Legal Requirements for Progress Monitoring under the IDEA: What Do the Courts Say?[*]

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The special education literature has included a continuing line of articles and chapters that have translated for practitioners the legal meaning of the progress monitoring provisions in the successive versions of the Individuals with Disabilities Education Act (IDEA). This article examines this line of publications in light of the language of the applicable legal framework, including the parallel line of judicial rulings specific to progress monitoring under the IDEA. These judicial rulings, which are the centerpiece of this analysis and which span the period from 1990 to 2021, form a continuing and consistent pattern that is severely discrepant with the characterization in the publications to date. For example, in these progress-monitoring rulings the courts have applied the relatively relaxed analyses of either the procedural or implementation—not the substantive—category of the IDEA's "free appropriate public education" (FAPE) obligation. Similarly, rather than treating progress monitoring as an "absolutely essential" priority for IEPs based on objective measures and high frequency, the vast majority of the rulings have been in favor of districts despite evidence of progress monitoring provisions that are either entirely absent or do not meet such rigorous standards. Consequently, based on overlapping criteria of completeness, accuracy, and transparency, the conclusion is that the legal quality of these special education publications warrant improvement to be commensurate with their impressive level of legal quantity. The suggested improvements include not only clear differentiation between but also solid foundation for legal requirements and professional recommendations. Their purpose is for not just monitoring but achieving meaningful progress in the legal literacy and professional practice in educating students with disabilities.

The Supreme Court's most recent ruling under the Individuals with Disabilities Education Act (IDEA, 2018) has crystallized a long-standing and increasing interest in the progress aspect of the Act's central obligation, a free appropriate public education (FAPE). More specifically, in *Endrew F. v. Douglas County School District RE-1* (2017) the Court refined the substantive standard for FAPE in *Board of Education v. Rowley* (1982) by requiring the individualized education program (IEP) to be "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances" (p. 999).

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In the background section of its decision, the *Endrew F*. Court briefly mentioned the IDEA's progress monitoring provision as one of the "detailed set of procedures" for IEPs (p. 994). In the next section of its decision, in the transition to its formulated substantive standard for FAPE, the Court observed that "the procedures are there for a reason" (p. 1000). Based on this indirect connection, special education scholars (e.g., Yell & Bateman, 2020, p. 289; Yell et al., 2020, p. 318) have emphasized progress monitoring as one of the IDEA priorities for practitioners.

In previous articles, I have warned about professional misconceptions of *Endrew F.* (Zirkel, 2019) and the general need for increased legal accuracy in the literature of special education and related fields, such as school psychology (Zirkel, 2014a; Zirkel, 2020). Among the key applicable criteria that overlap with legal accuracy are completeness and transparency. More specifically, completeness in this context refers to having sufficiently comprehensive coverage of the applicable law, which typically includes an ample and systematic sample of the case law. Similarly, transparency here refers to the need to make clear whether the viewpoint is impartial, with due differentiation of legal advocacy or professional norms.

The purpose of this article is to provide a comprehensive and systematic snapshot of the case law specific to progress monitoring under the IDEA from an impartial legal lens as the basis for considering the legal accuracy of a representative sample of the pertinent professional literature. The overall intent is to provide constructive feedback for improving the published sources of legal literacy for special educators and related practitioners, such as school psychologists. It is part of the open dialog, analogous to public education's "marketplace of ideas" (e.g., *Board of Education, Island Trees Union Free School District v. Pico*, 1982, p. 867), that avoids orthodoxy and improves the profession, with the identified authors being leaders

subject to enhancement rather than excoriation. Finally, whether the prevailing published prescriptions for and priority of progress monitoring under the IDEA represents evidence-based best practice is a separate area of expertise; the scope of this analysis is limited solely to the legal dimension.

Professional Literature

The special education publications concerning IDEA progress monitoring that include its case law dimension form a limited and ongoing line by a relatively small group of authors. In an early article, Yell et al. (2006) characterized the 2004 amendments of the IDEA as "increase[ing] the federal mandate" for progress monitoring by requiring special education teachers to "monitor a student's progress toward meeting [the IEP's] annual goals *at least* every 9 weeks" (pp. 21–22). Perhaps this unwarranted precision in the required frequency is attributable to their foregoing description of IDEA 2004 as requiring implementation "as frequently as students in general education receive their report cards" (p. 14), which is closer to the language in the 1997 version of the IDEA. Moreover, although not directly addressing case law, the article warns that IEPs that lack a progress monitoring provision "probably will not pass legal muster" (p. 23).

In another article during the same year, Etscheidt (2006) identified ten hearing officer decisions that contained rulings concerning progress monitoring under the IDEA. All of these rulings, such as *Escambia County Public School System* (2004), were in favor of the parents. The only court decision that the article identified was not specific to progress monitoring; the cited 2001 ruling was limited to the issue of stay-put. The 2002 decision in this case, which Etscheidt did not cite, briefly mentioned the IDEA's progress monitoring provision along with the other IEP requirements but its rulings were specific to other issues (*Kevin T. v. Elmhurst Community School District No. 205*, 2001/2002). Yet, based on this skewed and limited sample of case law,

she concluded, without qualification, that IEP teams have the enforceable legal responsibility to "specify . . . the individuals responsible for data collection, along with the location, dates, and time of data collection" (p. 59).

A cluster of pertinent special education publications in 2012–13 specified various more questionable legal conclusions based on an even more limited sampling of case law. First, Yell and Busch (2012), without any accompanying citation of the legal basis, made the following assertion, which I have italicized in relevant part: "Developing IEPs that meet the *substantive* requirements of the IDEA . . . . can *only* be ensured if IEP teams . . . . adopt a data-based progress monitoring provision that is implemented *systematically and frequently*" (p. 42). Then, after citing Etscheidt's article and only the *Escambia County* hearing officer decision, they reached this conclusion without any court citation or inferable legal foundation:

> Administrative and judicial decisions have shown that there are four critical mistakes IEP teams make with respect to monitoring students' progress. These mistakes are failing to (a) include any method for progress monitoring in IEPs, (b) delegate the task of collecting the progress-monitoring data to anyone on the team, (c) collect progress-monitoring data frequently enough to meet the requirements of the data, and (d) collect meaningful data that can actually provide valid information regarding a student's progress. An important consideration in determining how progress will be monitored, therefore, is that the measures must be objective and meaningful. That is, subjective or anecdotal data are not sufficient. (p. 46)

Soon thereafter, Yell et al. (2013) identified the "how" of the IEP's provision for progress

monitoring as one of the four key criteria "at the heart of the IEP process" (p. 701). For the basis for this criterion being "legally sound" (p. 701), they cited four hearing officer decisions from 2003–2004 with rulings in favor of parents, including the *Escambia County* decision. During the same year, Yell and Rozalski's (2013) analysis of the IDEA peer-reviewed research provision incidentally characterized the IDEA as "requir[ing] that student progress toward their goals be monitored on a systematic and frequent basis" (p. 168).

A few years later, Yell et al. (2016) concluded that, based on the IDEA and case law, "failing to monitor student progress" (p. 38) was one of "five serious substantive errors that IEP teams make" (p. 32). The "litigation" basis that they cited for this progress-monitoring conclusion consisted of *Escambia County* and two others of the same four hearing officer decisions from 2003–2004 along with two court decisions that were limited to pro-district rulings not specific to progress monitoring.

A pair of follow-up articles four years later repeated such characterizations, with the only cited case law support being the Supreme Court's decision in *Endrew F.* First, Yell and Bateman (2020) attributed to *Endrew F*. the purported legal requirement that the progress monitoring data be "relevant and meaningful" (p. 289). Next, in the same journal, Yell et al. (2020) again identified failure to monitor student progress as among the top five substantive violations by IEP teams, characterizing them as "very likely [to] result in rulings by hearing officers and judges that a school district did not provide a FAPE" (p. 316). Consequently, they concluded that "monitoring a student's progress is absolutely essential" (p. 318). Most recently, Rojo, Nozari, and Bryant (2021) relied on *Endrew F.*, including the Tenth Circuit's as well as the Supreme Court's rulings, as the rationale for their recommended method for progress monitoring in mathematics.

In sum, the professional literature in special education from 2006 to 2020 has rather consistently characterized progress monitoring under the IDEA as a priority substantive aspect of FAPE that, if violated, will likely be fatal upon adjudication. Moreover, the cited supportive case law, beyond the asserted implication of *Endrew F.*, amounted to a handful of hearing officer decisions in 2003–2004.

Legal Framework

The analysis of case law specific to progress monitoring warrants a prefatory overview of three successive levels of the outer framework: (a) the hierarchy for IDEA case law, (b) the settled dimensions, or categories, of FAPE, and (c) the progress monitoring provision under each of the successive versions of the IDEA.

Hierarchy

As explained in more detail elsewhere (e.g., Zirkel, 2014b), the successive levels of law under the IDEA start with the foundation of the legislation and, to the extent of any elaborations that fit within the intended scope of the statute, its regulations. Moreover, because this legislation is primarily a funding act, its name and content has undergone periodic amendments upon reauthorizations. The case law under the IDEA that interprets and applies its provisions starts with administrative adjudication via hearing officer decisions and, in the eight or so states that have opted for a second tier, review officer decisions. These administrative decisions have negligible precedential value but, especially when the decisions at the judicial level have not reached a critical mass, they provide an indication of what may be the contours of that ultimately settled case law. Finally, the ultimate and successively more weighty levels of the case law are the three tiers of the courts. Although the IDEA provides concurrent jurisdiction for state and federal courts, almost all of the judicial rulings under the IDEA in the past two or three decades

have come from federal courts. Thus, the three applicable tiers, with successively fewer relevant rulings at each one, are (a) the federal district courts, (b) the U.S. circuit courts of appeal, and (c) the U.S. Supreme Court. Finally, under the vertical and horizontal dimensions of precedent, the ruling of the court at each of these successive judicial levels is not only binding on hearing/ review officers and the lower court levels in its jurisdiction but also often persuasive in other jurisdictions.

FAPE

FAPE is, as one appellate court appropriately analogized, "the central pillar" of the IDEA (*Sytsema v. Academy School District*, 2008, p. 312), with the IEP serving as its "cornerstone" (*Murray v. Montrose County School District RE-1J*, 1995, p. 923). As partially codified in the IDEA legislation and as otherwise filled in by the courts, three primary dimensions of FAPE are now well settled: procedural, substantive, and implementation. As summarized elsewhere in more detail (Zirkel, 2022), these three categories are as follows:

(a) the *procedural* dimension requires a two-part test in adjudication: did the district violate one or more of the procedural requirements of the IDEA and, if so, did the violation(s) result in a substantive loss to the child or a significant interference with parental participation

(b) the *substantive* dimension is the aforementioned standard under *Endrew F.* in terms of a reasonable calculation of appropriate progress in light of the individual child's circumstances

(c) the settled third dimension, as compared to a still developing aspect that targets the next rather than the most recent IEP, is whether any shortfall in the school district's *implementation* was "material," which is more than minor for

any substantial or significant provisions of the IEP.

Progress Monitoring

Serving as the legal framework for the cumulating case law specific to progress monitoring are the successive versions of the legislation and its parallel regulations. Although the IDEA has been amended more frequently, the provisions specific to this particular IEP content requirement fit within three successive stages, which are presented here in inverse chronological order. The language has changed at each of these stages for the "how" and "when" of the IEP progress monitoring requirement, and the regulations have not added any elaboration to this language.

During the present stage, which started with the 2004 Amendments of the IDEA, the legislation specifies various required contents for IEPs, starting with "present levels of academic achievement and functional performance" (PLAAFPs), "measurable annual goals," and the following progress monitoring provision (§ 1414[d][1][A][i][III]), which the IDEA regulations repeat without elaboration (§ 300.320[a][3]):

> a description of how the child's progress toward meeting the [measurable] annual goals . . . will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided

The previous version of the IDEA, based on the 1997 reauthorization, contained the following different language for this particular content requirement for IEPs (P.L. 105-17, 111 STAT. 85):

> a statement of (I) how the child's progress toward the [measurable] annual goals … will be measured; (II) how the child's parents will be

> regularly informed (by such means as periodic report cards), at least as often as parents are informed of their non-disabled children's progress, of—(aa) their child's progress toward the [measurable] annual goals . . .; and (bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year

Finally, the original version of the IDEA, which was the Education of All Handicapped Children Act of 1975 and which did not change in relevant part until 1997, provided that the IEP include the following formulation for progress monitoring (P.L. 94-142, 89 STAT. 776): "appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved."

These three consecutive formulations represent the IDEA's IEP requirement for "progress monitoring," although none of them specifically use this term. As the successively applicable versions of the pertinent IDEA provision, they serve as the framework for the ensuing case law.

Case Law

The method was a Boolean search of the court decisions in the Westlaw and SpecialedConnection databases that included, among other search terms, "progress monitoring" and the citations and phrases of the progress monitoring provisions of the three successive versions of the IDEA legislation and regulations. The selection among the resulting 200+ decisions was limited to those that contained a ruling specific to the IEP's progress monitoring requirement. Thus, this criterion eliminated the many cases that merely mentioned or cited the IDEA's IEP progress monitoring provision in the background or footnotes but did not actually address a parent's claim with a ruling that applied to this provision. Similarly, the scope did not

extend to the distinct and very limited other progress monitoring or reporting provisions of the IDEA, such as the requirement for continuous progress monitoring that was added in the 2006 regulations for the identification of students with learning disabilities via the response to intervention approach (§ 300.309[b][2]).

Next, the selected cases were tracked forward to make sure that the final sample was limited to the most recent relevant decision. For those decisions that were affirmed on appeal on more general grounds without specifically addressing the progress monitoring ruling, the tabulation was based on the lower court decision, with the citation adding the nonspecific affirmance.

The Appendix provides a tabulation of the resulting case law in chronological order. The first two columns provide the name and citation of the court decision, with any nonspecific affirmance cited in asterisks at the end of the Appendix. The third column provides the express or inferable FAPE category and the abbreviated characterization of the parent's progress monitoring claim. The fourth column provides the court's ruling specific to this claim as being either in favor of the parent or the school district. The final column provides clarifying comments for the ruling entry. For the acronyms explained earlier in this article, the Appendix uses PLAAPF generically, with the understanding that the version prior to the 2004 Amendments was "present levels of educational performance."

For inter-observer agreement, the author obtained the independent coding entries of four experienced IDEA hearing officers, each from a different state within the top ten jurisdictions for due process decisions, for (a) FAPE category and (b) ruling outcome. In relation to the author's entries, their average level of agreement was 94% (with no single one being less than 90%) for the FAPE category and 99% for the outcome of the 32 court rulings.

Review of the Appendix reveals several relevant findings. First, there has been a continuing line of court rulings specific to progress monitoring under the IDEA that currently totals approximately 33 decisions, allowing for limited false positives and false negatives. As the third and final columns of the Appendix partially revealed, progress monitoring was a limited or marginal issue in many of these cases, being either a subset of another IEP content claim or one of multiple FAPE claims. Even in *Escambia County Board of Education v. Benton* (2005), the court regarded the lack of benchmarks in the progress reporting as significant when combined with vague present educational levels and non-measurable goals. Moreover, in that case the IEP's failure to address the student's major behavioral problems and the then, but no longer, applicable state regulation that placed the burden of persuasion on the district contributed to the denial of FAPE.

Second, these court rulings have established a settled pattern of FAPE analysis. Most of these court rulings categorized progress monitoring as a procedural FAPE issue. Although not entirely clear-cut, the limited remainder were in the implementation and substantive categories. For procedural FAPE, the courts have followed the two-part analysis by (a) providing rather relaxed interpretations of the respective versions of the IDEA's progress monitoring provisions so as to conclude that, contrary to the parent's claim, the defendant district had not engaged in a violation, or (b) even if there were a violation, the parent had not proven the requisite second-step loss (referred to in the Comments column with the abbreviated reference to "harmless error"). For the handful of implementation FAPE claims, the courts found either lack of proof of a deviation or that the deviation was not sufficient to reach the requisite materiality level. For the one or two substantive FAPE rulings, the courts applied the relatively relaxed standard in *Rowley* and, as subsequently refined, in *Endrew F*.

Third, the outcomes of these also formed a settled pattern. More specifically, the outcome was in favor of the school district in approximately 85–90% of these 33 rulings, including the five most recent of the six federal appellate court rulings. As the Comments column clarifies, the relatively few pro-parent rulings were largely part of a much larger, flagrant pattern of FAPE violations. Moreover, in light of the predominance of procedural FAPE in these cases and the lack of change in the substantive FAPE rulings more generally after *Endrew F*., the outcomes trend in the Appendix remained the same after this Supreme Court decision despite its replacement of "benefit" with "progress."

Finally, overlapping with the previous two findings, the courts generally continued their tradition of deference to school authorities and rather relaxed analyses that do not come close to the rigorous and nuanced approach of special education experts. Moreover, in most of these 33 court decisions, progress monitoring was one of multiple issues, without a primary or prominent role.

Discussion

Putting the frequency and outcomes of these rulings in perspective, Zirkel and Hetrick's (2016) more broad-based analysis of procedural FAPE decisions revealed that the rulings specific to progress monitoring are (a) at the low end in their frequency in relation to the various other IDEA procedural claims and (b) at the high end of the overall pronounced pro-district outcomes trend. Thus, consistent with that wider analysis, the findings here reveal that a systematic and impartial analysis of the case law does not at all support the purported high legal priority of progress monitoring under the IDEA for special education practitioners. The purported strong likelihood of fatal adjudication upon not following the publications' repeated prescriptions, such as frequent and objective progress monitoring, are not at all supported by the

frequency and outcomes of the applicable court rulings.

More specifically, the frequency of judicial rulings specific to progress monitoring, even upon including those that are marginally on point, amounts to approximately one half of one percent of the court decisions under the IDEA for the same extended period. Second, the outcomes are fatal for the plaintiff-parents, not the defendant-districts. A pair of overlapping reasons specific to progress monitoring are major contributing factors: (a) as excerpted above under "Legal Framework," the successive provisions in the IDEA legislation and regulations are far from rigorous, and (b) as the "Claims" and "Comments" columns of the Appendix reveal, the courts largely analyze this issue as a matter of procedural FAPE, thus requiring preponderant proof of not only a violation but also a resulting loss to the child or parents. Showing the initial hurdle of the violation step, the courts in the cases since 1997 summarily rejected claims of lack of objective measures for progress monitoring as not being required by the applicable IDEA legislation. Demonstrating the more frequently fatal second step, the courts have ruled that even if the district failed to comply with the IDEA's applicable provision for progress monitoring, the violation amounted to harmless error, which extended to the IEP's lack of any specification for frequency. Indeed, as the initial federal appellate court decision in the Appendix illustrates, this outcome extends to a district's entire omission of progress monitoring without a showing of the requisite loss to the student or parents.

Other more general primary reasons are (a) the predominant adjudicative analysis as procedural FAPE claims, thus subject to the district-favorable harmless-error approach; (b) the continuing tradition of judicial deference to school authorities; and (c) the imbalance of attorney representation and expert testimony in favor of school districts. A less pronounced systemic reason is the settlement process. Although stereotypically associated with a strongly skewing

effect, this process does not account for the inaccuracy of the publications' characterization of the case law for several reasons.

First, the special education publications refer to adjudications, without any mention of the likelihood of settlement. Second, even if they implicitly referred to the subsurface level of the litigation iceberg, the cases that do not end in a decision include abandonments as well as settlements. Third, to the extent that the outcome odds contribute to settlements, it also affects the parents, thus increasing the proportion of close cases for the courts. Fourth, the factors that lead to settlements extend well beyond the probabilities of losing or winning. As Baker (2019) observed, "countless other factors that are wholly detached from the merits often play crucial roles in achieving an agreed upon resolution" (p. 270). In the special education context, these other settlement factors include, among others, an estimate of transaction costs, the extent of the parents' request relief, the relationship with and perception of the opposing party, the perceived effect on public image and future litigation, the state's availability and efficacy of alternate dispute resolution mechanisms, and the role of insurance companies and attorneys' fees. Fifth, the settlement process occurs before more often than after the issuance of the hearing officer decision; yet, half of the hearing officer decisions in the 33 cases in the Appendix were completely or partially in favor of the parent, belying the characterization that districts settle all but the clear winners. Sixth, this outcomes ratio of these cases, which is approximately 7:1, is significantly higher than the overall outcomes ratio for IDEA cases generally, which via estimated extrapolation to rulings as the unit of analysis approximates 4:1 and which is subject to the same settlement process. Finally, to the extent that settlements are based on likelihood of winning or losing, the judicial rulings, as a matter of vertical and horizontal precedent, shape those odds as they increasingly establish a settled pattern.

Just as the literature review herein shows that the authors of these special education publications provide a largely consistent view with individual differences, the inter-observer agreement herein reveals individual variation among impartial legal specialists within an overall marked level of concurrence similar to that of the adjudicators at the successive levels in these cases. The distinct difference is between rather than within the two perspectives.

The rather stark difference between the professional literature as to the case law significance of progress monitoring and these findings from the sufficiently settled pattern of the court decisions warrants closer examination. More specifically, the differences and their significance are identifiable for each of the three aforementioned facets of legal quality—completeness, accuracy, and transparency.

Completeness

The pertinent literature is severely discrepant from reasonable completeness, with due consideration for the timing of the cited publications and the cited judicial rulings. For example, Etscheidt (2006) relied almost exclusively on hearing officer decisions even though there were a handful of court decisions issued well before her article.

The disparity became much more pronounced in the line of publications between 2012 and 2020. Each of them relied on far fewer and no more recent hearing officer decisions than did Etscheidt and yet made less tempered legal conclusions, despite successively increased number of available and relevant judicial rulings. Moreover, each of the first three of these four articles repeated citation to the hearing officer decision in the Escambia County case, missing the court's affirmance in *Escambia County Board of Education v. Benton* (2005). Only one of these publications (Yell et al., 2016) cited this court decision but for a separate serious IEP error and without showing any connection to the separately cited hearing officer decision. For progress

monitoring, this article cited two court decisions, but neither case was on point, whereas by then, even after allowing for the time lag in the publication process, there had been at least a dozen relevant judicial rulings. The most recent article relied on the Supreme Court's *Endrew F.* decision, which did not even include progress monitoring in its various dicta, whereas by then there were approximately two dozen directly relevant rulings. Interestingly, these relevant rulings include the one for progress monitoring in the Tenth Circuit's decision in *Endrew F.*, which remains effective because its procedural FAPE rulings were not part of the appeal to and reversal by the Supreme Court.

Accuracy

The relevant judicial rulings successively available for each of these publications shows the significant legal inaccuracy of each of them in several respects. Re-examination of the neglected Tenth Circuit Court of Appeal decision in *Endrew F. v. Douglas County School District RE-1* (2015) identifies more than one example. First, noting that "neither the IDEA nor its regulations actually prescribe the frequency or the content of progress reports," the Tenth Circuit ruled that "even assuming a procedural violation, the District's progress reporting did not result in a denial of FAPE" (p. 1335). Second, the court distinguished the *Escambia County School District v. Benton* (2005) decision, pointing out that the procedural violations in that earlier case were more extensive, including unmeasurable goals, and resulted in the requisite second-step loss. Finally, the court expressly acknowledged the professional importance of progress monitoring per Yell et al. (2013) but, as a legal matter, concluded that without this required loss there was no denial of FAPE.

The disparity between the cited publication's characterization of the case law and the contents of the relevant rulings, as canvassed in the Appendix, is evident more generally. First,

contrary to the publications' repeated categorization of progress monitoring as substantive FAPE, the entries in column three of the Appendix reveal that the courts predominantly categorized this issue as a matter of procedural FAPE. Although the inter-observer agreement step revealed some variance with the substantive category, the cases that addressed the claim in the separate category of FAPE implementation were the clearer exception to the procedural FAPE predominance. The difference in the prevailing literature is likely attributable to the norms of these authors, who from a professional perspective understandably view IEP contents as substantive matters and who largely do not have corresponding specialized training in not just the terminological nuances but the broader lens of what may be termed "legal thinking."

Second and more significantly, whereas these publications provide the impression that failure to adhere to their progress monitoring prescriptions will likely be fatal upon adjudication, the entries in the Rulings column tell a very different story in light of (a) the aforementioned adjudicative analyses for procedural and implementation categories of FAPE, which are clearly less rigorous than professional best-practice norms, and (b) the continuing tradition of judicial deference to the expertise of school authorities, which again is not the same as the professional norm of achieving more effective practice. Similarly, the top priority that these publications put on progress monitoring as absolutely essential is contrary to the negligible frequency that 33 cases represent among the more than 5000 decisions under the IDEA reported in Westlaw and SpecialedConnection during the same period.

Third, comparison of particular assertions in the publications with the entries in the Comments column of the Appendix reveal further examples of legal inaccuracy. Identifying the examples in order of publication, none of the rulings in the Appendix support Etscheidt's (2006) asserted progress monitoring requirement to specify the dates and location of data collection.

Next in chronological order of the publications, Yell and Busch's (2012) above-quoted characterization of case law as requiring "objective" progress monitoring is clearly contradicted by the case law in two successive periods of the Appendix. First, for the six cases that applied the progress monitoring provision prior to the 1997 amendments, which expressly required "objective criteria," the majority of the rulings found progress data that did not meet this standard did not amount to denial of FAPE. As shown by comparing the Sixth Circuit rulings in *Doe* (1990) and *Cleveland* (1998), the difference in outcomes was in notable part due to the second of the two steps in the applicable analysis for procedural FAPE. Second, for the many more relevant rulings under the 1997 and 2004 versions of the progress monitoring provision, which eliminated the "objective criteria" language, objectivity was clearly not an outcome-determinative criterion. Indeed, in *Preciado* (2020), which was the only one of these rulings in favor of the plaintiff-parent after *Escambia County*, the seemingly objective progress monitoring tool (Istation) contributed to a denial of FAPE largely because the district did not explain it to the parent.

Soon thereafter, Yell and Rozalski's (2013) characterization of the current IDEA as requiring "systematic and frequent" progress monitoring (p. 168) does not square with the IDEA's rather bare "how" and "when" requirements. Per the Tenth Circuit Court of Appeals aforementioned reminder in *Endrew F.* and as the federal district court independently observed in *J.H. v. Riverside County Office of Education* (2015): "The IDEA imposes no specific requirements about the content or frequency of reports" (p. *12).

Subsequently, Yell and Bateman's (2020) aforementioned attribution to *Endrew F.* of "relevant and meaningful" criteria for progress monitoring data was not part of the Court's ruling, although relevance is a general criterion for any adjudicative evidence and

meaningfulness is one way of viewing the appropriate progress that must be reasonably calculated regardless of what the IEP's progress monitoring provision might be.

Finally and most significantly, the Yell et al. (2020) characterization of the very high likelihood of judges ruling in favor of parents for district progress monitoring violations is clearly opposite to the very high proportion in favor of districts for the rulings in the Appendix. Specifically, depending on whether their final version was before or after the March 11 issuance of *Preciado* (2020), the proportion of the rulings to date that was in favor of districts was either 89% or 86%.

Transparency

For this next overlapping aspect of legal quality, two dimensions of transparency are key to useful understanding by the practitioner-consumers of the professional literature. The vertical dimension is author transparency in clearly differentiating legal requirements as the minimum from professional norms as the optimum. The judicial gap-filling for the legal requirements for progress monitoring under the IDEA reflects a distinction that needs to continued clarification: "The non-rigorous deferential lens of the courts has been distinctly different from the normative lens of the profession" (Zirkel, 2013, p. 505). Rather than fusing these two dimensions into euphemistic phrases, such as "legally correct and educationally useful" (Bateman & Linden, 2012), "educational[ly] meaningful and legally sound" (Yell & Busch, 2012, p. 47; Yell et al., 2020, p. 346), "educationally appropriate and legally sound" (Yell et al., 2013, pp. 671, 686, 701–702), such contributions to the literature need first to separate the legal requirements and the professional recommendations, showing the specific basis for each of these levels and the relationship between them.

The intertwined horizontal dimension is making similarly transparent whether the author is professing an impartial or an advocacy perspective with regard to the law. In law reviews, the difference is relatively clear between description of what the law is and prescription of what the law should be. In special education journals, the use of the distinction between "must" and "should" needs more clarity for the readership.

The combination of these two dimensions is a source of confusion, such as the statements that progress monitoring measures "must be objective" (Yell & Busch, 2012, p. 46) and that progress monitoring is "absolutely essential" (Yell et al., 2020, p. 318). Are the authors impartially describing what the case law says or are they engaged in legal advocacy or professional prophylaxis? The readership in special education needs clear identification, via precise language and explicit context, of which of these valued perspectives applies. Certainly, such transparency allows for healthy latitude for individual differences among these authors just as it does within (a) the impartial legal perspective, as the judges in the 33 cases show, and (b) both between and within the advocacy perspectives represented by the attorneys in these cases.

Finally, whether fulfilling the repeated messages of these publications for prioritizing progress monitoring will result in actual progress for special education students, especially the gap-closing progress that is beyond the reasonable-calculation standard of *Endrew F.*, is an open question. As Sayeski et al. (2019) pointed out, effective monitoring and effective delivery of specially designed instruction are not identical. The educational effectiveness of these prescriptions is a matter for the professional, not the legal side, of special education research and writing. In contrast, the focus here is limited to accuracy and the related aspects of their legal dimension.

Conclusion

This candid examination of the legal side of special education publications concerning progress monitoring is intended for constructive quality improvement. Thanks to a pioneering and productive cluster of authors, the quantity of legal information in the special education literature is impressive in comparison, for example, to the journal articles in the related field of school psychology (Zaheer & Zirkel, 2014). In addition to the suggestions for improved transparency, the completeness and accuracy dimensions warrant either fulfilling the norms for legal research that are commensurate with those for educational research or, as previously recommended (Zirkel, 2014a; Zirkel, 2019), a significantly higher level of collaboration in authorship and peer reviewing from legally trained specialists. The overall shared purpose is progress in the scholarship and practice of special education, with due demarcation of the foundation of legal requirements arising from legislation and litigation as differentiated from the higher and more nuanced levels of evidence-based professional recommendations.

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Appendix: Court Decisions with Rulings Specific to Progress Monitoring under the IDEA

Case Name	Citation	FAPE Category – PM Claim	Ruling	Comments
Doe v. Defendant I	898 F.2d 1186 (6th Cir. 1990)	procedural – entire omission	for SD	violation but harmless error ("technical deviations" for parental participation)
Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist.	930 F. Supp. 83 (S.D.N.Y. 1996)	procedural (subset of PLAAFPs) – vague measures	for P	subpart of 1 of 4 procedural violations + separate substantive denial of FAPE
D.B. v. Ocean Twp. Bd. of Educ.	985 F. Supp. 457 (D.N.J. 1997)	procedural – insufficient objectivity	for SD	violation but promptly remedied by district – no remedy or attorneys' fees (thus, close call re ruling)
Cleveland Heights-Univ. Heights Sch. Dist. v. Boss	144 F.3d 391 (6th Cir. 1998)	procedural – insufficient objectivity	for P	harmful violation (distinguishing *Doe*)
Bd. of Educ. of Avon Lake City Sch. Dist.	9 F. Supp. 2d 811 (N.D. Ohio 1998)	procedural (subset of goals) – inadequate	for SD	no violation [marginal case]
Bd. of Educ. of Montgomery Cnty. v. Brett Y.	155 F.3d 557 (4th Cir. 1998)	procedural (subset of goals) – insufficient objectivity	for SD	harmless error in the context of this case
Escambia Cnty. Bd. of Educ. v. Benton	406 F. Supp. 2d 1248 (S.D. Ala. 2005)	procedural (part of cluster) – absence of notations of mastery	for P	clustered with non-measurable goals and vague PLAAFPs) + separate FBA-BIP denial of FAPE
Virginia S. v. Dep't of Educ., Haw.	47 IDELR ¶ 42 (D. Haw. 2007)	procedural (subset of goals/ PLAAFPs) – inadequate	for SD	clearly included – distinguishing *Escambia* [marginal case]
Pierce v. Mason City Sch. Dist.	48 IDELR ¶ 7 (S.D. Ohio 2007)	procedural (subset of goals) – not objective	for SD	lack of standardized measures not fatal (unlike "objective" requirement in former IDEA)
Ashland Sch. Dist. v. Parents of Student R.J.	585 F. Supp. 2d 1208 (D. Or. 2008)*	implementation – report cards alone	for SD	adequate including informal and unquantified parts – not material deviation

Stanley C. v. M.S.D. of Sw. Allen Cnty. Schs.	628 F. Supp. 2d 902 (N.D. Ind. 2008)	procedural – meaningless evaluation codes	for SD	multiplicity of communications was cumulatively adequate
W.T. v. Bd. of Educ. of N.Y.C. Sch. Dist.	716 F. Supp. 2d 270 (S.D.N.Y. 2010)	procedural – omission of methods of measurement	for SD	harmless error in the context of this case
P.K. v. N.Y.C. Dep't of Educ.	819 F. Supp. 2d 90 (S.D.N.Y. 2010)	procedural – omission of methods of measurement	for SD	harmless error (citing *W.T.* and analogous decisions in various jurisdictions)
R.P. v Prescott Unified Sch. Dist.	631 F.3d 1117 (9th Cir. 2011)	procedural – lack of objectivity	for SD	sufficiently objective
Bridges v. Spartanburg Cnty. Sch. Dist. 2	57 IDELR ¶ 128 (D.S.C. 2011)	procedural (subset of PLAAFPs/goals) – teacher judgment of %	for SD	sufficiently measurable and, in any event, harmless error
T.G. v. Midland Sch. Dist.	848 F. Supp. 2d 902 (C.D. Ill. 2012)	procedural (subset of goals) – insufficient objectivity	for SD	sufficiently objective in context – including teacher judgment of writing goal on numerical scale
J.A. v. N.Y.C. Dep't of Educ.	58 IDELR ¶ 223 (S.D.N.Y. 2012)	procedural – omission of methods of measurement	for SD	harmless error (citing *W.T.* and an analogous other previous decision in same jurisdiction)
E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle	60 IDELR ¶ 243 (S.D.N.Y. 2013)	procedural – inadequate	for SD	no violation – clearly sufficient
A.M. v. N.Y.C. Dep't of Educ.	964 F. Supp. 2d 250 (S.D.N.Y. 2013)	procedural (subset of goals) – no specific measurement standard	for SD	harmless error (citing *P.K.* and a related other previous decision in same jurisdiction) [marginal case]
Matthew O. v. Dep't of Educ. Haw.	62 IDELR ¶ 225 (D. Haw. 2014)	procedural (subset of PLAAFPs – omission of "when"	for SD	harmless error – parents were well aware of quarterly basis based on past practice
Anthony C. v. Dep't of Educ.	62 IDELR ¶ 257 (D. Haw. 2014)	procedural (subset of goals) – insufficiently clear re "when"	for SD	harmless error in this case
Forest Grove Sch. Dist. v. Student	63 IDELR ¶ 163 (D. Or. 2014)**	procedural (including progress notes)	for SD	harmless error in this case (and no requirement for progress notes)

West-Linn Wilsonville Sch. Dist. v. Student	63 IDELR ¶ 251 (D. Or. 2014)	implementation – lack of numeric specificity	for SD	not material failure – detailed notes [marginal case]
Endrew F. v. Douglas Cnty. Sch. Dist. RE-1	798 F.3d 321 (10th Cir. 2015)***	procedural – absent or either limited in detail or conclusory	for SD	harmless error (distinguishing *Escambia*) – not challenged in appeal to S. Ct.
J.H. v. Riverside Cnty. Off. of Educ.	2015 WL 13762931 (C.D. Cal. 2015)	procedural – lack of sufficient detail and frequency	for SD	"The IDEA imposes no specific requirements about the content or frequency of reports."
L.B. v. Katonah-Lewisboro Union Free Sch. Dist.	68 IDELR ¶ 157 (S.D.N.Y. 2016)	procedural – cursory and unquantified	for SD	not violation and, in any event, no resulting loss [marginal case]
T.M. v. Quakertown Cmty. Sch. Dist.	251 F. Supp. 3d 792 (E.D. Pa. 2017)	implementation	for SD	effectively implemented and supervised (partially substantive) [marginal case]
Renee J. v. Hous. Indep. Sch. Dist.	333 F. Supp. 3d 674 (S.D. Tex. 2017)****	procedural – lapse	for SD	harmless error due to prompt correction
Oskowis v. Sedona-Oak Creek Unified Sch. Dist. #9	73 IDELR ¶ 226 (D. Ariz. 2019)	implementation – failed to fulfill IEP PM provision	for SD	unrebutted hearing officer finding that district fulfilled this provision
Preciado v. Bd. of Educ. of Clovis Mun. Schs.	443 F. Supp. 3d 1289 (D.N.M. 2020)	procedural – unexplained Istation progress method	for P	resulting loss to parental participation – but limited part compared to other violations [marginal case]
McKnight v. Lyon Cnty. Sch. Dist.	812 F. App'x 455 (9th Cir. 2020)	procedural – insufficient progress information	for SD	no violation – complied with regulatory requirement
Whitaker v. Bd. of Educ. of Prince George's Cnty. Pub. Schs.	77 IDELR ¶ 64 (D. Md. 2020)	procedural – insufficient frequency (arguably implementation)	for SD	no violation – done quarterly per IEP specification (thus, no need to determine step 2 loss issue)
Alexander G. v. Downingtown Area Sch. Dist.	78 IDELR ¶ 213 (E.D. Pa. 2021)	substantive – insufficient and inaccurate reports	for SD	failure to prove – unsupported by the record [marginal case]
Thurman G. v. Sweetwater Indep. Sch. Dist.	79 IDELR ¶ 66 (N.D. Tex. 2021)	procedural – inadequate	for SD	sufficiently detailed and, in any event, harmless error

Capistrano Unified Sch. Dist. v. S.W.	21 F.4th 1125 (9th Cir. 2021)	implementation – not consistently quantitative	for SD	failure to prove deviation – "there is no specific form of measurement required by statute or case law" (citing *R.P.*)

* *aff'd,* 588 F.3d 1004 (9th Cir. 2009)
** *aff'd*, 665 F. App'x 612 (9th Cir. 2016)
*** *rev'd on other grounds*, 137 S. 988 Ct. (2017)
**** *aff'd,* 913 F.3d 523 (5th Cir. 2019)