

Forest Grove v. T.A. Rejoinder to Zirkel: An Attempt to Profit From Malfeasance?

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Peter W. D. Wright¹, James B. Hale², Erica M. Backenson²,
Eleazar C. Eusebio³, and Shauna G. Dixon⁴

Abstract

In this issue, Professor Perry Zirkel argues that the points presented in the Dixon, Eusebio, Turton, Wright, and Hale treatise of the *Forest Grove School District v. T.A.* Supreme Court case confuses “legal requirements with professional norms.” Although we appreciate Zirkel’s acknowledgment that our position reflects the professional norm—that comprehensive evaluation of psychological processes is critical for identifying children with learning and other disabilities—this position does not equate with “confusion” regarding the Individuals with Disabilities Education Improvement Act statutory or regulatory requirements, or legal precedents, presented in Dixon et al. On the contrary, Dixon et al. specifically address all three requirements in their article, suggesting Zirkel’s rebuttal is not supported. The resultant effects of Zirkel’s arguments on public opinion, professional conduct, and individual children served by the law will be elucidated in this rebuttal.

Keywords

comprehensive evaluation, special education law, assessment

On June 22, 2009, the U.S. Supreme Court issued their decision in *Forest Grove School District v. T.A.* (2009).¹ This is a case about a child who had a disability, should have been found eligible for special education and an Individualized Education Program (IEP), but was not found eligible by the school multidisciplinary team, did not have an IEP, and did not receive special education services. The parents removed the child from the public school, placed the child into a private school, and sued the local public school district for reimbursement of the private school tuition. The Individuals with Disabilities Education Act (IDEA; 20 USC § 1412(a)(10)(C)(ii)) expressly states that, to obtain reimbursement, the child must have “previously received” special education services prior to being enrolled in a private placement. (Note: The special education law was enacted in 1975. There have been revisions over the years. It was revised in 1997 and most

¹Wrightslaw, Deltaville, VA, USA

²University of Calgary, Calgary, Alberta, Canada

³The Chicago School of Professional Psychology, Chicago, IL, USA

⁴St. John’s University, New York, NY, USA

Corresponding Author:

James B. Hale, Professor of Education and Paediatrics, University of Calgary, Education Tower, Suite 538, 2500 University Drive NW, Calgary, AB T2N 1N4, Canada.

Email: halejb@ucalgary.ca

recently in 2004. It was known as IDEA 1997 and is now referred to as IDEA 2004. After each revision, the federal regulations were issued 2 years later. Since this case began in December, 2003, it was pursuant to IDEA 1997 and the 1999 regulations. With the 2004 revision, the wording of the critical statute and regulation remained unchanged.) The school district argued that since the child had not “previously received” services, the parents could not be reimbursed. In other words, the statute provided an immunity from liability for the school district.

Dixon, Eusebio, Turton, Wright, and Hale (2011) published “*Forest Grove School District v. T.A. Supreme Court Case: Implications for School Psychology Practice*” in the *Journal of Psychoeducational Assessment* in which the authors stressed the need for comprehensive psychoeducational assessments in all areas of suspected disability. In the current issue, Professor Perry Zirkel² writes a critique of that article alleging that the “article’s reliance on the Supreme Court’s decision in *Forest Grove* is flawed for several reasons” (p. 314). Zirkel expressed concerns that the authors confused legal requirements with professional norms.

In rebuttal to Zirkel’s (2013) claims, let us be clear on the Dixon et al. (2011) position. Dixon et al. explained that

Although teachers, school psychologists, and other practitioners can be integral members of teams providing RTI services, school psychologists are the team members most likely to have advanced training in comprehensive psychoeducational evaluation of psychological processes. School psychologists not only can conduct these evaluations, but work with team members so that they can better understand the implications of their findings. This interdisciplinary effort can help others see that comprehensive evaluations are not just for disability identification purposes but intervention as well (Fiorello et al., 2009; Hale et al., 2010). If school psychologists are unprepared to conduct these evaluations, school districts must contract with individuals qualified to perform the comprehensive evaluations of psychological processes, which would be costly. It might be the case that a comprehensive psychoeducational evaluation would have accurately identified T.A.’s disabilities, and his needs could have been met in the public school. (p. 110)

It is clear that Dixon et al. (2011) are advocating for the use of comprehensive evaluations to ensure that all children with disabilities are identified and provided with appropriate educational services. However, Zirkel (2013) alleged that

[T]he literature in special education and school psychology often confuses (a) legal requirements, which is in terms of must and minimum, with (b) professional norms, which is in terms of should and optimum . . . Legal inaccuracies in the special education and school psychology literature may be attributable to authors who lack specialized expertise³ in the law. (p. 313)

Zirkel (2013) also questioned the need for a comprehensive evaluation in all areas of suspected disability. Zirkel stated, “Their premise, as expressed in the second half of the article, is that a ‘comprehensive evaluation’ under the IDEA requires assessment of the child’s cognitive neuropsychological as well as academic and psychosocial functioning . . .” (p. 314)

The authors disagree with this conclusion. If the school district had completed a comprehensive psychoeducational evaluation in all areas of suspected disability according to IDEA requirements, in either 2001 or 2003, the child would have been diagnosed with a disability and may have received an appropriate special education program designed to meet his needs. Later, at the parent’s expense, the child did receive a comprehensive evaluation that verified the child had disability under IDEA, which was not contested by the school district. Dixon et al. (2011) explained that

This comprehensive psychoeducational evaluation evaluated T.A. in multiple areas of suspected disability and found cognitive and neuropsychological deficits in auditory memory, auditory discrimination, sequential processing, language formulation/retrieval, organization, and processing speed/fluency. The psychologist concluded that these deficits interfered with T.A.'s academic achievement in mathematics and negatively affected his learning skills in areas such as organization, note taking, and work completion. T.A.'s final diagnoses included ADHD-combined type, dysthymia, math disorder, and cannabis use, and an appropriate private school placement was recommended to address his disabilities and needs. The district's hired psychologist concluded that the independent psychologist had conducted a "very comprehensive evaluation" of T.A. (p. 106)

IDEA is explicit in mandating that comprehensive evaluations require a child to be assessed in all areas of a suspected disability.⁴ T.A. was not comprehensively assessed in all areas. Dixon et al. (2011) noted that the due process hearing officer "concluded that the school psychologist evaluation was 'legally inadequate' because it failed to evaluate T.A. and had missed his disability as a result"⁵ (p. 106). Dixon et al. (2011) asserted that

Comprehensive evaluations that assess cognitive and neuropsychological processes make good clinical sense for children suspected of having disabilities, especially as there is now ample evidence that most learning and behavioral disabilities are related to brain-behavior dysfunction and changes in neuropsychological and brain function accompany intervention response (p. 107). . . The root cause of the conflict was the difference between the school psychologist evaluation that indicated T.A. did not have a disability and the comprehensive psychoeducational evaluation provided by the independent evaluator that found T.A. did have a disability warranting special education services. As a result, the findings of this case may resonate in school psychology training and practice as states and local education agencies address the consequences of the Court's decision. (p. 104)

Dixon et al. (2011) subsequently concluded that

With the *Forest Grove* Supreme Court decision, the role of school psychologists will continue to evolve. It seems logical, based on the arguments presented here, that practitioners will benefit from becoming more competent and thorough when conducting comprehensive psychoeducational evaluations in all areas of suspected disability. This is important not only for determining eligibility for special education but also to provide individualized interventions for children with disability. When a more intensive RTI approach is not successful in meeting a child's needs, the additional data gained through comprehensive psychoeducational evaluations can provide the impetus for developing more specific interventions targeted to individual learning and behavioral needs. Leaders in school psychology training can help practitioners develop best practices in RTI and comprehensive psycho-educational evaluation and service delivery. This will help ensure that all children, with or without disability, can be served in the least restrictive environment designed to meet their academic and psychosocial needs. (p. 110)

To understand the impact of the decision in *Forest Grove*, it is helpful to review the facts of the case, the questions asked by the Justices during Oral Argument, and the Court's ruling. Justice Scalia raised the question as to whether the school district was trying to profit from its own "malfeasance."⁶ During the Oral Argument⁷ before the Court, the child's attorney described the facts as follows:

The school district in this case improperly denied T.A., a child with a disability who had always been enrolled in public schools, access to all public special education services. It asserts that because its wrong eligibility determinations prevented T.A. from receiving special education services, it is immune from reimbursing T.A.'s parents the cost of obtaining those services from another source. (p. 25). . . . In this case, the school district assessed the child in 2001 and again in 2003, and both times it erroneously concluded that the child [was not eligible]. (p. 37)

The school district attorney claimed that “(t)he 1997 amendments to IDEA prohibit tuition reimbursement awards for students who are unilaterally placed in private school without first having received special education services from the public school district” (p. 3).

Justice Stevens asked the school district attorney

Doesn't your interpretation of the statute create an incentive for the school board to just say, we'll never provide any kind of education, special education, we will just tough it out? Because they can't lose, they can't be liable if they do that, if I understand you correctly. (p. 19)

To the school district attorney, Justice Scalia stated, “You can't profit by your own malfeasance” (p. 19). Justice Kennedy expressed concerns that “the problem with your position is that it seems in a way formalistic and in some cases to encourage intransigence” (p. 22).

In fact, similar school district actions using a response-to-intervention (RTI) approach to delay or deny comprehensive evaluations prompted the U.S. Department of Education Office of Special Education and Rehabilitative Services memorandum, OSEP 11-07, admonishing schools not to use RTI to delay or deny a special education eligibility evaluation. In essence, this memorandum echoed the reasoning of Justices Scalia and Kennedy—school districts could not use RTI to delay or deny a child's right to a comprehensive evaluation to determine special education eligibility and thus deny children their right to a free, appropriate public education (FAPE).

During the Oral Argument, the child's attorney described the school district's position that “because it offered no special education at all, it was therefore categorically immune from such an award” of tuition reimbursement (p. 45). The child's attorney summarized the legal issue during the Oral Argument:

One other point I make, Your Honor, and Justice Scalia, you make reference to this principle of equity, that you ought not be allowed to prevent something from happening and then come into court and claim, “Ha, ha, they didn't satisfy a condition.” And that was a point that was made by Justice Cardozo in the *R.H. Stearns* case that we rely on, where he said he who prevents a thing from being done may not avail himself of the nonperformance which he himself has occasioned. That's precisely what happened here. (p. 44)

In essence, a school district cannot use its own misconduct as a defense to liability. In the decision, the Court reasoned that

The dispute giving rise to the present litigation differs from *Burlington* and *Carter* in that it concerns not the adequacy of a proposed IEP but the School District's failure to provide an IEP at all . . . Moreover, when a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. (pp. 7-8). . . . The District's

position similarly conflicts with IDEA's "Child find" requirement . . . [requiring States] . . . to identify, locate, and evaluate all children with disabilities' to ensure that they receive needed special education services (p. 14). . . . Indeed, by immunizing a school district's refusal to find a child eligible for special education services no matter how compelling the child's need, the School District's interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational (p. 15). . . . [T]his case vividly demonstrates the problem of delay, as respondent's parents first sought a due process hearing in April 2003, and the District Court issued its decision in May 2005—almost a year after respondent graduated from high school (p. 16) . . . [W]e conclude that IDEA authorizes [tuition] reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school. (p. 17)

Thus the Court affirmed the judgment of the Court of Appeals because "the District Court did not properly consider the equities in this case and will need to undertake that analysis on remand. Accordingly, the judgment of the Court of Appeals is affirmed"⁸ (p. 17).

Implications for Policy, Training, and Practice

The findings presented within and in Dixon et al. (2011) are clear. While Zirkel (2013) tries to distract readers from the real issues at hand, arguing there is confusion between legal requirements and professional norms, Dixon et al. (2011) and this legally supported redress show careful attention to legislative, litigative, and professional standards (e.g., Hale et al., 2010) regarding best practices in comprehensive psychoeducational evaluation. Of those capable of performing such comprehensive evaluations, school psychologists are most likely to have the advanced training and skills necessary to meet child find IDEA requirements for assessment in all areas of suspected disability (Dixon et al., 2011). Justice Scalia's malfeasance comment suggests professional misconduct, and whether it just gives the appearance of impropriety or actually constitutes impropriety, does not justify school districts providing poor or limited psychoeducational evaluations. In essence, a school district's refusal to conduct a thorough and comprehensive evaluation could deny a child's special education eligibility and services, which is clearly a violation of a child's right to a FAPE under IDEA.

A comprehensive evaluation is in the best interest of children suspected of having a disability to determine need for special education and related services (IDEA, 2004). Zirkel (2013) states,

Dixon et al. primarily relied on the "relevant" (p. 107) IDEA regulation (2006) that requires evaluation in "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (§ 300.304[c)][4]). Not only was this regulation not at issue in the Supreme Court's *Forest Grove* decision, but also Dixon et al. failed to give sufficient significance to two express limitations in this requirement: (a) the specific focus on "the" suspected disability, and (b) the integral qualifier "if appropriate." The cited regulation does not require evaluating all areas relating to all disability classifications, and it does not require—as necessarily appropriate—including assessment of cognitive ability in every evaluation. (p. 315)

Zirkel's assertion that a comprehensive evaluation was "not an issue" in the *Forest Grove* decision suggests he is essentially adopting the similar failed strategy the school district unsuccessfully

argued. While not an act of malfeasance, Zirkel makes the same egregious error. In essence, Zirkel is ignoring the problem, and the reality is, it does not make the problem go away.

A critical component of the *Forest Grove* case involved the failure to administer and interpret essential measures that could have adequately addressed T.A.'s areas of suspected disability. Zirkel (2013) writes, "A district's failure to propose an IEP obviously amounts to a failure to provide an appropriate IEP, but it does not obviously or subtly define the scope or contents of a comprehensive evaluation" (p. 314). While this statement may be accurate, we cannot ignore a basic fact—the decision to propose an IEP is dependent on the team's determination of the presence or absence of a disability. If a comprehensive evaluation is not sufficiently adequate to address all areas of suspected disability, the limited information gained from the inadequate evaluation would likely skew the school multidisciplinary team's determination of whether a child has a disability, and lead to a Type II error (e.g., concluding there is no disability when there is one). In other words, in T.A.'s case, the inadequate evaluation led to the team's inaccurate decision where they concluded T.A. did not have a disability, even though he did. Therefore, the failure to propose an IEP was clearly the result of an inadequate evaluation that wasn't comprehensive enough and thus did not address T. A.'s areas of suspected disability.

While the question of the definition of a comprehensive evaluation still looms large, we must examine the basis on which school districts determine what information is required to determine disability and subsequently propose an IEP. As Zirkel (2013) points out, there is no federally identified series of assessments that must be administered to satisfy the requirement for a comprehensive evaluation. However, IDEA mandates school districts must assess a child ". . . in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (see 34 CFR § 300.304[c][4] in 2006 regulations and 34 CFR § 300.532(g) in 1999 regulations, both using same language.). While the disclaimer "if appropriate" is in fact present, it can be argued that the above dictates use of cognitive and neuropsychological measures.

For example, visual (e.g., occipital lobe, dorsal/ventral streams), hearing (e.g., temporal lobe), social and emotional status (e.g., frontal-subcortical and cerebral-cerebellar circuits), communicative status (e.g., left and right Wernicke's, Broca's, and associated areas), and motor (e.g., premotor, supplementary motor, primary motor, cerebellar) "abilities" suggest assessment of numerous brain areas and psychological processes (e.g., Hale & Fiorello, 2004). It is unclear how any evaluation would adequately address these processes in the absence of cognitive and neuropsychological measures.

As for "general intelligence," this archaic representation of the results of modern cognitive measures should be reconsidered in the language of the law, as few argue this is the appropriate use of these tools for diagnostic or intervention purposes (see Decker, Flanagan, & Hale, in press; Elliott, Hale, Fiorello, Moldovan, & Dorvil, 2010; Fiorello, Hale, Decker, & Coleman, 2009; Hale et al., 2007, 2010). Although still potentially needed for adhering to the "ability-achievement discrepancy" IDEA Specific Learning Disability (SLD) regulatory method, "general intelligence" interpretation fails to capture the essence of the statutory SLD definition (Fiorello, Hale, & Wycoff, 2012; Hale et al., 2010). The federal SLD definition recognizes that there must be

. . . a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (20 USC § 1401(30))

The severe discrepancy model does not identify strengths and/or weaknesses in basic psychological processes at all, thus ignoring the defining essence of SLD in determining whether one exists. The flawed discrepancy identification method, especially when a processing deficit has not been identified, can lead to Type I and Type II errors in identifying SLD and other disabilities. This was evidenced in T.A.'s case, as his processing deficits and resultant disability were not identified when the school psychologist used a severe discrepancy approach, which led to the team's Type II error (e.g., no disability identified when there was one), and the resultant denial of T.A.'s right to a FAPE, a point made clear in *Forest Grove*.

As noted in Dixon et al. (2011), *Forest Grove* has dramatic implications for school psychology training and practice. If school psychology training programs do not adequately prepare their students to address all areas of suspected disability using reliable and valid measures of psychological processes, then only those trained (e.g., clinical psychologists or neuropsychologists) in administration and interpretation of psychological processing measures will be able to complete IDEA-mandated comprehensive evaluations. As such, we must also ask ourselves if school psychologists should be prepared to identify SLD and other disorders that are in part related to brain-based processing deficits. If the answer is no, school districts may find themselves regularly referring children with potential disabilities to more highly qualified professionals to make disability eligibility determinations as required by IDEA child find and comprehensive evaluation requirements, which Dixon et al. (2011) point out would be cost prohibitive and not in the best interest of children suspected of having a disability.

In essence, the arguments presented here, and in Dixon et al. (2011), are clear—either school psychologists and school psychology training programs adopt assessment strategies and comprehensive evaluation models that address all areas of suspected disability, or they will likely find themselves advocating practices that lead to noncompliance with IDEA statutory and regulatory requirements. Not only can this lead to legal liability for failure to provide children with a FAPE under IDEA, it more importantly fails to address the needs of children with and without disabilities for whom practitioners are required to serve.

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Notes

1. The decision issued by the Supreme Court can be found on the www.wrightslaw.com website at <http://www.wrightslaw.com/law/caselaw/ussupct.forest.grove.ta.pdf>
2. Professor Zirkel is a professor of education and law at Lehigh University in Bethlehem, Pennsylvania. His vita posted on the Lehigh University website does not reflect any special education trial experience representing either children or school districts. He is not a licensed attorney in Pennsylvania. At one point he was a panel review officer for Pennsylvania special education due process hearings. The vita does not reflect any experience teaching or evaluating children with disabilities. He is described as a "prolific writer."
3. One coauthor of the Dixon article, Peter W. D. Wright, an attorney licensed in Virginia, has 35 years experience in special education litigation including the 1993 landmark U.S. Supreme Court *Florence County Sch. Dist IV v. Carter* case. He has authored numerous books about special education law, one which has sold in excess of 200,000 copies and is used in many law schools and schools of education. He has represented children in special education due process hearings and before federal courts in Vir-

- ginia, North Carolina, South Carolina, Pennsylvania, and Ohio and the Fourth and Sixth Circuit Courts of Appeal, prevailing in five of seven appeals before the Courts of Appeal. As an Adjunct Faculty at the William & Mary School of Law, he has taught special education law and assisted in the creation and operation of their special education law clinic.
4. 34 CFR § 304(c)(2)+(4)—Evaluation procedures, subsection (c)
 - (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. . . .
 - (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;
 5. The authors reviewed trial exhibits, motions, transcripts, legal briefs, affidavits, and prior rulings in this case in the preparation of the article.
 6. Malfeasance in office, or official misconduct, is the commission of an unlawful act, done in an official capacity, which affects the performance of official duties. Malfeasance in office is often grounds for a cause removal of an elected official by statute or recall election. See http://en.wikipedia.org/wiki/Malfeasance_in_office
 7. The audio file and actual transcript of the oral argument are located on the www.wrightslaw.com website at <http://www.wrightslaw.com/law/art/forestgrove.ta.analysis.htm>
 8. Later, on remand, the U. S. District Court, using a legal basis other than 20 USC § 1412(a)(10)(C), held that the “equities do not support reimbursement” to the parents while referencing the US\$5,200 monthly cost of the private school.

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