Legal Information in Special Education: Accuracy with Transparency

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Special education is the most legalized segment of P–12 schooling in the United States. It is subject to not only the usual boundaries of the federal Constitution and state common law but also the extensive legislation, regulations, and case law under the Individuals with Disabilities Education Act (2017) and the overlapping pair of civil rights acts—Section 504 of the Rehabilitation Act (2017) and the Americans with Disabilities Act (2017).

Yet, the legal information specific to special education law in the professional literature is infrequent (e.g., Zaheer & Zirkel, 2014) and often inaccurate (e.g., Zirkel, 2014; Zirkel, 2019). Given the lack of editorial and/or peer review and selection, the legal information on the Internet is subject to even more question. As previously pointed out, legal inaccuracy in such traditional and Internet publications is attributable in significant part to the confusion between legal requirements (i.e., the objective minimum "shall," or "must," of settled law) and professional norms (e.g., the recommended target "should" of best practices and ethical standards) in special education, which authors often do not clearly differentiate with sufficient transparency. Although the requisite accuracy also depends on other factors, such as sufficient specialized legal expertise, the transparency of the author's perspective is a major contributed to the reader's legal literacy.

An article published recently on the Internet illustrates the overlapping problems of legal accuracy and transparency. In this Internet article, Margolis (2020), who is identified as a retired

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professor of reading and special education, included a caveat: "I am not an attorney …. [being instead] an educator who has spent decades developing IEPs for parents, public schools, and private schools." He then proceeded to explain the meaning of the Supreme Court's decision in *Endrew F. v. Douglas County School District RE-1* (2017) based on selected quotations from the Court's opinion, various attorneys, and the U.S. Department of Education's (2017) Q-and-A on *Endrew* F. Despite his caveat, the problems are (a) the quotations from Court's opinion are a skewed selection of what attorneys refer to as "dicta," or the side comments, rather than the "holding," or rule that represents the combination of the issue and answer; (b) although the article provides the names of the attorneys it did not reveal that all of them exclusively represented parents in special education cases; and (c) that the Department's pronouncements, as a federal appeals court recently clarified, lack the force of law (*K.D. v. Downingtown Area School District*, 2018). With parents being his primary intended audience, his final statement is: "If you use [these quotations] correctly, they can prove tremendously powerful." The "correctness" of the quotations and their use is what ultimately lacks due transparency.

For both authors and readers, I offer the following grid that helps guide the extent to which legal information in traditional and Internet special education publications is accurate, including transparent. The purpose of this tool is to facilitate readers' and authors' systematic reflection for awareness and analysis of significant dimensions of accuracy, including the distinction between legal requirements and professional norms. The three levels of the vertical dimension successively differentiate statements that (1) conflict with the law, (2) square with applicable legal requirements, and (3) reflect the higher standards of professional norms, including best-practice and ethics. The three categories on the horizontal axis represent the respective roles symbolized by the attorneys and judge in the courtroom—(A) the pro-parent

perspective, (B) the impartial perspective, and the (C) pro-district perspective. Although neither of these two axes, or dimensions, is exclusive of other considerations or mathematically precise in its categories, the resulting cells provide a frame of reference for authors' self-awareness and readers' assessment.

	A. Pro-Parent	**B. Impartial**	**C. Pro-District**
3. Professional Norm	3-A	3-B	3-C
2. Legal Requirement	2-A	2-B	2-C
1. Violative Statement	1-A	2-B	3-C

For example, many readers may have mistaken Margolis' aforementioned article as a "2-B" on this grid. On closer examination, however, it fits much more within the "3-A" area. To the extent that this perspective was not sufficiently transparent in terms of due differentiation, it is the same sort of problem that has led to conflict-of-interest disclosures policies for authors in both traditional and on-line academic publications (e.g., Open Access, 2013; Sage Publishing, n.d.). The lack of sufficient author transparency can contribute to reader legal inaccuracy not only on the horizontal axis but also and at least as importantly on the vertical axis. The lack of differentiation between "2" and "3" leads to confusion as to what the legal requirements are, much the same as statements that are "1" by falling short of the law. In promising powerful results from his skewed legal information, Margolis himself may not have been aware of the difference based on his admitted lack of expertise. Yet, the ultimate result could be undue and losing litigation for parents as to the *Endrew F.* standard for "free appropriate public education"

(FAPE). The more traditional literature in special education, including school psychology periodicals, provides articles that similarly lead to misconceptions of the substantive standard for FAPE (Zirkel, 2019). The Court's *Endrew F.* decision was particularly fertile for these interpretive issues due to its multiple dicta on both the parent and district sides and also its ambiguous holding, which ultimately defines "appropriate," which is the A in FAPE, as "appropriate" (e.g., Zirkel, 2017b).

However, this problem extends to various other issues in which the judicial case law has yielded outcomes at least as adverse to parents as the approximately 3-to-1 ratio in favor of districts under the IDEA (e.g., Karanxha & Zirkel, 2014). For example, the court decisions specific to functional behavioral assessments (FBAs) and behavior intervention plans (BIPs) under the IDEA are approximately 7-to-1 in favor of districts (Zirkel, 2017a), thus largely cancelling out the intervening variable of settlements. Yet, the professional literature evidences confusion, such as Young and Bauer-Yur's (2013) premise that "[an] FBA is mandated by the Individuals with Disabilities Education Act … for students receiving special education services who engage in challenging behaviors" (p. 24). More specialized legal analyses contribute to such misconceptions. For example, the statement that "a BIP must be developed when behavior interferes with learning" (Etscheidt, 2006, p. 225), although published prior to the more settled stage of the judicial trend, failed to provide a clear differentiation between legal requirements and professional recommendations (e.g., Collins & Zirkel, 2017). Other IDEA issues that lack sufficient accuracy, including transparency, in the special education literature include child find (e.g., Zirkel, 2015), response to intervention (Zirkel 2018b), and transition services (e.g., Zirkel, 2018a).

Yet, repeated calls for transparently differentiating the "shall" of legal requirements with

the "should" of professional recommendations and the dicta from the holdings of key court decisions has resulted in overly defensive reactions (e.g., Zirkel, 2013), including implications of malfeasance (e.g., Wright et al., 2013). Like other such grid-type models in the field (e.g., Mayes, 2019), the intent of this tool is to facilitate more constructive consideration, including refinement of the framework to a more gradated, multi-dimensional conception to the extent appropriate. For example, adding levels of legal expertise as a third dimension may be useful.

Subject to such refinements, if you are an author, consider where your published contributions fit on the grid and the extent, if any, that more transparency would contribute to improving the legal literacy of the field. Similarly, if you are a reader, use the lens of the grid to assess the position of a publication that provide legal information in special education. If the author has not been sufficiently transparent in terms of both expertise and perspective, consider context clues such as the nature of the publication, its inferable primary audience, its language (e.g., "must" or "shall" as compared with "should"), and the role/affiliation of the author(s).

For some authors, including professors, the advocacy perspective and the normative orientation may be so natural they are not aware of the extent and effect of these factors on the accuracy of readers' legal understanding. For other authors, including attorneys on both the parent and district sides of the bar, the lack of transparency may be deliberate for the sake of both persuasive advocacy and normative activity. However, readers, including professional personnel and participating parents in special education, are entitled to accurate legal understanding so that they may exercise their discretion to make informed decisions.

Finally, with regard to the horizontal axis of the grid, pro-child is not one of the categories, because presumably all members of the field ascribe to this orientation. The difference, however, is the perspective of the individual in applying this orientation. For

example, the parents tend to view the child alone, whereas the school personnel are more likely to view not only other children and the rest of the institution, including the limited societal resources for public education, in exercising the pro-child perspective.

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