA does not extend to training issues specific to funding, Part C, or unilateral private school placements.

*891 IDEA Framework

Legislation

The IDEA, as amended in 2004, provides both broad-based funding[6] and general requirements for "appropriately and adequately" trained personnel,[7] in addition to the requirement and proviso of "highly qualified" special education teachers that the previous article addressed.[8] Beyond these limited provisions, the IDEA leaves the matter of personnel qualifications, including those of special education teachers, to (a) state laws and policies and, within this framework and subject to the IDEA's decisional dispute resolution avenues,[9] (b) school district policies and practices.

Regulations

In addition to their parallel, general provisions,[10] the IDEA regulations provide training requirements for special education teachers who have responsibilities for assistive technology,[11] mainstreaming,[12] and student records.[13]

Agency Policy Interpretations

Providing guidance that interpret the IDEA legislation and regulations, its administering agency, which is the U.S. Department of Education's Office of Special Education Programs (OSEP) has occasionally addressed the training and related qualifications of special education teachers. For example, in relation to parental notification, OSEP offered the following guidance:

> IDEA does not provide parents a specific right to be informed of the qualifications of individuals providing services to their children. If, however, an IEP team determines that it is necessary for the individual providing

> special education or related services to a child with a disability to have specific training, experience and/or knowledge in order for the child to receive FAPE, then it would be appropriate for the team to include those specifications in the child's IEP.[14]

***892** In subsequent policy letters, OSEP has interpreted the IDEA requirements for personnel qualifications to apply to special education teachers and other individuals providing extended school year services[15] or the remedy of compensatory services.[16]

Court Rulings

Unlike the scant judicial authority concerning the IDEA provisions for highly qualified special education teachers,[17] a long, although not particularly thick, line of court rulings has addressed other training qualifications of these teachers. The focus here will be on those court decisions that have decided such lack of specialized training claims on the merits, thus excluding rulings based on the statute of limitations, lack of exhaustion, attorney's fees, or other either threshold or post-judgment adjudicative grounds. Moreover, the scope is limited to court decisions that address the issue of whether the school district met the substantive standard for the central obligation under the IDEA--free appropriate public education (FAPE). Thus, court rulings that use training solely as part of the remedy, without identifying it as a factor for the requisite denial of FAPE, are not included herein.[18]

As an overall matter, two prefatory observations are notable. First, the majority of these cases concerned students in the IDEA classifications of either autism or specific learning disability (SLD). Second, the outcomes appear to fit within either a traditional majority view, which tends to provide ample latitude to district discretion, or a minority view, which tends to be more strict about specialized training beyond state certification. Nevertheless, some of the relevant case law falls in a middle ground that is less determinative as to the role of specialized training.

Majority View

Illustrative of the traditional majority view, in an early case the Fourth Circuit reversed the lower court's ruling that the special education teacher and other personnel serving a child with autism lacked adequate training and experience.[19] Observing that they all had received specialized in-service training beyond their unquestioned certification, the appellate court concluded that the lower court's optimal standard was more than the IDEA ***893** legislation, applicable state law, and the Supreme Court required.[20] During the ensuing years, various other courts have similarly taken a relatively relaxed approach with regard to the level or nature of inservice training beyond state certification in special education.[21] One of the primary reasons for this relaxed approach is, as a federal district court in New York explained, that "if there is anything that requires the 'specialized knowledge and experience' that warrants judicial deference, it is the determination of a teacher's qualifications."[22]

Representing an alternative route to a relaxed result, a federal court in Hawaii concluded that in light of the special education teacher's overall effectiveness as a special education teacher and the specific progress of the plaintiff-student with autism, her use of one improper educational tactic did not deprive the student of FAPE.[23]

Finally, for the occasional case addressing the training requirements associated with a specific, branded methodology, the majority approach does not strictly apply the training requirements of the sponsoring organization. As an example, specific to the Wilson Reading System, a federal court in Illinois found that the school district's trainer for the other special education teachers did not meet Wilson Company's certifying standards. Yet, the court rejected the parents' FAPE claim, because the company was aware of the trainer's lack of its certification but permitted her to continue in this role in its contract with the district.[24]

Intermediate Category

However, representing an intermediate position, a federal court in Arkansas characterized the adequacy of the teacher's qualifications and the substantive standard for FAPE as "slightly different" questions.[25] For the teacher qualifications issue, the court borrowed from the danger-based change-in-placement context the Eighth Circuit's "reasonable steps" approach for training.[26] Applying this approach, the court concluded that the ***894** child's special education teachers met state standards for the first of the two years at issue, but those for the second year did not in light of questionable certification in combination with the conclusion that "not one [of these teachers] convincingly testified that [the alleged additional training] even happened."[27]

Also in the middle ground but to one side are the relatively few cases in which the special education teacher had such ample additional specialized training that the court did not have to opt between a relaxed or strict approach. For example, in a case in the state of Washington, the special education teacher and other staff members serving a student with autism had reached or exceeded the level of training in Applied Behavioral Analysis (ABA) that the parents' expert recommended.[28]

Minority View

In a minority of cases, courts have been less relaxed about specialized training beyond certification of special education teachers. Yet, this factor was typically only a limited part of a larger pattern that constituted denial of FAPE. For example, in an early case, a federal district court in Indiana identified the lack of specialized training and expertise in teaching students with dyslexia as a contributing factor for its conclusion that the proposed program did not meet the substantive standard for FAPE.[29] Similarly, two decisions approximately ten years later were parent FAPE victories based in part on inadequate training. First, a federal district court in Connecticut cited the lack of mandatory and specific training as one of six deficiencies that led to its conclusion that the proposed IEP for a student with autism did not meet the substantive standard for FAPE.[30] Second, the Fifth Circuit cited inadequate training as one of multiple factors contributing to denial of FAPE for a child with speech and language impairment.[31]

Finally, in the most recent example of the minority view, a federal court in New Mexico cited the special education teacher's lack of training and experience as one of multiple factors supporting the conclusion that the district's program for a fourth grader with SLD fell short of the substantive standard for FAPE.[32] The resulting remedy was a compensatory education ***895** award that included "one-on-one reading, writing, and spelling instruction with a licensed special-education teacher trained in Orton-Gillingham or a similar program."[33]

Administrative Decisions

The IDEA provides two alternative decisional mechanisms at the administrative level--the adjudicative avenue of impartial hearings and the investigative avenue of the state complaints process.[34] Because these decisions are much more numerous than court rulings, yet are not as readily available and have negligible, if any, precedential weight, the sampling of relevant rulings here is limited and illustrative only.

Hearing Officer Decisions

Partially reflecting the pattern of higher, judicial authority, the hearing officer decisions that include rulings on specialized teacher training tend to take the relatively relaxed approach. For example, although finding that the defendant district did not train its special education teacher and other staff to address the behavioral needs of the child, a Kentucky hearing officer rejected this part of the parents' IDEA claim based on an overbroad interpretation of the aforementioned[35] IDEA framework.[36] Fitting

less extremely within this majority category, some other cases have directly addressed claims of insufficient specialized training but fall short of the strict level for which the parents advocated.[37]

However, providing a less clear split of authority, various other cases range from relevant rulings in favor of districts to those in favor of students without squaring with a relaxed or strict approach. For example, a Connecticut hearing officer found a denial of FAPE based on insufficient training in Orton-Gillingham methodology although rejecting the rigorous interpretation of the requisite standards for which the parents advocated.[38] As another variation, an Illinois hearing officer cited the confusing and unclear testimony from the district witnesses about the teacher's training and experience in the Wilson Reading System as one of several contributing factors for the conclusion that the proposed program for a third grader with SLD did not meet the substantive standard for FAPE.[39] Other hearing officer decisions illustrate other variations that are not subject to polar categorization.[40]

***896 State Complaint Decisions**

Although the IDEA proviso that appears to steer disputes about teacher certification to the state complaint process,[41] the administrative case law focusing on specialized training beyond certification is not particularly frequent in this alternative administrative avenue of decisional dispute resolution. Illustrating the prevailing focus on compliance with regulatory requirements, a pair of Kansas cases at this state's second tier rejected the parents' claim of insufficient specialized training in dyslexia-oriented methods in the absence of any such specific standards in the IDEA and Kansas regulations for teacher certification and training.[42]

Discussion

For this illustrative sampling of the adjudicative and investigative rulings under the IDEA for claims of inadequate specialized training of special education teachers beyond certification, the overall conclusion is similar to that of the predecessor article, which focused on certification. More specifically, the adjudications, particularly at the court level, and the state complaint investigations tend to take a relaxed approach that favors defendant districts. Parents who seek rigorous training based on the specialized standards of branded methodologies or private experts generally face a steep uphill slope under both of the decisional dispute resolution avenues of the IDEA. Subject to the rare exception of state laws, school district policies, or IEPs that specify particular levels of specialized training beyond regular certification of special education teachers, parent-complainants are unlikely to prevail unless they prove rather clear training insufficiencies as part of a multi-pronged substantive FAPE claim. Moreover, even for the limited exceptions, such as the infrequent IEP that identifies a specific type and level of training, the adjudicative avenue and, to a discretionary mixed extent, the investigative avenue[43] do not necessarily yield parent-favorable outcomes via the alternative FAPE theory of incomplete-implementation.

In sum, as with methodology disputes more generally, which especially but not exclusively arise for students with SLD or autism, parents should not over-rely on the standards and recommendations of private companies and pedagogical experts. Instead, they should first engage in collaborative discussions with district authorities and, if necessary, consequent compromises via ***897** alternate dispute resolution processes. If, after exhausting these steps, parents choose to resort to formal legal action under the IDEA, they need to be strategically selective in choosing between the two administrative avenues and generally oriented to a multi-pronged substantive FAPE claim, with specialized training as one tempered part of the overall evidentiary pattern. Unless the courts change their traditional course, the overall trend for specialized training claims poses district-friendly outcome odds although not at an overwhelming level.

Footnotes

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1 *See, e.g.*, Michael A. DiNapoli, Eroding Opportunity: COVID-19's Toll on Student Access to Well-Prepared and Diverse Teachers (Feb. 2021), https://learningpolicyinstitute.org/blog/covid-eroding-opportunity-student-access-prepared-diverse-teachers (observing that the pandemic has worsened the teacher shortages in high need subjects, including special education).

2 *See, e.g.*, Bonnie Billingsley, *Special Education Teacher Attrition and Retention: A Review of the Literature*, 89 Rev. Educ. Res. 697 (2019) (synthesizing thirty research studies from 2002 to 2017 analyzing factors associated with the continuing attrition and retention problems among special education teachers); Erling E. Boe, *Long-Term Trends in the Demand, Supply, and Shortage of Special Education Teachers*, 40 J. Special Educ. 138 (2004) (finding that the shortage of fully certified teachers for students with disabilities has been chronic since 1987-88 and has increased annually from 7.4% in 1993 to 13.4% in 2002-03); Bill Thornton, Gary Peltier, & Ricky Medina, *Reducing the Special Education Teacher Shortage*, 80 Clearing House 233 (2007) (discussing contributing factors and suggesting recommendations for addressing the continuing shortage of special education teachers).

3 Perry A. Zirkel, *Challenges Based on Lack of Teacher Licensing Qualifications under the IDEA*, 395 Educ. L. Rep. 477 (2022).

4 The scope includes those cases that included the related qualification of experience as a decisional factor.

5 *See, e.g.*, A.A. v. Sch. Bd. of Broward Cnty., 79 IDELR ¶ 251 (S.D. Fla. 2021) (addressing Section 1983 claim that school district was liable for untrained special education teacher's physical abuse of students with autism in violation of their constitutional rights); Rogich v. Clark Cnty. Sch. Dist., 79 IDELR ¶ 252 (D. Nev. 2021) (finding that the reasonable costs and benefits of the teacher training in the methodology that child needed contributed to the conclusion that the district violated the child's rights under Section 504).

6 20 U.S.C. § 1411(e)(2)(C)(i) (2018).

7 *Id.* § 1412(a)(14)(A) (2018); *see also id.* § 1412(a)(D) (2018).

8 Zirkel, *supra* note 3, at 477 (discussing the respective requirement and proviso at 20 U.S.C. § 1412(a)(14)(C), § 1412(a)(13)(E) (2018)). The proviso would seem to extend beyond the highly qualified requirement to the more general training provisions by denying an individual's right of action based on failure to meet "the applicable requirements described in this paragraph" and by preserving the right to the state complaint to challenge "staff qualifications").

9 *See, e.g.*, Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes-Complaint Procedures and Impartial Hearings: An Update*, 369 Educ. L. Rep. 550 (2019) (identifying, via a systematic comparison, the advantages and disadvantages of these two alternate decisional dispute resolution mechanisms under the IDEA).

10 34 C.F.R. § 300.156, § 300.207, § 300.704(b)(4)(i) (2019).

11 *Id.* § 300.6(f) (2019).

12 *Id.* § 300.119 (2019).

13 *Id.* § 300.623(c) (2019).

14 Letter to Dickman, 37 IDELR ¶ 284 (OSEP 2002).

15 Letter to Copenhaver, 50 IDELR ¶ 16 (OSEP 2007).

16 Letter to Anonymous, 49 IDELR ¶ 44 (OSEP 2007). This guidance was in response to a question about "staff hired by the local educational agency (LEA) to provide compensatory special education and related services." *Id.* at *1. Thus, it does not directly address staff training, rather than direct student services, as compensatory education. *See infra* note 18.

17 Zirkel, *supra* note 3, at 477 (examining Cooper v. Sch. City of Hammond, 2021 WL 4819611, 79 IDELR ¶ 250 (N.D. Ind. Oct. 15, 2021)).

18 *See, e.g.*, D.D. v. Garvey Sch. Dist., 79 IDELR ¶ 15 (C.D. Cal. 2021) (affirming hearing officer's award of training as compensatory education, citing Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025 (9th Cir. 2006)).

19 Hartmann v. Loudoun Cnty. Bd. of Educ., 118 F.3d 996, 1004, 120 Educ. L. Rep. 61 (4th Cir. 1997).

20 *Id.* (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982)).

21 *E.g.*, D.B. v. Ithaca Sch. Dist., 690 F. App'x 778, 784, 346 Educ. L. Rep. 702 (2d Cir. 2017) (nonverbal learning disability); Mr. and Mrs. R. v. York Sch. Dep't, 2019 WL 2245014 (D. Me. 2019) (Lindamood Bell methodology); E.R. v. Spring Branch Indep. Sch. Dist., 2017 WL 3016952 (July 14, 2017), *adopted*, 70 IDELR ¶ 158 (S.D. Tex. 2018), *aff'd on other grounds*, 909 F.3d (5th Cir. 2018) (health services); Sauers v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 72 IDELR ¶ 10, at *10-11 (M.D.N.C. 2018); C.H. v. Goshen Cent. Sch. Dist., 61 IDELR ¶ 19, at *13 (S.D.N.Y. 2013); N.M. v. Sch. Dist. of Phila., 585 F. Supp. 2d 657, 666, 239 Educ. L Rep. 591 (E.D. Pa. 2008) (Orton Gillingham method); Ganje v. Depew Union Free Sch. Dist., 60 IDELR ¶ 43, at *16, *adopted*, 60 IDELR ¶ 74 (W.D.N.Y. 2012) (reading methodology); Greenwood v. Wissahickon Sch. Dist., 571 F. Supp. 2d 654, 665, 237 Educ. L. Rep. 276 (E.D. Pa. 2008) (mainstreaming); *cf.* S.H. v. Eastchester Union Free Sch. Dist., 58 IDELR ¶ 46 (S.D.N.Y. 2011); L.K. v. Dep't of Educ. of New York City., 2011 WL 127063 (S.D.N.Y. Jan. 13, 2011) (characterizing the key criterion as whether the training enabled the teacher to implement the IEP rather than training specific to the child's disability).

22 M.P.G. v. N.Y.C. Dep't of Educ., 55 IDELR ¶ 37, at *10 (S.D.N.Y. 2010) (citing Rowley, 458 U.S. at 208).

23 B.V. v. Dep't of Educ., Haw., 451 F. Supp. 2d 1113, 213 Educ. L. Rep. 1073 (D. Haw. 2005), *aff'd mem.*, 514 F.3d 1384 (9th Cir. 2008).

24 Jaccari J. v. Bd. of Educ. of Chi. Dist. 299, 690 F. Supp. 2d 687, 699, 256 Educ. L. Rep. 785 (N.D. Ill. 2010).

25 Paris Sch. Dist. v. Harter, 69 IDELR ¶ 243, at *6 (W.D. Ark. 2017).

26 *Id.* at *7 (citing Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1230, 96 Educ. L. Rep. 98 (8th Cir. 1994)).

27 *Id.* at *8.

28 Hensley v. Colville Sch. Dist., 51 IDELR ¶ 279 (Wash. Ct. App. 2009).

29 Nein v. Greater Clark Cnty. Sch. Corp., 95 F. Supp. 2d 961, 979-80, 144 Educ. L. Rep. 214 (S.D. Ind. 2000). The other reason, which appeared to be the primary factor, was the finding that the district was not willing to implement the dyslexia-specific methodologies that the student needed for FAPE. *Id.* at 978-79.

30 Reg'l Sch. Dist. No. 9 v. Mr. P., 51 IDELR ¶ 241 (D. Conn. 2009).

31 Houston Indep. Sch. Dist. v. V.P., 582 F.3d 576, 588, 249 Educ. L. Rep. 585 (5th Cir. 2009) ("Although the school provided its personnel with a one-page tip sheet for working with an auditory or speech impaired child, such minimal training was insufficient. Moreover, despite such training, [the child's] teacher ... explained that she was unable to communicate effectively with [the child] and evaluate her progress.").

32 Preciado v. Bd. of Educ. of Clovis Mun. Sch., 443 F. Supp. 3d 1289, 1302, 379 Educ. L. Rep. 169 (D.N.M. 2020).

33 *Id.* at 1309.

34 *Supra* note 9 and accompanying text. The limited coverage herein extends to the relatively few states that provide a second administrative tier within their adjudicative or investigative avenues.

35 *Supra* notes 7-8, 10 and accompanying text.

36 In re Student with a Disability, 114 LRP 40108, at *10 (Ill. SEA July 14, 2014) (characterizing the IDEA legislation and regulations as "silent as to teacher qualifications" and, via their proviso, precluding any adjudicative relief for violations).

37 *See, e.g.*, Boyceville Cmty. Sch. Dist., 48 IDELR ¶ 297 (Wis. SEA 2007) (ABA training).

38 Amity Reg. 5 Bd. of Educ., 74 IDELR ¶ 86 (Conn. SEA 2019).

39 In re Student with a Disability, 121 LRP 11995 (Ill. SEA Oct. 30, 2021).

40 *See, e.g.*, Silver Consol. Schs., 74 IDELR ¶ 60 (N.M. SEA 2018) (finding ineffective training in ABA methodology); Dep't of Educ., Haw., 55 IDELR ¶ 300 (Haw. SEA 2010) (concluding that the district's failure to provide the training and experience of the special education teacher specific to ABA, which the child needed, contributed to a procedural denial of FAPE that significantly impeded the parents' opportunity for meaningful participation); San Ramon Valley Unified Sch. Dist., 39 IDELR ¶ 282 (Cal. SEA 2003) (providing considerable weight to Wilson Company standards but finding that the district's proactive provision of Wilson services offset the limited denial of FAPE).

41 *See supra* note 8.

42 In re Student with a Disability, 120 LRP 5050 (Kan. SEA Dec. 17, 2019); In re Student with a Disability, 120 LRP 5178 (Kan. SEA Dec. 6, 2019).

43 *See, e.g.*, Perry A. Zirkel, *The Two Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*,16 Conn. Pub. Int. L.J. 169, 196 (2017) (finding for failure-to-implement FAPE claims the adjudicative avenue's general application of the *Van Duyn or Bobby R.* approach, which provides latitude for school districts and the investigative avenue's discretionary use of the per se approach, which is more favorable to parents).

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