

# VSBA Law Conference 2022

Legal Considerations Regarding Dyslexia and Specialized  
Reading Instruction

Jason H. Ballum  
JBallum@sandsanderson.com  
(804) 783-7281



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## Agenda

- Introduction
- Why should you care about dyslexia and specialized reading instruction?
- What is dyslexia?
- Do school divisions have to specifically evaluate for dyslexia?
- Do school divisions have to provide services for dyslexia?
- What do the courts say about dyslexia and specialized reading instruction?
- What can public school boards do with this information?

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## Why should you care about dyslexia and specialized reading instruction?

- Special education programs are being challenged at historic numbers.
- On December 15, 2021, The Center for Appropriate Dispute Resolution in Special Education (“CARDE”) published research on the last ten years of IDEA disputes.
- In school year 2019-2020 there were 22,359 due process hearings filed.
- Steady incline over the last ten years.

## What is “dyslexia?”

- The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM–5):
- Diagnostic Code 315.00 Specific Learning Disorder contains the following note:
  - *Note: Dyslexia is an alternative term used to refer to a pattern of learning difficulties characterized by problems with accurate or fluent word recognition, poor decoding, and poor spelling abilities. If dyslexia is used to specify this particular pattern of difficulties, it is important also to specify any additional difficulties that are present, such as difficulties with reading comprehension and math reasoning.*

## What is “dyslexia?”

IDEA disability categories 34 CFR 300.8:

1. Autism
2. Deaf Blindness
3. Developmental Delay
4. Emotional Disability
5. Hearing Impairment (can include Deaf and Hard of Hearing)
6. Intellectual Disability
7. Multiple Disabilities
8. Orthopedic Impairment
9. Other Health Impairment
10. Specific Learning Disability
11. Speech or Language Impairment
12. Traumatic Brain Injury
13. Visual Impairment

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## What is “dyslexia?”

Virginia regulations at 8 VAC 20-81-10 define “Specific learning disability” as:

- *a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.*
- *Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; of intellectual disabilities; of emotional disabilities; of environmental, cultural, or economic disadvantage. (§ 22.1-213 of the Code of Virginia; 34 CFR 300.8(c)(10))*

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## What is “dyslexia?”

Virginia regulations at 8 VAC 20-81-10 continued:

- *Dyslexia is distinguished from other learning disabilities due to its weakness occurring at the phonological level. Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.*

## Do school divisions have to specifically evaluate for dyslexia?

## Crofts v. Issaquah Sch. Dist. 411, 122 LRP 2043 (9<sup>th</sup> Cir. 2022)

- The parents of an elementary school student had the student privately evaluated, which concluded the student: "demonstrated a pattern of academic and cognitive strengths and weaknesses consistent with the classic profile of the specific learning disability of dyslexia."
- The school district then conducted its own evaluations of the student and determined the Student was eligible under the IDEA's "specific learning disability" category. See 20 U.S.C. § 1401(30).
- A year later, the parents requested that the school district change the student's disability category from "specific learning disability" to "dyslexia," and that they teach the student using the Orton-Gillingham approach. The District denied both requests, stating that SLD serves as the eligibility category for dyslexia and that the District does not identify specific learning programs in IEPs.
- The Parents then filed a due process hearing request alleging that the District denied the student a FAPE.

## Crofts v. Issaquah Sch. Dist. 411, 122 LRP 2043 (9<sup>th</sup> Cir. 2022)

- The court found that the School District's refusal to change the student's identification from "specific learning disability" to "dyslexia" did not constitute a violation of the IDEA.
  - The District fully evaluated the student in all suspected areas of disability and considered the private evaluation's findings, including the diagnosis of dyslexia.
  - "Crofts's insistence that the District should have evaluated A.S. for dyslexia rather than recognizing her difficulties with reading, writing, and spelling under the broader 'specific learning disability' category is based on a distinction without a difference. Medical and psychiatric dictionaries describe dyslexia as 'a general term for primary reading disorder.'" (internal citations omitted).
- The court also found that the Student's proposed IEPs were reasonably calculated to help the Student progress, even though the IEPs did not propose to use the parents' preferred teaching methodology.
  - The IEPs set goals that targeted the student's specific areas of need, including the ability to apply phonetic principles to read, reading-fluency, sight word vocabulary, reading comprehension, writing grade-appropriate sentences, and using correct punctuation when writing.
  - Evidence supported that the student also demonstrated appropriate progress without the school utilizing the Orton-Gillingham approach.

# Do school divisions have to provide specific services or methodology for students with characteristics of dyslexia?



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## § 22.1-253.13:2(G) Standard 2. Instructional, administrative, and support personnel.

- *“In addition to the full-time equivalent positions required elsewhere in this section, each local school board shall employ the following reading specialists in elementary schools, one full-time in each elementary school at the discretion of the local school board.*
- *One reading specialist employed by each local school board that employs a reading specialist shall have training in the identification of and the appropriate interventions, accommodations, and teaching techniques for students with dyslexia or a related disorder and shall serve as an advisor on dyslexia and related disorders.*
- *Such reading specialist shall have an understanding of the definition of dyslexia and a working knowledge of (i) techniques to help a student on the continuum of skills with dyslexia; (ii) dyslexia characteristics that may manifest at different ages and grade levels; (iii) the basic foundation of the keys to reading, including multisensory, explicit, systemic, and structured reading instruction; and (iv) appropriate interventions, accommodations, and assistive technology supports for students with dyslexia.”*

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## § 22.1-298.1(6) Regulations governing licensure.

- *“Every person seeking initial licensure or renewal of a license shall complete awareness training, provided by the Department of Education, on the indicators of dyslexia, as that term is defined by the Board pursuant to regulations, and the evidence-based interventions and accommodations for dyslexia[.]”*

## What do the courts say about dyslexia and specialized reading instruction?

## Bd. of Educ. of Hendrick Hudson v. Rowley, 458 US 176 (1982)

- Landmark Supreme Court Decision Establishing FAPE Standard (under EHA)
  - State satisfies FAPE requirement by “providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”
  - Instruction and services must:
    - Be at public expense;
    - Meet State’s educational standards;
    - Approximate the grade levels used in State’s regular education;
    - Comport with child’s IEP; and
    - If child is being educated in the regular classrooms of the public school system, should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”

## Bd. of Educ. of Hendrick Hudson v. Rowley, 458 US 176 (1982)

- Court’s inquiry:
  - Has the State complied with procedures of the IDEA?
  - Is the IEP “reasonably calculated to enable the child to receive educational benefits?”
- “Courts must be careful to avoid imposing their view of PREFERABLE EDUCATIONAL METHODS upon the States.” (emphasis added)
  - “The primary responsibility for formulating the education to be accorded a handicapped child, and for CHOOSING THE EDUCATIONAL METHOD most suitable to the child’s needs, was left the Act to state and local educational agencies in cooperation with the parents or guardian of the child.” (emphasis added)
  - IDEA charges States with responsibility of “acquiring and disseminating to teachers and administrators . . . Information derived from educational research, demonstration, and similar projects, and of adopting, where appropriate, promising educational practices and materials.” 20 U.S.C. §1413(a)(3).
  - “It seems highly unlikely that Congress intended courts to overturn a State’s choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2).”

## Fairfax County Sch. Bd. v. Knight, 49 IDELR 122 (4<sup>th</sup> Cir. 2008)

- Parents of 9<sup>th</sup> grade student with dyslexia and other learning disabilities believed their daughter required Lindamood-Bell program to obtain meaningful educational benefit.
- Court of Appeals affirmed trial court's decision that the school division's program, which used a different METHODOLOGY, was reasonably calculated to provide FAPE.
  - "While not opining upon the relative merits of educational theories and methodologies, see *Rowley*, the district court found that the educational approach proposed in the . . . IEPs was appropriate and would provide an appropriate curriculum for [the student]."
  - "The district court found that the parents' testing evidence and expert witnesses were not persuasive and did not establish by a preponderance of the evidence that J.K. make only trivial progress at FCSB."
    - School division's witnesses had extensive special education experience and post-baccalaureate degrees in special education and related fields.
    - Parents' experts had substantial experience, but no degrees in education, reading or special education.

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## Andrew F. v. Douglas County Sch. Dist., 580 U.S. \_\_\_\_ (2017)

- In *Rowley*, the Court specifically declined to endorse any one standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act."
  - *Andrew* Court: "That more difficult problem is before us today."
- Parents of a fifth-grader with autism challenged whether school district's educational program was sufficiently ambitious.
- Court articulated a substantive standard for FAPE:
  - "An IEP must be reasonably calculated to enable a child to make progress that is appropriate in light of his circumstances."

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## Endrew F. v. Douglas County Sch. Dist., 580 U.S. (2017)

- Court declined to elaborate on what “appropriate” progress would look like from case to case.
  - The adequacy of an IEP turns on the unique circumstances of the subject child.
  - “This absence of a bright-line rule, however, should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” (quoting *Rowley*)
  - “A reviewing court may fairly expect those [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”

## Preciado v. Board of Educ. of Clovis Mun. Schs., 76 IDELR 67 (D.N.M. 2020)

- In third grade, the student was found eligible under the IDEA for a learning disability in reading.
  - Student was provided programming focused on fluency (WPM), without regard to decoding or how many words were read correctly.
- As a fourth-grade student, the same teacher introduced the Orton-Gillingham methodology into the student’s instruction.
  - Teacher testified that when he learned how much O-G differed from student’s previous program, “It made [his] head explode.”
- At the start of fifth-grade, the student was assessed to be reading at a 3.1 grade level and found no longer eligible.

## Preciado v. Board of Educ. of Clovis Mun. Schs., 76 IDELR 67 (D.N.M. 2020)

- School division used “Istation,” and interactive computer-based assessment, to measure reading skills and develop IEP goals.
- Court Held:
  - No one could adequately explain how the Istation measured academic progress. This problem impacted the IEP development as well as the litigation.
  - All parties agreed that O-G or similar programming was required, but teacher was not properly trained to implement.
  - The student’s attendance and behavioral challenges did not excuse the IDEA violations.

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## WV v. Copperas Cove Ind. Sch. Dist., 77 IDELR 92 (5<sup>th</sup> Cir. 2020)

- A first-grade student, eligible under the IDEA with SLI, was referred by a parent for additional evaluations for suspected SLD. School refused.
- As a second-grade student, the school started providing the student with the Wilson Reading System.
- The school also agreed to re-evaluate and found the student not eligible.
- Parents filed for a DPH alleging eligibility violations and a failure to address the student’s dyslexia.

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## WV v. Copperas Cove Ind. Sch. Dist., 77 IDELR 92 (5<sup>th</sup> Cir. 2020)

- After appearing in the WD TX and 5<sup>th</sup> Cir (twice each), Court held:
  - Yes, the School Division should have found the student eligible as a student with a SLD.
  - This violation was “only procedural” and did not deprive WV of FAPE.
  - The Courts found the Wilson Reading System was “a structured, researched-based program,” and found “ample evidence of WV’s improvement..”

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## Falmouth School Dep’t v. Doe, 79 IDELR 221 (D. ME 2021)

- The student started having reading issues in first grade, and at the beginning of third grade, the student’s parent express concerns about lack of progress.
- Parent asked about programming options other than the reading program utilized by the school district, later asking specifically about the Lindamood-Bell program.
- The family obtained independent evaluations that made clear recommendations for literacy programming.
- The school division:
  - Proposed only incremental increases in the amount of specialized instruction;
  - Did not further evaluate his issues (**despite school division staff acknowledging they existed**), or reconsider type of reading instruction he might need; and
  - Removed a measurable reading goal early on when he failed to reach it.

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## Falmouth School Dep't v. Doe, 79 IDELR 221 (D. ME 2021)

- In affirming hearing officer's decision to award tuition reimbursement and evaluation expenses, the court said:
  - Child made only minimal progress.
  - Refusal to continue Lindamood-Bell was not "reasonable" and was not "data driven".
  - *"...flexibility in methodology does not mean that a district can ignore evidence that its preferred structured literacy program has not worked and that the unique needs of a student may require school officials to provide alternative, accepted methodologies."*
  - While an IEP need not aim for grade-level advancement, it must provide more than de minimis progress from year to year.
  - *"...it appears Falmouth was eager simply to return to offering the programming that it had readily available, despite ample credible evidence that this programming did not address John's unique combination of deficits."*

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## CK v. Sylvania City Sch. Dist., 78 IDELR 65 (N.D. Ohio 2021)

- Mother of Ohio elementary student with autism and dyslexia sought reimbursement for private tutoring services she arranged to supplement reading instruction at school.
- The student historically was behind grade level in reading.
- Student initially received private Lindamood Bell tutoring, during non-school hours, but the student's parent later pulled the student from school to participate in LMB tutoring DURING school.
- Student's IEP:
  - Offered 100 minutes per week of reading instruction.
  - Goals and services designed to address executive functioning and social communication.

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## CK v. Sylvania City Sch. Dist., 78 IDELR 65 (N.D. Ohio 2021)

- Reimbursement denied.
- District had no obligation to maximize student’s potential.
  - IDEA requires district to develop an IEP that would allow student to make progress appropriate in light of student’s circumstances.
  - LMB tutoring – which required student to miss several hours of school each day – impeded his progress in other areas.
    - “The student’s goals in social communication and executive functioning, for example, are not advanced and are likely harmed by [LMB] tutoring taking [him] out of the classroom.”
    - Noted that the parent rejected district’s offer to include LMB instruction in the IEP based on preference for private tutoring.

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## Rogich v. Clark County School District, 79 IDELR 252 (D. Nev. 2021)

- A student who was born with hydrocephalus and diagnosed with multiple learning disabilities, including developmental dyslexia, was found eligible for special education services under the category of Other Health Impairment.
- After withdrawing the student from the School District for several years, the parents requested that the student be reevaluated for eligibility for special education services in the District.
- The reevaluation report again found the student eligible under OHI, and the proposed IEP stated that “multisensory instruction that will incorporate the simultaneous use of two or more sensory pathways.” was to be used.
- The parents rejected the IEP and sought reimbursement for their unilateral private placement.

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## Rogich v. Clark County School District, 79 IDELR 252 (D. Nev. 2021)

The court of appeals found that:

1. The District denied FAPE procedurally by refusing to discuss the types of programming provided by the District that had the capacity to address the Student's needs.
  - "Defendant failed to consider 'the concerns of the parents' by refusing to discuss with them during development of the IEP the types of programming provided by the District that had the capacity to address O.R.'s unique needs. O.R.'s parents had presented compelling professional evidence that was unrefuted or challenged by the District which established that O.R. required a teaching methodology with particular facets."
2. The District denied FAPE substantively because the child required a specific methodology that was research based, systematic, cumulative, and rigorously implemented in order to receive a FAPE.
  - "The Court finds that the District did not even have any program equivalent to Orton-Gillingham in terms of offering a multimodal teaching methodology. Thus, Defendant's alleged representation about a "multisensory" program in the IEP was illusory as the District had no such program or methodology."

## G.D. v. Swampscott Public Schools, 80 IDELR 149 (1<sup>st</sup> Cir. 2022)

- An eleven-year-old student was eligible to receive special education services due to her learning disabilities which included severe dyslexia, dysgraphia, and a phonological processing disorder.
- The parents sought a placement at "substantially separate school" for students with language-based disabilities, however, the student's IEP team decided on a public-day placement with services provided in both the general education and special education settings.
- The parents were dissatisfied with the student's progress, and unilaterally placed the student at a private school exclusively focused on SLD. The parents then filed a due process hearing request alleging that the district had denied the student a FAPE and seeking reimbursement for the private school tuition.

## G.D. v. Swampscott Public Schools, 80 IDELR 149 (1<sup>st</sup> Cir. 2022)

The Court of Appeals found that:

1. The District Court and the Hearing Officer properly considered the student's unique circumstances when determining whether the IEP was reasonably calculated to provide FAPE.
2. The District Court did not err in relying on "informal evidence" of the student's "slow gains" to determine that the Student's progress was appropriate in light of her circumstances.
  - A child receives a FAPE if a school district offers her "an IEP that is reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances." *Andrew F.*, 137 S. Ct. at 999. A standardized test is, by definition, designed to measure a child's progress without regard to her individual circumstances, let alone with regard to the individual circumstances for that child identified in her IEP.
3. Evidence showing that the student made "swift, significant, and quantifiable progress" at the private school after she was unilaterally placed did not show that the earlier IEP instituted by the school district was not reasonably calculated to enable the student to make appropriate progress, as "the progress itself post-dated the formulation of that IEP."
  - "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."

## What can public school boards do with this information?

## Important Takeaways from Cases Regarding Specialized Instruction and Methodology

- Yes, schools have wide discretion to determine methodology...  
...as long as it works.
  - Progress is always the key.
  - Data collection, documentation, and progress monitoring remain essential.
- Assessment instruments:
  - Staff must understand how to utilize, and
  - Be able to explain to the parents.

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## Important Takeaways from Cases Regarding Specialized Instruction and Methodology

- Programing must meet the individual needs of the student.
  - Can a single “approved” reading program be sufficient for all students?
  - Teachers must have the resources and training to implement.
- Know the child, your program(s), and how the proposed program meets the child’s needs.
  - Identify the student’s needs/deficits.
  - Develop an appropriate program.
  - Be able to explain how the program you have developed meets the student’s needs/deficits.

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## Important Takeaways from Cases Regarding Specialized Instruction and Methodology

- What are parents requesting?
  - Structured;
  - Research-based;
  - Multisensory;
  - Systematic;
  - Phonics-based;
  - Reading program with built-in progress monitoring
- What are your staff requesting?
  - Ask them.

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## Consider LEA Reading Certifications

- Provide teachers with program materials.
- Train the teachers to implement with fidelity.
  - Consider on-line training modules.
- “Certify” teachers who have completed your school division’s training program.
- Monitor service delivery and data collection through file audits.

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# Questions?

Thank you for your time!



Anne E. Mickey



Bradford A. King



LaRana J. Owens



Jason H. Ballum



Nicole S. Cheuk



Patrick T. Andriano



Pamela Y. O'Berry



Lori M. Purvis

