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Education Law into Practice
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SPEECH LANGUAGE PATHOLOGY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT[a1]

The Individuals with Disabilities Education Act (IDEA) is funding legislation dating back to 1975 that provides detailed requirements that serve as the primary legal framework for special education in P-12 schools.[1] The secondary parts of the framework include the corollary state special education laws and the pair of federal civil rights acts, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA).[2]

For each individual student eligible as a child with a disability, the IDEA provides for various state and local education requirements, with the core obligation being a free appropriate public education (FAPE).[3] For eligibility, the essential elements consist of (1) meeting the criteria of one or more recognized classifications, including "speech or language impairment" (SLI), that (2) adversely affect educational performance (3) to the extent of necessitating special education and related services.[4] In turn, related services, defined as supportive services necessary for the eligible child to benefit from special education, including "speech-language pathology" (SLP) services as one of the identified examples.[5] The corresponding FAPE requirement ***378** provides the resulting special education and related services via an individualized educational program (IEP).[6]

During the decades since 1975 the courts have gradually established procedural, substantive, and implementation dimensions of FAPE.[7] The substantive dimension, which the Supreme Court first established in 1982 and subsequently refined in 2017, focuses on the reasonable calculation of progress.[8] The courts have developed a "snapshot" approach for applying this standard, using what the IEP team knew or had reason to know at the time of formulating the IEP.[9] The adjudication of the procedural dimension, which the IDEA codified in its 2004 amendments, requires not only one or more violations of the Act's various procedural requirements but also a resulting substantive loss to the parents or the student.[10] The implementation dimension, which is not yet subject to a uniform standard across all jurisdictions, arises when the parent alleges that the district has not fully implemented the IEP's provisions. The majority view among the courts is the materiality approach, limiting the denial of FAPE to more than minor shortfalls in implementing substantial or significant provisions of the IEP.[11]

Upon a determination that the school district has denied FAPE to an eligible child in one or more of these dimensions, the adjudicator has wide authority for equitable relief.[12] Although not extending to money damages, the various forms of relief under the IDEA primarily include compensatory education and tuition reimbursement.[13]

For adjudication, the IDEA provides for an impartial administrative hearing and a subsequent right to judicial appeal.[14] The IDEA also provides ***379** for an alternative decisional dispute resolution mechanism at the administrative level, which is investigative rather than adjudicative and which is called state complaint procedures.[15]

The purpose of this article is to provide a comprehensive canvassing of (a) the IDEA legislation, the (b) IDEA regulations, (c) agency policy interpretations, and (d) court decisions specific to the SLI classification and SLP services. The usual caveat applies to all of these primary sources: inasmuch as this canvassing is limited to inevitably selected summarization, for cited items of particular interest, readers are advised to examine the full contents in consultation with legal counsel.[16]

The selection for each of these successive primary sources was relatively thorough, except that the focus on court decisions was on representativeness rather than exhaustiveness. More specifically, the focus was on cases in which SLI eligibility or SLP services was a major issue. Although the boundary was not a bright line, cases in which SLI or SLP was only a relatively limited factor were not included.[17] Conversely, the exclusions consisted of SLP-related court decisions that were (a) based on technical judicial grounds under the IDEA, such as exhaustion of administrative remedies or the statute of limitations;[18] (b) under either of the IDEA's administrative dispute resolution avenues--due process hearings[19] or state complaint procedures;[20] or (c) under Section 504 of the Rehabilitation Act.[21]

***380** Finally, in addition to the usual acronyms under the IDEA, this article uses "SLPt" to distinguish the speech and language pathologist from SLP services to the extent that the cited sources focus on the qualifications or activities of this professional provides rather than on the appropriateness of the provided services. Similarly, this article uses "SLT" when quoting an agency policy interpretation or court decision that refers to "speech and language therapy" for what the IDEA legislation and regulations call SLP services.

IDEA Legislation

The only expressly speech-specific provisions in the IDEA statute are in the definitions section. First, the definition of "child with a disability" includes SLI in addition to other relevant classifications, such as "hearing impairments" and "autism," and clarifies that eligibility also requires a resulting need for special education and related services.[22] Second, in defining "related services" as various supportive services necessary for any eligible child to benefit from special education, the statute identifies as one of the expressly identified examples "[SLP] and audiology services."[23]

Indirectly, other statutory provisions are significant via their more general applicability. A leading example for SLP services is the qualified FAPE requirement for peer-reviewed research (PRR) that the 2004 amendments of the IDEA added. Specifically, the addition was to require the IEP's provision for "special education and related services" be "based on [PRR] to the extent practicable."[24] Similarly, a leading example for SLPt is the general qualifications requirement for related services personnel to have "the content knowledge and skills to serve children with disabilities," including "consisten [cy] with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services." This consistency requirement expressly excludes waivers for certification or licensing "on an emergency, temporary, or provisional basis."[25]

IDEA Regulations

The IDEA regulations have various provisions particularly pertinent to SLI or SLP. First, after repeating the aforementioned statutory definitions,[26] ***381** the regulations define SLI as "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance."[27] Similarly, they add a definition of SLP services as including "(i) Identification of children with [SLI]; (ii) Diagnosis and appraisal of [SLI]; (iii) Referral for medical or other professional attention necessary for the habilitation of [SLI]; (iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and (v) Counseling and guidance of parents, children, and teachers regarding [SLI]."[28]

Next, unusually unlike most other related services, the regulations define "special education" to include SLP services if so categorized under state law.[29] Thus, a child with SLI who solely needs SLP services may be entitled to an IEP if state law considers these services special education.

The other pertinent provisions are respectively peripheral or indirect. The leading example is the peripheral provision specific to the determination of SLD eligibility. For this limited purpose, the regulations specify that the required members of the evaluation team extend to at least one person qualified to conduct individual diagnostic examinations of children," identifying as one of the qualifying roles a SLPt.[30]

Agency Policy Interpretations

As the administering agency of the IDEA, the U.S. Department of Education, through its Office for Special Education and Rehabilitation Services (OSERS) or its subsidiary Office of Special Education Programs (OSEP), issues policy interpretations of the regulations. Some are in response to letters of inquiry from individuals or organizations. Others are in relation to current priorities in the form of Dear Colleague Letters or other such memoranda to state or local education agencies. These various policy interpretations amount to informal guidance, but courts often find them persuasive in arriving at their binding decisions.[31]

Due in part to active advocacy of the national and state organizations of SLPs, the agency has issued a long line of policy interpretations specific to SLP services. They are comprehensively canvassed below chronologically within three broad subheadings--qualifications of SLPts, activities of SLPts, and other SLP issues. In addition to the more general prefatory caveat,[32] ***382** readers are cautioned that these policy interpretations are specific to regulations that were then applicable but that have gradually changed in response to the successive reauthorizations that have amended the IDEA.[33]

Qualifications of SLPts

In an early policy letter,[34] OSEP clarified that the above-mentioned[35] statutory requirement for the qualifications of related service personnel to comport with state certification or licensing standards does not adopt the licensure criteria of any professional organization, such as those of what is now the American Speech-Language-Hearing Association (ASHA).[36] Soon thereafter, OSERS clarified that the regulatory reference to "professional discipline" allows states the discretion to establish different occupational categories for SLP services just as long as "the responsibilities and degree of supervision ... do not differ in a discernible manner."[37]

Next, in response to a question from New Jersey's state ASHA affiliate, OSEP interpreted the New Jersey law that allows emergency certification in proven cases of unforeseen shortages or other extenuating circumstances as being inconsistent with the IDEA's statutory requirements for related service personnel qualifications.[38]

Activities of SLPts

Responding to an ASHA suggestion, OSEP declined to interpret the aforementioned[39] regulation's illustrative identification of SLPts as extending to membership on teams that school districts use for response to intervention (RTI). Instead, OSEP explained that the regulations do not prescribe the model for RTI or the utilization of personnel for the chosen model, leaving such matters to the discretion of state and local education agencies. OSEP also clarified that the regulations, in line with the statute, are silent as to the use of RTI for other disability classifications, including those connected with communications disorders, leaving this issue too to state and local discretion.[40]

Subsequently, OSEP pointed out that under the IDEA regulations SLP providers may be either (1) a required member of the child's IEP team if the ***383** child's disability category is SLI and the only service that the child receives is SLP or (2) an invited member of the team regardless of disability category if determined by the district or parent to have the requisite knowledge or special expertise regarding the child. OSEP also clarified: (1) the limited excusal provisions in the regulations only apply to required, not invited, IEP team members; and (2) for the parent-invited members, (a) the district's responsibilities for arranging participation are a matter of state or district policies, and (b) the parent does not have a legal right to require the member's attendance.[41]

Most recently, OSEP issued a Dear Colleague Letter that recognized concerns that some districts "may be including applied behavior analysis (ABA) therapists exclusively without including, or considering input from, [SLPts] and other professionals who provide different types of specific therapies that may be appropriate ... when identifying IDEA services for children with [autism spectrum disorder]." However, although pointing out that ABA is "just one methodology to address the needs of [such] children," OSEP merely recited the regulations specific to their evaluation and services without interpreting them as requiring SLP involvement.[42]

Other SLP Issues

Directly after the issuance of the regulations for the original version of the IDEA, the forerunner of OSEP issued a policy letter in response to a chief state school officer's inquiry, cautiously agreeing that the evaluation and IEP for a child with mild SLI may be more streamlined than those for students with other disabilities.[43] Soon thereafter, the agency agreed with the ASHA interpretation that evaluation of the "educational performance" element in the definition of SLI is primarily a matter of communicative, not academic, achievement.[44] In a policy letter approximately twenty years later, OSEP reaffirmed this same position that eligibility for SLI may not be conditioned on "a concurrent deficiency in academic performance."[45]

Next, in a letter to the Florida Department of Education that confirmed a finding of noncompliance and agreement for corrective steps, OSEP clarified that regardless of whether state law opts to categorize SLP services as special education, every student with a disability who needs these services to benefit from special education is entitled to them as a related service even if the child does not meet the criteria for the SLI category.[46]

***384** In a subsequent letter, OSEP included the following interpretations specific to the formulation and implementation of SLP services: (1) the formulation of the amount and location of SLP services is an individualized determination by the child's IEP team, and (2) the determination of whether an interruption in the delivery of the IEP's specification of SLP services constitutes as denial of FAPE is "an individual determination that must be made on a case-by-case basis."[47]

Next, in response to an inquiry as to whether the IDEA permits a district to unilaterally dismiss a child from SLP services because the child has reached a plateau of progress, OSEP declared that the child's IEP team must make that determination. Moreover, it "may not be the decision of a single service provider; nor can [it] be based on a single standard and applied to all children without regard to their individual needs."[48]

A few years later, in the wake of an addition to the IDEA regulations requiring written notification to parents and district compliance with "no cost" provisions regarding public or private insurance, OSEP included this example: "If ... the school district's use of public benefits or insurance to pay for [SLT] will limit the amount of [SLT] a child may receive outside of school, the school district may not use the parent's or child's public benefits or insurance to pay for that service."[49]

More recently, a joint administrative agency Dear Colleague Letter reminded school districts of the interplay of the IDEA with Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA) for children with speech, hearing, or vision

disabilities. More specifically, the letter explained, students with SLI are entitled to effective communications via auxiliary aids and services under the ADA that in some cases exceed the requirements under the IDEA.[50]

Finally, in its most recent pertinent policy interpretation, OSEP responded to the inquiry of a preschool special education program about the school district's alleged categorical refusal to add to the program's provision of two hours per week of SLP services, OSEP opined as follows: "In general, a policy that prohibits the provision of specific related services or restricts the amount or type of services that can be provided to a child based solely on the particular setting in which the child is placed, regardless of the child's individual needs, would not be consistent with IDEA."[51]

*385 Court Decisions

There has been a long line of court rulings specific to SLP services, including but not limited to students with SLI. This line is much thinner than the case law addressing the various dimensions of FAPE that, together, dominate IDEA litigation.[52] The next three subsections provide a rather representative sampling of SLP-specific court decisions to date, sequenced chronologically within two successive categories--SLI eligibility and SLP services.

SLI Eligibility

In an early decision, a federal district court in Illinois addressed the issue of whether a second grader with various voice problems including hoarseness, squeakiness, and fluctuations in pitch, strain, and volume due to small modules on his vocal cords was eligible under the IDEA category of SLI despite his satisfactory academical performance. Determining that the abovementioned[53] OSEP guidance, which concluded that the requisite adverse effect on educational performances is not limited to academic performance, warranted judicial deference, the court concluded that the child was eligible as SLI based on its effect on his communication with teachers and peers. As relief, the court ordered the district to reimburse the parents for the SLP services that they had privately arranged for him and to duly revise the IEP to include thirty minutes of SLP services per week.[54]

Subsequently, a federal district court in Wisconsin addressed the termination, or exiting, side of eligibility. The child in this case was a third grader who had an IEP under the SLI classification since preschool. After a meeting in which the IEP team concluded that she had met or exceeded all of her goals and no longer needed SLP services, they exited her from IDEA eligibility. The parents filed for a due process hearing, which upheld the district's determination. The court affirmed the hearing officer's decision, concluding that the district's evaluation and IEP team meeting conformed to the applicable procedural requirements, including parental participation, and substantive standards.[55]

Recently, a federal district court in California upheld a school district's exiting of a high school student as SLI, also concluding that the parents' claim of eligibility for other categories of the IDEA, such as SLD, lacked preponderant proof. Although only marginally pertinent here, because the parent raised a panoply of procedural claims, this decision specifically included a ruling that the bilingual SLPt's assessment of the student's eligibility was appropriate.[56]

*386 SLP Services

In an early case, a federal appeals court, in a relatively brief decision, addressed two issues under the IDEA in relation to the SLP services for a fourth grader with an IEP: (1) whether, per the parents' contentions, the district's provision of these services on a pull-out, rather than in-classroom, basis was a denial of FAPE, and (2) whether, as the parents also argued, the child was entitled to continuity of the district-contracted private SLPt instead of the district's change to its own SLPt. For these respective issues, the Ninth Circuit Court of Appeals affirmed the lower court's ruling in favor of the district, concluding that (1) the pull-

out services met the substantive standard for FAPE, being reasonable even if not optimal; and (2) the district's SLPt met the personnel qualifications requirements of the IDEA and, thus, conformed to the reasonableness standard for FAPE.[57]

Subsequently, a federal district court decision in the District of Columbia illustrated, in relation to SLP services, an increasingly frequent FAPE claim more generally under the IDEA--the failure to implement fully the provisions of a child's IEP. In this case, the IEP for a student with multiple disabilities included a provision for three forty-five minute sessions of SLP services per week. In addition to days that the school was not in operation, including "snow days," or that the student was absent, the SLPt missed "a handful of sessions" due to her scheduling problems and reduced the length of other sessions due to the student's fatigue. Applying the "materiality" standard that prevails in most jurisdictions,[58] the court ruled that the shortfall was not substantial or significant enough to be material, thus not amounting to a denial of FAPE.[59]

The next case illustrates the application of the substantive standard for FAPE to an IEP in which SLP services amounted to a major, although not the only, issue of dispute. Here, the parents sought tuition reimbursement for the private placement of a second grader with SLD and various other disabilities connected with being born with a malformation of the brain and a cleft palate. Due to her apraxia and other impairments, SLP services was a major issue. The school district's proposed IEP called for a total of 120 minutes of SLP services per week for an unspecified mix of group and individual sessions, whereas the private school provided her with 150 minutes of individual SLP services, along with the therapist in the classroom for seven hours, per week. Although mentioning by way of background the ASHA standard for apraxia for 90-150 minutes of individual SLP services, the court ***387** ultimately relied on the reasonable-calculation standard for FAPE. Explaining that in tuition reimbursement cases the analysis is not to compare which placement is better or best but whether the school district's proposal meets this substantive standard, the federal court upheld the hearing officer's ruling in favor of the district.[60] On appeal, the Third Circuit affirmed with a rather brief and deferential decision.[61]

Another case that arose at about that time serves as a second illustration of the determination of appropriate SLP services as a major part of a substantive FAPE claim. In this case, the SLP services in the school district's two successive annual IEPs for a preschool child with SLI respectively amounted to two twenty-minute small-group sessions per week and, after Brigance testing that showed low language scores, the addition of a third twenty-minute session on an individual basis. The parent's expert, a licensed SLPt, conducted an evaluation of the student at about the time of the second IEP, resulting in diagnoses of severe apraxia and various other speech disorders and recommended two hours of individualized SLP services per week. Although they did not share her results and recommendations with the IEP team in the development of the second IEP, the parents contracted for one-hour of one-on-one SLP services with the private SLPt and filed for a due process hearing to challenge the appropriateness of the two IEPs. The requested relief included reimbursement for the private SLPt's services and a revised IEP in line with her recommendations. The hearing officer ruled in favor of the district, and upon the parents' appeal, the court applied the prevailing snapshot approach[62] for determining substantive FAPE. Based on what the successive IEP teams knew or had reason to know at the time of the respective annual meetings, which did not include the information from the private expert, the court affirmed the hearing officer's ruling that the district's SLP services for each of the two years met the reasonable-calculation standard.[63]

A third court decision in that same year was more marginal in terms of the prominence of the SLP-services issue but makes clearer the limited role of professional and research-based standards in the determination of substantive FAPE. In this case, the proposed IEP for a preschool child with autism included five weekly sessions totaling 2.5 hours of SLP services based on the recommendation of the school district's SLPt. In contrast, the parents' private SLP expert testified that, based on the child's undisputed diagnosis of apraxia, peer-reviewed research indicated that three to five hours were needed. The court ruled in favor of the district on this issue, relying on the primacy of the reasonably-calculated standard, as compared to the professionally optimal standard and the similarly subordinated and qualified role of the IDEA's PRR requirement.[64]

***388** In another FAPE variation, which is a hybrid of the substantive and implementation dimensions, the Fourth Circuit Court of Appeals addressed the parents' challenge to the SLP services for a third grader with autism. The IEP provided for forty-five

minutes sessions per day of SLP services in an "embedded, inclusive model" rather than a pull-out one-on-one approach. The SLPt implemented this IEP provision along with SLP interns whom she supervised. Based on precedents that call for "great deference" to school district professionals who work with the child and that generally abstained from methodology issues, the Fourth Circuit ruled in favor of the school district by simply clarifying that "[t]he dispute here centers not on whether [the child's IEPs] themselves were appropriate, but whether the [SLP services] required by those programs was in fact provided."[65]

Occasionally, parents prevail in substantive FAPE cases in which SLP services play a major role, but in these cases the deficiencies are usually part of a rather flagrant larger pattern. For example, in a case of a middle school child with intellectual disabilities and behavior-related diagnoses, a federal district court found, in light of the child's blatant lack of progress, a fatal pattern of substantive flaws. These deficiencies were in not only other parts of his latest IEPs but also the successive reduction in his monthly SLP services first from four hours to two hours and then, in the next IEP, to thirty minutes. Contrary to the school district's justification for the reductions, the court observed that "the record is replete with evidence that [the student] has not 'plateaued [in SLP progress]."[66]

In an example that amounts to an outlier decision under substantive FAPE, the federal district court in Arizona ruled in favor of the parents of a preschool child with SLI on their FAPE claim based on SLP services, while upholding the hearing officer in rejecting their various other FAPE claims. More specifically, the court applied the snapshot approach to decline evidence of the child's SLP progress, ruling that the IEP's provision of two thirty-minute individualized sessions per week of SLP services did not meet the reasonably-calculated standard. Moreover, citing the qualified requirement added in the 2004 IDEA amendments,[67] the court reasoned that the SLP services were based solely on the SLPt's expert judgement without any evidence of PRR. Although rejecting the parents' reliance on the ASHA Technical Report as representing optimal standard, the court found the district's lack of "any peer-reviewed standards" for its provision of SLP services to be fatal.[68]

***389** Another parent-favorable ruling was based on the procedural dimension of FAPE, for which SLP services was one of three violations that the court found harmful to the parents' opportunity for meaningful participation. The student was a ninth grader with SLI, and the proposed IEP offered forty minutes per week of SLP services without any specification as to whether it would be on an individual or group basis. The court concluded that in the specific context of this case, which included a district-paid independent educational evaluation that recommended weekly SLP services for forty-five minutes on an individual basis and forty-five minutes on a group basis, "the confusion caused by the lack of specificity deprived [the parent] of her right to meaningfully participate in the IEP process."[69] Moreover, the decision is relatively limited in two other ways: (1) the court rigorously applied precedents that are largely specific to the Ninth Circuit, thus not necessarily generalizable to other jurisdictions;[70] and (2) the court rejected the parents' requested remedy of tuition reimbursement for the private school in which they unilaterally placed the student, instead upholding the hearing officer's limited remedy of compensatory education for the SLP violation.[71]

SLPt Qualifications

In a much more recent decision, a federal district court in Florida addressed the parents' claim that the school district's provider of SLP services to their child, a sixth grader with multiple disabilities, including SLI, was unqualified. The court rejected that parents' claim because it was based on a procedural technicality, the alleged failure of the district to submit a plan to the state education agency per the state law "sparsity-supplement" requirements for use of bachelor-level "speech-language associates" under the supervision of a certified SLPt. The court concluded that regardless of whether the district submitted the plan, the SLP provider for the child met the requisite degree and supervision requirements, and, in any event, the procedural violation did not result in a substantive denial of FAPE.[72]

Overall Conclusions

The IDEA legislation and regulations provide a rather skeletal framework for SLI and SLP services, specifically identifying and broadly defining them as among the recognized classifications and related services, respectively. The unusual feature is the potentially dual role of SLP services, which the regulations allow state laws to categorize as special education. This feature is the basis for the frequent choice of the SLI classification sufficing for ***390** eligibility upon the child meeting the definitional criteria while solely needing SLP services. The more general provisions that have significance for both legal and practical activity include the minimum qualifications requirement that applies to SLPts and other related service personnel and the practicability-limited requirement for a peer-reviewed research basis for SLP and other related services.

The agency policy interpretations, which potentially have the force of law to the extent that hearing/review officers and court find them to be persuasive, are extensive for SLPts and other SLP services. The reasons for this extensiveness likely include the frequency of IDEA-eligible students who are classified as SLI[73] and the active professional advocacy role of ASHA and its affiliates.[74]

Yet, the potential gap-filling influence of these agency policy interpretations has been largely lacking in the case law to date.[75] Perhaps the lack of specialized legal counsel for parents of students with disabilities in various parts of the country may be a contributing factor.[76] On an overlapping basis, one wonders whether the extent of the resources and specialization of most parent attorneys extend to knowledge of these agency interpretations.

The court decisions also reflect the negligible use of the practicability-limited PRR standard in the SLP services cases to date. The limited exception in the above-cited cases is an outlier due to not only its use of this standard but also and more importantly its resulting parent-favorable application,[77] which is contrary to the prevalent district-deferential interpretation of this provision of the IDEA.[78]

The long line of pertinent court decisions is likely attributable not only to the overall predominance of FAPE cases but the integral role of SLP not only for the substantial segment of students with SLI but also for other notable classifications, such as autism.[79] Thus, the clear majority of the cases ***391** in our ample sample concern the appropriateness of SLP services, and the plaintiff-students are not at all limited to the SLI classification.

Notably, the bulk of the pertinent court rulings were in favor of the defendant districts, which conforms to the general outcomes pattern of IDEA litigation.[80] One of the significant "hidden" factors in this general trend is the skewing effect of the settlement process, which tends to weed out those cases that districts and their insurers perceive as likely losers.[81] More specifically, the case law in this relatively representative relevant sample reveals the following additional contributing factors to this pro-district outcomes trend, particularly for the FAPE issues that predominate in these court decisions: (a) the relaxed standard for substantive FAPE that uses a reasonable, rather than optimal, interpretation, and a snapshot approach;[82] (b) the tempering effect of the two-part adjudicative test for procedural FAPE;[83] (c) the less than rigorous prevailing approach for the implementation dimension of FAPE;[84] and (d) the general judicial deference to school authorities in not only assessing the expert opinions of SLPts[85] but also interpreting the personnel standards for SLPts.[86] As with the IDEA case law more generally, this deference is particularly pronounced for methodology issues.[87]

Finally and perhaps most importantly for SLP professors and practitioners, the case law reveals the significant difference between judicial standards, which focus on minimum legal requirements, and professional norms, which focus on best practice recommendations.[88] With due differentiation, rather than confusing fusion, school district personnel should continue to focus on prophylactic practice in collaboration with parents and adherence to professional standards, while realizing that prevailing judicial interpretations are nowhere near as strict and nuanced. For SLP legal advocacy, the most likely locus for success is at the level of state law, which fills gaps or adds to the IDEA's foundational framework per the Act's structure of "cooperative

federalism."[89] For those who seek higher standards for SLPts, the focus should be on the state's certification laws, and for those who seek more detailed definitions of SLP or SLI, the corresponding target is the state special education law.

Footnotes

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1 20 U.S.C. §§ 1400 *et seq.* (2018). The original legislation was the Education of All Handicapped Children Act of 1975. *See, e.g.*, Ronald T. Brown, *A Closer Examination of the Education of All Handicapped Children Act*, 17 Psych. Schs. 355 (1980) (summarizing the primary requirements of the original version of the IDEA). Congress has reauthorized the legislation several times, with amendments in 1986, 1990, 1197, and 2004. *See, e.g., See* Dixie S. Huefner & Cynthia M. Herr, Navigating Special Education Law and Policy 43-49 (2012). The administering agency, which originally was the U.S. Department of Health, Education, and Welfare and currently is the U.S. Department of Education, has issued regulations providing further specifications. For the latest version of the regulations, see 34 C.F.R. §§ 300.1 *et seq.* (2019).

2 29 U.S.C. §§ 705(20)(B), 794a (2018) (Section 504); 42 U.S.C. §§ 12101 *et seq.* (2018) (ADA). For a systematic analysis of the differences in relation to P-12 schools, *see* Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 Educ. L. Rep. 886 (2017).

3 *See, e.g., Perry A. Zirkel, Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 Tchr. Educ. & Special Educ. 263 (2015) (explaining eligibility, FAPE, and other key components of the IDEA).

4 20 U.S.C. § 1401(3)(A). *See generally* Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 Educ. L. Rep. 30, 31 (2018).

5 20 U.S.C. § 1401(26)(A).

6 *Id.* § 1401(9).

7 *See, e.g.*, Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE under the IDEA*, 346 Educ. L. Rep. 18 (2017). The primary implementation dimension consists of claim of failure-to-implement the IEP, although a new additional implementation dimension has started to emerge in relation to the school district's capability to implement the IEP, thus focusing on the near future rather than the near past. *Id.* at 20.

8 Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017) (whether the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982) (whether the IEP is "reasonably calculated to enable the child to receive educational benefits"). For an analysis of *Endrew F.*'s refinements of *Rowley*, 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 Educ. Law Rep. 545 (2017).

9 *See, e.g.*, Perry A. Zirkel, *The "Snapshot" Standard under the IDEA: An Update*, 358 Educ. L. Rep. 767 (2018). The courts application of this approach favors school districts because it usually allows evidence of subsequent progress but not evidence of subsequent lack of progress in evaluating whether the IEP met the substantive standard for FAPE. *Id.*

10 20 U.S.C. § 1415(f)(3)(E)(ii) (requiring the adjudicator to find a resulting "deprivation of educational benefits" to the student or significant interference with "the parents' opportunity to participate in the decision-making process regarding the provision of a [FAPE]").

11 Zirkel, *supra* note 7, at 20 (citing Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007)).

12 20 U.S.C. § 1415(i)(2)(C)(iii).

13 *See, e.g.*, Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Two Primary Remedies under the IDEA*, 354 Educ. Law Rep. 637 (2018).

14 *Id.* § 1415(f), § 1415(i)(2). States also have the option of a two-tiered administrative system, starting with a local due process hearing and a state-level appellate review. *Id.* § 1415(g). For a canvassing of the state systems, including the relatively few states that have a second, review officer tier, see Jennifer F. Connolly, Perry A. Zirkel, & Thomas A. Mayes, *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. Disability Pol'y Stud. 156 (2019).

15 34 C.F.R. §§ 300.151-300.153. For a systematic analysis of the differences and commonalities between these two mechanisms under the IDEA, see Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes-Complaint Procedures and Impartial Hearings: An Update*, 359 Educ. Law Rep. 560 (2019).

16 Among the organizations for specialized legal counsel on behalf of school districts and parents, respectively, are the Council of School Attorneys (https://www.nsba.org/Services/Council-of-School-Attorneys/Join-COSA) and the Council of Parent Advocates and Attorneys (https://www.copaa.org/).

17 *See, e.g.*, R.F. v. S. Lehigh Sch. Dist., 74 IDELR ¶ 292 (E.D. Pa. 2019) (upholding appropriateness of successive IEPs and subsequent exiting of high school student from IDEA eligibility without focusing specifically on the student's SLI classification or SLP services); C.H. v. Goshen Cent. Sch. Dist., 61 IDELR ¶ 19 (S.D.N.Y. 2013) (concluding briefly that student did not need SLP services in tandem with various more detailed FAPE rulings). Some cases were a close call. *See, e.g.*, L.O. v. N.Y.C. Dep't of Educ., 822 F.3d 95 (2d Cir. 2016) (interpreted each of three disputed SLP-services provisions as resulting in substantive loss to the child but also treated this category as one of five categories of procedural violations that cumulatively amounted to a denial of FAPE).

18 *E.g.*, L.K. v. Charlotte-Mecklenburg Bd. of Educ., 67 IDELR ¶ 240 (W.D.N.C. 2016) (limitations period for filing for judicial review); Allen v. State-Operated Sch. Dist. of Newark, 61 IDELR ¶ 300 (D.N.J. 2013) (exhaustion requirement for IDEA FAPE-implementation claim).

19 *E.g.*, District of Columbia Pub. Sch., 116 LRP 43140 (D.C. SEA 2016); Grapevine-Colleyville Indep. Sch. Dist., 115 LRP 15682 (Tex. SEA 2015); Palo Alto Unified Sch. Dist., 115 LRP 10194 (Cal. SEA 2015); District of Columbia Pub. Sch., 114 LRP 25792 (D.C. SEA 2014); Folsom-Cordova Unified Sch. Dist., 64 IDELR ¶ 190 (Cal. SEA 2014).

20 *E.g.*, Clark-Shawnee Local Schs., 121 LRP 30301 (Ohio SEA 2021); Pueblo Sch. Dist. 70, 68 IDELR ¶ 239 (Colo. SEA 2016); Van Far R-1 Sch. Dist., 114 LRP 26805 (Mo. SEA 2014).

21 *E.g.*, Robert F. v. N. Syracuse Cent. Sch. Dist., 79 IDELR ¶ 96 (N.D.N.Y. 2021); F.C. v. N.Y.C. Dep't of Educ., 68 IDELR ¶ 63 (S.D.N.Y. 2016).

22 *Supra* note 4 and accompanying text.

23 *Supra* note 5 and accompanying text.

24 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

25 *Id.* § 1412(a)(14)(A)-(B). The version of the IDEA prior to the 2004 amendments provided that state professional requirements be based on the highest requirements in the state. As explained in the commentary accompanying the new regulations, Congress removed this provision to provide more flexibility to the states in relation to the shortage of related services personnel, including SLPts. 71 Fed. Reg. 46,540, 46,610 (Aug. 15, 2006). Additionally, these current provisions apply to related services paraprofessionals and extend to allow the use of "paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting [these] requirements ... to assist in the provision of special education and related services ... to children with disabilities." 20 U.S.C. § 1412(a)(14)(B).

26 34 C.F.R. § 300.8(a), § 300.34(a),§ 300.156(a)-(b), § 300.320(a)(4). The only difference, which is inconsequential, is that the regulations refer to SLI in the singular, rather than plural, form.

27 *Id.* § 300.8(b)(11).

28 *Id.* § 300.34(c)(15) (here referring to SLI in the plural form). The separate definition for "audiology" includes, inter alia, various speech and language services, such as "speech reading (lip-reading)" and "speech conservation." *Id.* § 300.34(c)(1).

29 *Id.* § 300.39(a)(2)(i) ("if the service is considered special education rather than a related service under State standards").

30 *Id.* § 300.308. The other two expressly identified roles as qualifying examples are school psychologists and remedial reading teachers. *Id.*

31 *See, e.g.*, Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 Educ. L. Rep. 671 (2017) (finding in a systematically selected sample of 27 cases in which the court addressed whether the OSEP policy interpretation was persuasive, the distribution of the answers was yes--22 and no--5).

32 *Supra* text accompanying note 16.

33 The most recent amendments were in 2004, followed by the 2006 regulations. *Supra* note 1.

34 The other policy letters at that time regarding SLP qualifications concerned the legislation and regulations for transitioning to the current focus on full regular certification. *See, e.g.*, Letter to Kennedy, 21 IDELR 742 (OSEP 1994); Letter to Myers, 17 IDELR 994 (OSERS 1991); Letter to Rose, 17 IDELR 121 (OSERS 1990); Letter to Anonymous, 16 IDELR 795 (OSEP 1990).

35 *Supra* note 25 and accompanying text.

36 Letter to Patterson, 16 IDELR 1361 (OSEP 1990). The differences with the former name of ASHA, the American Speech and Hearing Association, and the former version of the regulation are immaterial for this interpretation.

37 Letter to Dublinske, 17 IDELR 392 (OSERS 1990). For reaffirmation and application of this interpretation, see Letter to Black, 24 IDELR 851 (OSEP 1996).

38 Letter to Goldman, 55 IDELR ¶ 202 (OSEP 2010).

39 *Supra* note 30 and accompanying text.

40 Letter to Clarke, 51 IDELR ¶ 223 (OSEP 2008). This letter also addressed ASHA questions on the use of assistants and paraprofessionals in the provision of SLP services, which is beyond the specific scope of this article.

41 Letter to Rangel-Diaz, 58 IDELR ¶ 78 (OSEP 2011).

42 Dear Colleague Letter, 66 IDELR ¶ 21 (OSEP 2015).

43 Letter to Porter, 211 IDELR 78 (BEH 1978). The office that directly administered the original version of the legislation (*supra* note 1) was the Bureau of Education for the Handicapped (BEH).

44 Letter to Dublinske, 211 IDELR 202 (BEH 1980).

45 Letter to Lybarger, 16 IDELR 82 (OSEP 1989). For reaffirmation of this interpretation with the clarification that the determination is on a case-by-case basis "depending on the unique needs of a particular child and not based *only* on discrepancies in age or grade performance in academic subject areas," see Letter to Clarke, 48 IDELR ¶1 77 (OSEP 2007) (emphasis added).

46 Letter to Goff, 37 IDELR ¶ 187 (OSEP 2002).

47 Letter to Clarke, 48 IDELR ¶ 77 (OSEP 2007). The second of these two interpretations was in response to an inquiry as to whether the IDEA obligates the district to provide "make-up sessions when [SLP] sessions are missed due to a child's absence from school[,] cancellation for a class or school activity, or absence of the speech language pathologist." *Id.*

48 Letter to Koscielniak, 58 IDELR ¶ 168 (OSEP 2011).

49 Letter to McKinney, 62 IDELR ¶ 152 (OSEP 2013).

50 Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, 64 IDELR ¶ 180 (OSERS/OCR/DOJ 2014).

51 Letter to Rowland, 75 IDELR ¶ 108 (OEP 2019).

52 *See* Zirkel, *supra* note 7, at 18 (pointing out the predominance of IDEA court decisions concerning FAPE, including the overlapping categories of compensatory education and tuition reimbursement).

53 *Supra* note 45 and accompanying text.

54 Mary P. v. Ill. State Bd. of Educ., 919 F. Supp. 1173 (N.D. Ill. 1996).

55 Sand v. Milwaukee Pub. Sch., 46 IDELR ¶ 161 (E.D. Wis. 2006).

56 J.D. v. E. Side Union High Sch. Dist., 78 IDELR ¶ 35 (N.D. Cal. 2021).

57 Zasslow v. Menlo Park City Sch. Dist., 60 F. App'x 27, 28-29 (9th Cir. 2003). The appeals court did not identify the student's disability, and the lower court only referred to a diagnosis of pervasive development disorder and IDEA eligibility based on "a severe language disorder." Zasslow v. Menlo Park Sch. Dist., 35 IDELR ¶ 244 (N.D. Cal. 2001). The case also presented several other issues, including a hearing officer ruling in favor of the parents' concerning the number of hours per week of SLP services, but these two were the only issues under the IDEA addressed on the merits upon the parents' successive appeals. The district also prevailed on the parents' claims under Section 504 and Section 1983.

58 *Supra* note 11.

59 Catalan v. District of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007).

60 Rachel G. v. Downingtown Area Sch. Dist., 57 IDELR ¶ 4 (E.D. Pa. 2011). Illustrating it lack of nuanced professional attention, in its ultimate legal conclusions the court mischaracterized AHSA as the "American School Health Association." *Id.*

61 R.G. v. Downingtown Area Sch. Dist., 528 F. App'x 153 (3d Cir. 2013). In another Third Circuit decision, SLP services was a more limited issue, and the court upheld the substantive appropriateness of an IEP that lacked such services for a child with SLD. Souderton Area Sch. Dist. v. J.H., 351 F. App'x 755 (3d Cir. 2009).

62 *Supra* note 10 and accompanying text.

63 L.R. v. Bellflower Unified Sch. Dist., 59 IDELR ¶ 105 (C.D. Cal. 2012).

64 B.M. v. Encinitas Union Sch. Dist., 60 IDELR ¶ 188 (S.D. Cal. 2013).

65 E.L. v. Chapel Hill-Carrboro Sch. Dist., 773 F.3d 509, 517 (4th Cir. 2014).

66 Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35 (D.D.C. 2016). For a more marginal example due to the more limited role of SLP services but blatant predetermination that the child with multiple disabilities did not need such services directly, see B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio 2011). Conversely, for a marginal example of a district-deferential approach for the level of SLP services as a limited issue, see Bd. of Educ. of Albuquerque Pub. Sch., 70 IDELR ¶ 157 (D.N.M. 2017).

67 *Supra* note 24 and accompanying text.

68 L.M.H. v. Ariz. Dep't of Educ., 68 IDELR ¶ 41 (D. Ariz. 2016).

69 S.H. v. Mount Diablo Unified Sch. Dist., 263 F. Supp. 3d 746, 764 (N.D. Cal. 2018).

70 Even within the Ninth Circuit, some court decisions that take a pro-district view in applying the second step of procedural FAPE to SLP services. *E.g.*, Jill W. v. Haw. Dep't of Educ., 59 IDELR ¶ 288 (D. Haw. 2012) (concluding that even if the IEP provision for SLP services was ambiguous, it did not result in a requisite loss to the parents or the child).

71 This part of the remedy was for a total of twenty forty-minute sessions of group SLP services focused on social skills. *Id.* at 771.

72 S.M. v. Hendry Cnty. Sch. Bd., 2017 WL 9360881 (M.D. Fla. July 27, 2017), *adopted*, 70 IDELR ¶ 249 (M.D. Fla. 2017).

73 In the most recent year for which federal data are available (2019-20), the highest proportions for the various IDEA classifications of students with disabilities ages 3-21 under were as follows in descending order: SLD (33%), SLI (19%), OHI (11%), and autism (11%). Nat'l Ctr. for Educ. Stat., Students with Disabilities (May 2021), https://nces.ed.gov/programs/coe/indicator/cgg

74 *See, e.g., supra* text accompanying notes 38 and 44.

75 For the limited exception, see *supra* text accompanying notes 53-54.

76 *See, e.g.*, Kay Hennessy Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?* 9 Georgetown J. on Poverty L. & Pol'y 193, 218-19 (2002) (reporting results of national survey that suggested an insufficiency of available and affordable attorneys to represent parents of students with disabilities).

77 *Supra* notes 66-¿67 and accompanying text. It is also an outlier in terms of its application of the snapshot approach. For the contrasting prevailing approach, see *supra* note 10.

78 *Supra* note 64 and accompanying text; *see also* E.M. v. Lewisville Indep. Sch. Dist., 72 IDELR ¶ 22 (E.D. Tex. 2018), *aff'd mem.*, 763 F. App'x 361 (5th Cir. 2019); J.S. Dep't of Educ., Haw., 55 IDELR ¶ 43 (D. Haw. 2010) (illustrating relaxed application of PRR provision in cases in which SLP services was a more limited issue). For the more general application of this provision, see Mitchell L. Yell & Michael E. Rozalski, *The Peer-Reviewed Requirement of the IDEA: An Examination of Law and Policy*, 26 Advances Learning & Behav. Disabilities 149, 167 (2013) ("Thus far courts have not used the PRR requirement to raise the standard of school districts' responsibility to provide a FAPE for IDEA eligible students with disabilities").

79 *Supra* note 73.

80 *See, e.g., 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).

81 The settlement process under the IDEA involves multiple factors and is largely hidden from public empirical analysis, but this skewing effect, on a net basis, is reasonably inferable. The specific extent of this skew is subject to speculation.

82 *Supra* notes 8-9 and accompanying text.

83 *Supra* note 10 and accompanying text.

84 *Supra* note 11 and accompanying text.

85 *Supra* note 56 and accompanying text.

86 *Supra* notes 57, 72 and accompanying text.

87 *See, e.g.*, Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. at 208:
[C]ourts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." .... We think that Congress shared that view when it passed the [IDEA] .... Once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

88 *Supra* notes 57, 60, 64, 68, and accompanying text. For a similar distinction in agency interpretations, see *supra* note 36 and accompanying text.

89 *E.g.*, Schaffer v. Weast, 546 U.S. 49, 52 (2005).

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