COMPREHENSIVE EVALUATION: LEGAL DO'S AND DON'TS WITHIN A PROBLEM SOLVING MODEL

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I. INTRODUCTION

The alleged failure to appropriately evaluate and identify students under the IDEA is increasingly becoming a popular topic in special education litigation, particularly in light of the Problem Solving-RtI "movement." When a denial of FAPE is found to be based upon an improper identification or evaluation process, courts will traditionally award prospective funding or reimbursement for private placement and/or compensatory education, sometimes in the form of extended eligibility for public (or even private) school services. If bad faith or intentional failures are found, it could even lead to an award of damages under Section 504/ADA. The following discussion includes "Do's and Don'ts" related to the IDEA's overall comprehensive evaluation process, beginning with child find/referral, moving to evaluations/reevaluations, and ending with the eligibility determination.

II. CHILD-FIND/REFERRAL DO'S AND DON'TS

DO train all school personnel to take the "Problem Solving Team" process seriously and to understand the role of such Teams.

- To prevent disproportionality/overrepresentation based upon race or ethnicity.
- To prevent over-referral and over-identification of students in special education generally.
- To identify students at risk of underachievement

DON'T let school personnel operate under the assumption that the "Problem Solving Team" process is "the way" to special education.

DO train all school personnel (including, *importantly*, regular education teachers and those who serve on Problem Solving Teams) on the overall legal requirements applicable to the evaluation process, including identification, evaluation, placement and FAPE requirements.

- Individuals with Disabilities Education Act (IDEA)
- Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act of 1973 (Section 504)
- Family Educational Rights and Privacy Act (FERPA)
- No Child Left Behind (NCLB)
- Applicable State Statutes, Regulations and/or Rules

DO remember that the concept of "continuous progress monitoring" is applicable--regardless of whether an overall RtI approach for identification is used--in order to ensure that a student's difficulties are not due to an overall lack of "appropriate" (scientific/research/evidence-based) instruction.

Letter to Zirkel, 50 IDELR 49 (OSEP 2008). When asked to clarify whether an SLD evaluation team must consider continuous progress monitoring, regardless of whether the approach used is RtI, OSEP responded that the eligibility group must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. "The regulation does not use the term 'continuous progress monitoring.'" "'A critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected and analyzed and that parents are kept informed of the child's progress.' We believe that this information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction."

DO stress the importance and affirmative nature of IDEA's child find requirements, even within an RtI/problem solving model.

- The child find duty is triggered when there is "reason to suspect" or "reason to believe" that the student may be a child with a disability and in need of special education services.

  Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011). States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RtI strategy. The use of RtI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provisions of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RtI framework.

  Letter to Zirkel, 56 IDELR 140 (OSEP 2011). If a private school located within a district's jurisdiction does not use RtI, the district is neither required to implement it with the private school student, nor entitled to deny or delay a referral for an evaluation because the private school did not use RtI. In addition and regardless of whether the private school has used RtI, unless the district believes that there is no reason to suspect that the child is eligible, it must respond to a referral from the private school or parent by conducting an evaluation within 60 days or according to the state-imposed deadline. "If an RtI process is not used in a private school, the group making the eligibility determination for a private school child may need to rely on other information, such as any assessment data collected by the private school that would permit a determination of how well a child responds to appropriate instruction, or identify what additional data are needed to determine whether the child has a disability."

  Letter to Brekken, 56 IDELR 80 (OSEP 2010). School districts cannot require outside agencies, such as Head Start, to implement RtI before referring a child for an initial evaluation. Once a district receives a child-find referral, it must initiate the evaluation process in accordance with the IDEA. The IDEA neither requires nor encourages districts to monitor a child's progress under RtI prior to referring the child for an evaluation, or as part of an eligibility determination. Rather, it requires states to allow districts to use RtI in the process of determining whether a student has an SLD.

  Polk Co. (FL) Sch. Dist., 56 IDELR 179 (OCR 2010). Where district's policies indicated that completing the RtI process was a prerequisite to qualifying for special education services and the district told the parent that the student first had to complete general education interventions before an evaluation could be conducted, district violated Section 504's evaluation requirements. By September of 2009, the district had sufficient evidence, based upon parent input, the student's

academic performance and medical documentation that the student might need special education and related services because of his ADHD, but waited until March 2010 to conduct an evaluation.

Jamie S. v. Milwaukee Pub. Schs., 48 IDELR 219, 519 F.Supp.2d 870 (E.D. Wis. 2007). District failed to refer children with suspected disabilities in a timely fashion and improperly extended the initial evaluation process. In addition, the State DOE violated its legal responsibility to properly supervise and monitor the LEA's compliance. [Note: The State DOE settled the case with the class plaintiffs, requiring the LEA to take extensive action and to be monitored by an outside authority. The LEA objected to the settlement, but the district court found it to be fair. 50 IDELR 127 (E.D. Wis. 2008). The court then went on to order additional remedies against the school district. 52 IDELR 257 (E.D. Wis. 2009) [where district has made only minimal efforts to remedy its systemic child find violations, additional interventions are necessary, including the appointment of a special education professional to monitor the district's review of each student's compensatory education needs. The independent monitor will establish guidelines for deciding which individuals qualify as class members, evaluating each class member's eligibility for compensatory services and determining the amount, type and duration of the services. In addition, a "hybrid IEP team" will apply those guidelines in assessing each student's right to compensatory education. The hybrid IEP team will include at least four permanent members, selected from district personnel, and "rotating" members who are knowledgeable about each student's unique needs. In addition, the district must notify potential class members of the remedial scheme and students whose evaluations were delayed during the relevant time period are to receive individualized notice of the class action, and for all other potential class members, the district can provide a general notice on its web site]].

DO ensure that if/when developing and implementing a problem solving/RtI approach, the process is implemented with fidelity and that data indicate positive response to interventions.

Citrus Co. (FL) Sch. Dist., 54 IDELR 40 (SEA Fla. 2009). The district had no reason to conduct an evaluation prior to the parent's request because the student was making slow-but-steady progress in RtI Tier 3.

Delaware College Preparatory Academy, 53 IDELR 135 (SEA Del. 2009). Where there was no evidence that the school had a written RtI plan or had developed any new interventions to address the student's behavioral difficulties, the school's explanation that it did not conduct an evaluation because it was engaging in RtI is rejected. The student's behavior that required him to be removed from class and suspended almost weekly for violent temper tantrums was sufficient by itself to trigger the school's duty to evaluate as early as a few weeks into the school year.

Montgomery Co. Bd. of Educ., 51 IDELR 259 (SEA Ala. 2008). School district was not required to refer fourth-grade student for an evaluation where the AAC requires districts to implement "pre-referral" interventions for at least 8 weeks before referring a student for a special education evaluation. Indeed, the district referred the student to her school's student intervention team after she had received an F in math. Because she earned a C in math after receiving interventions, the district did not err in determining that a special education evaluation was not necessary. Although the student had some inappropriate behaviors, it was proper to conclude that they were not severe enough to qualify the student as having ED. Notably, the district developed a positive behavior plan for the student and notified the parent that an FBA would be done when the student started fifth grade.

Stone County (MS) Sch. Dist., 52 IDELR 51 (OCR 2008). Where district placed a 6th grade student with ADHD on academic interventions pursuant to its RTI model in August 2007, district

did not err when it refused to conduct an evaluation in October at parent's request. The district based its decision on the fact that the student was already receiving Tier II interventions, that his grades had improved, and that he had done well on standardized tests and on the district's screening tests the prior year. The district was not required to evaluate the student, given its supported belief that he did not need special education services. The information the district reviewed after receiving the parent's request indicated that the student was making academic progress, that his grades improved as a result of interventions, and that he was capable of performing well on tests. Importantly, however, the district *did* violate 504 by neglecting to notify the parent of its decision not to evaluate or to provide notice of the 504 procedural safeguards.

El Paso Indep. Sch. Dist. v. Richard R., 50 IDELR 256, 567 F.Supp.2d 918 (W.D. Tex. 2008), aff'd in part and rev'd in part on other grounds, 53 IDELR 175, 59 F.3d 417 (5th Cir. 2009), cert. denied, 130 S. Ct. 3467 (2010). District violated its child find obligations by repeatedly referring a student with ADHD for interventions rather than an evaluation. While the interventions included Section 504 accommodations, additional tutoring, and Saturday tutoring camps, the interventions did not demonstrate positive academic benefits. Not only did the student continue to struggle in reading, math and science, he failed the Texas Assessment of Knowledge and Skills test for three years in a row. "Why [the district's] STAT committee would have suggested these measures, knowing that [the student] had undertaken each of these steps in the past three years and that none had helped him achieve passing TAKS scores, simply baffles this court."

A.P. v. Woodstock Bd. of Educ., 50 IDELR 275 (D. Conn. 2008). District did not err in failing to refer student for a special education evaluation. Although the student had some difficulties in the classroom, the evidence showed that he responded well to interventions, received As, Bs and Cs on his report card, and performed "on goal" on a statewide assessment without any accommodations. In addition, the teacher had regular contact with the parents about the student's progress. "This is decidedly not a case in which a school turned a blind eye to a child in need….To the contrary, [the teacher] acted conscientiously, communicating regularly with [the mother] and utilizing special strategies to help [the student] succeed." Although the student was ultimately found eligible for services in 6th grade (as a student with a nonverbal LD), the district did not err in failing to evaluate sooner due to the student's response to interventions.

DO watch carefully for and monitor "referral red flags."

Ridley Sch. Dist. v. M.R., 56 IDELR 74, 2011 WL 499966 (E.D. Pa. 2011). There was little evidence that school officials had reason to suspect that the student might need specialized instruction at the beginning of first grade. Rather, the student had just been evaluated a few months earlier and was found to have average skills across all areas and that she was not LD. The parent's allegation that a failing grade on a math test during the first few weeks of school was an indicator of the student's potential disability is rejected, because it was the student's first test-taking experience. Thus, the hearing officer's award of compensatory education for the time period from the start of first grade through the district's reevaluation in November is reversed.

Jackson v. Northwest Local Sch. Dist., 55 IDELR 104, 2010 WL 3452333 (S.D. Ohio 2010). The failure to conduct an MD review prior to suspending and ultimately expelling a third-grade student with ADHD for threatening behavior violated the IDEA's procedural safeguards. Clearly, the district should have known that the student had a disability at the time it expelled her because it had provided her with RTI services for approximately two years but she had made few gains. In addition, there were behavioral concerns expressed by her teacher and others that resulted in a

referral by her RtI team to an outside mental health agency for an evaluation, but the district did not initiate its own evaluation at that time.

D.K. v. Abington Sch. Dist., 54 IDELR 119 (E.D. Pa. 2010). To establish a child-find violation, a parent must first show the district knew, or should have known, that the child was a student with a disability. Before the district learned of his ADHD diagnosis, it had insufficient reason to suspect a disability. Rather, the student did not stand out from his classmates and his inattentiveness could be explained by his young age. Although the school psychologist acknowledged after the fact that the student may have had some behavior consistent with ADHD, there was also evidence that the student's difficulties were less pronounced when he was first evaluated and found ineligible and were typical of a 5 or 6-year-old.

Richard S. v. Wissahickon Sch. Dist., 52 IDELR 245 (3d Cir. 2009). District court's ruling that district did not fail to timely identify student as disabled prior to the eighth grade is affirmed. The district court found that the district did not focus solely upon the ability/achievement analysis to determine that there was no evidence of LD at the relevant time. In addition, the district court considered the testimony of the student's teachers that the student was not one who had problems with attention, impulsivity, or hyperactivity during the relevant period. Indeed, the district court pointed to extensive evidence that, in the seventh and eighth grades, the student was perceived by professional educators to be an average student who was making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences and failure to complete homework.

Anello v. Indian River Sch. Dist., 53 IDELR 253 (3d Cir. 2009). District did not violate the IDEA in failing to evaluate a transfer student for LD until the middle of her third grade year, because the district had no reason to suspect a disability before the parents requested an evaluation. The parents' claim that the student's struggles under her 504 plan should have alerted the district to the need for an IDEA evaluation is rejected. Rather, the student was successful under her 504 Plan, as the student's grades had been improving in all subjects. Although the student ultimately failed third grade and a statewide standardized assessment, the district could not have predicted the student's failure.

Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 53 IDELR 8 (D. Conn. 2009). Where district violated its child find obligation, it must reimburse the parents for the student's therapeutic placements. Although the student's hospitalization did not in itself qualify her as a child with an emotional disturbance, "[t]he standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability." The parent completed a health assessment form just one week before the student's hospitalization, when she enrolled the student in her local high school. The form stated that the student had been diagnosed with depression the previous year and was taking an antidepressant. Those statements, combined with the student's subsequent hospitalization, should have raised a suspicion that the student suffered from an emotional disturbance over a long period of time. Based upon private evaluations, the student is eligible for IDEA services and her parents are entitled to reimbursement.

Los Angeles Unif. Sch. Dist. v. D.L., 49 IDELR 252, 548 F.Supp.2d 815 (C.D. Ca. 2008). Although the LAUSD did not conduct its own evaluation of the student before he moved to another district and, therefore, was not required to pay for an IEE conducted by the new school district on that basis, LAUSD is still ordered to fund the evaluation conducted by the new school district. This is so based upon the fact that the ALJ found it significant that between October 17 and 25, 2005, the student was disciplined by his teacher on 4 occasions and her notes show that he engaged in significant disruptive behavior, including roaming the playground, falling out of

his chair, making noise, failing to follow directions, walking on tables, and tearing up other students' work. Although the court did not reach the legal issue of whether LAUSD was "duty-bound" to assess the student upon the parent's request, the parties have not challenged the factual findings of the ALJ. Based on the facts pertaining to behavior while attending school at LAUSD, the repeated requests of his mother for an assessment, his diagnosis of ADD, and the new school district's determination that the student should be assessed, it appears at least arguable that LAUSD should have performed an assessment while he was a student there. Thus, LAUSD must make arrangements for payment of the assessment done after the student moved to the new school district.

N.G. v. District of Columbia, 50 IDELR 7 (D. D.C. 2008). Where student exhibited at least two of the five characteristics of SED (pervasive depression and inappropriate types of behaviors), her academic performance was adversely affected as a result, and DCPS knew it, the school district should have evaluated her, particularly after being informed of her ADHD diagnosis. In addition, she failed four of her seven classes when she had previously been an A/B student.

DON'T wait for parents to initiate a referral for an evaluation when referral red flags are present.

Compton Unified Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010). Where failing 10th grade student was referred by the school to a mental health counselor (who ultimately recommended an evaluation), her teachers indicated that her work was "gibberish and incomprehensible," she played with dolls in class and urinated on herself, district cannot avoid a child find claim based upon an argument that it did not take any affirmative action in response to high schooler's academic and emotional difficulties because the parent did not request an evaluation. Where the district argued that the IDEA's written notice requirement applies only to proposals or refusals to initiate a change in a student's identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces "absurd" results and the IDEA's provision addressing the right to file a due process complaint is separate from the written notice requirement. "Section 1415(b)(6)(A) states that a party may present a complaint 'with respect to any matter relating to the identification, evaluation, or educational placement of the child,'" and the IDEA's written notice requirement does not limit the scope of the due process complaint provision. By alleging that the district failed to take any action with regard to the student's disabilities, the parent pleaded a viable IDEA claim. (Note: The dissent in this case noted that determining that a "refusal" to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child find claim without a request and a "refusal" on the part of the district).

Wilson County (NC) Pub. Schs., 51 IDELR 137 (OCR 2008). District could not avoid liability for its child find violation merely by pointing out that the 7th-grader's parents never requested a special education assessment. The student's poor grades, inappropriate behaviors and ADHD tendencies should have given the district reason to suspect the existence of a disability. Along with poor academic performance, the student was suspended from the school bus on several occasions for offenses that included throwing objects, moving from seat to seat, and hitting fellow classmates. In addition, the student failed math and social studies and will repeat 7th grade. Furthermore, an evaluation conducted in 2005 showed that the student tested in the "at-risk to clinically significant" range for ADHD. All of these factors should have put the district on notice of potential disability.

DON'T ignore parent and/or staff referrals or requests for an evaluation.

❖ When there's debate, evaluate!

Charlotte-Mecklenburg Bd. of Educ. v. B.H., 51 IDELR 71 (W.D. N.C. 2008). District's alleged failure to identify and evaluate a child ultimately found to have a fatal neurological condition is more than a mere FAPE violation. The parents' complaint suggests that the district acted in bad faith or with gross misjudgment when it failed to take any action in response to the kindergarten teacher's IDEA referral and when he was sent to the kindergarten classroom when unable to complete work in first grade. Thus, the parents have sufficiently stated a claim under Section 504.

DO utilize a Team approach to review a referral for an evaluation.

DO seek input from the parents, even if they cannot attend meetings.

DO document attempts to include parents in all decision-making.

DO look for specifics regarding the reason for a referral and gather all relevant information prior to a referral meeting (e.g., Problem Solving/Child Study Team information, medical information, report cards, cumulative record, work samples, recent evaluations, Response to Intervention (RtI) data, student referral forms).

DO gather additional relevant information from parents and all other Team members.

DON'T forget to refer back to the "Problem Solving Team" process if a determination is made that the student will not be referred.

DO provide prior written notice of the proposal or refusal to refer for an evaluation.

Stone Co. (MS) Sch. Dist., 52 IDELR 51 (OCR 2008). Where student had been receiving academic interventions pursuant to the district's RtI model since August 2007, district's refusal to refer the student for an evaluation upon the parent's request in October was not in violation of 504 regulations. The district's refusal to conduct an evaluation was based upon the fact that the student's grades had improved with the use of Tier II interventions and he had done well on standardized assessments and screening tests the prior year. Thus, the district's belief that the student did not need special education was reasonable. However, a violation of 504 did occur when the district did not provide notice to the parent of its decision not to evaluate or provide her with a notice of her procedural safeguards.

III. EVALUATION/REEVALUATION DO'S AND DON'TS

DON'T treat the RtI/problem solving process as a replacement for a comprehensive special education evaluation.

Questions and Answers on RtI and Early Intervening Services, 47 IDELR 196 (OSERS 2007). States adopting criteria for the identification of students with SLD do not have to require districts to use RtI as part of the evaluation process, but they cannot preclude the use of RtI either. States must include a variety of assessment tools in their evaluation procedures and cannot use a single measure or assessment to identify SLD. "However, an SEA could require that data from an RtI process be used in the identification of all children with SLD." RtI is not intended to be a replacement for a comprehensive special education evaluation and is only one tool of many that a district can employ to identify eligible students.

DO obtain written consent prior to initial evaluation or prior to any reevaluation that contemplates the administration of an assessment, including some functional behavior assessments (FBAs).

> Letter to Sarzynski, 49 IDELR 228 (OSEP 2007). As to whether evaluations of student progress are "evaluations" requiring consent, OSEP responds that evaluations of student progress occur as a regular part of instruction for all students in all schools. If such evaluations are designed to assess whether the child has mastered the information in, for example, chapter 10 of the social studies text, and are the same or similar to such evaluations for all children studying chapter 10, parental consent would not be required for such an evaluation. If, however, the evaluation specific to an individual child is "crucial to determining a child's continuing eligibility for services or changes in those services," such evaluations would require parental consent.
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> Letter to Christiansen, 48 IDELR 161 (OSEP 2007). If an FBA is being conducted for the purpose of determining whether the positive behavioral interventions and supports set out in the current IEP for a particular child with a disability would be effective in enabling the child to make progress toward the child's IEP goals/objectives, or to determine whether the behavioral component of the child's IEP would need to be revised, OSEP believes that the FBA would be a reevaluation. However, if the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, parental consent would generally not be applicable to such an FBA because it would not be focused on the educational and behavioral needs of an individual child.
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> Harris v. District of Columbia, 50 IDELR 194, 561 F.Supp.2d 63 (D. D.C. 2008). For purposes of seeking an IEE, a functional behavioral assessment is an educational evaluation under IDEA and the parent can seek an independent FBA if she disagrees with one conducted by the school district. "The FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." In addition, failure to act on a request for an IEE is "certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA….D.H. has languished for over two years with an IEP that may not be sufficiently tailored to her special needs. The intransigence of DCPS as exhibited in its failure to respond quickly to plaintiff's simple request has certainly compromised the effectiveness of the IDEA as applied to D.H. and it thereby constitutes a deprivation of FAPE."

DO remember that where a parent refuses consent to an initial evaluation or reevaluation, the district may, *but is not required to,* initiate mediation or due process to obtain the evaluation/reevaluation.

DO also remember that when a parent refuses consent to a reevaluation and the district chooses not to seek to override the refusal, the district is not required to continue to provide FAPE to the child if the district determines that, based upon existing data, the child does not continue to meet special education eligibility criteria. However, the district must provide the parent with prior written notice of its proposal to discontinue services.

> OSERS Questions and Answers on IEPs, Evaluations, and Reevaluations, Question D-4 (2010).

DO consider whether parents are actually refusing an evaluation by imposing too many conditions on the district's evaluation.

> G.J. v. Muscogee County Sch. Dist., 54 IDELR 76 (M.D. Ga. 2010). Where parents placed numerous restrictions on how a reevaluation would be conducted, including the requirement for a

specific evaluator, parental approval for each instrument and meetings before and after the evaluation, this was not really consent for a reevaluation.

DO consider conducting your own evaluations, by professionals of the school system's choosing, for purposes of determining eligibility.

M.L. v. El Paso Indep. Sch. Dist., 52 IDELR 159, 610 F.Supp.2d 582 (W.D. Tex. 2009). While the IDEA permits a reevaluation only one time per year unless the parties agree otherwise, this does not restrict a hearing officer or reviewing court from overriding lack of parental consent to a reevaluation. Under the circumstances and where the parent wants the child to continue to receive special education services, the district is entitled, indeed obligated, to conduct a reevaluation, because it has determined that the student warrants one. Plaintiff may not continue to assert that the student is entitled to special education services while simultaneously refusing to allow the district to evaluate A.L. to determine what those services may be.

Independent Sch. Dist. No. 701 v. J.T., 2006 WL 517648, 45 IDELR 92 (D.C. Minn. 2006). Where district agreed to use former district's evaluation when it prepared IEP, when parent asked for IEE and was able to prove former district's evaluation was inappropriate, new district is required to fund the IEE.

Fort Atkinson (WI) Sch. Dist., 46 IDELR 142 (OCRV, Chicago (WI) 2006). The Office for Civil Rights (OCR) found that the district did not comply with 504 regulations when it agreed to accommodate a student's SLD with a 504 Plan without first evaluating the student's need for special education services. Although the student objected to a proposed special education evaluation, the district still had an obligation to evaluate the student before providing services. The district improperly allowed the student's preference not to undergo evaluation to trump its obligation to evaluate the student.

Shelby S. v. Kathleen T., 45 IDELR 269, 454 F.3d 450 (5th Cir. 2006). School district has justifiable reasons for obtaining a medical evaluation of the student over her guardian's refusal to consent. If the parents of a student with a disability want the student to receive special education services under the IDEA, they are obliged to permit the district to conduct an evaluation.

M.T.V. v. DeKalb County Sch. Dist., 45 IDELR 177, 446 F.3d 1153 (11th Cir. 2006). Where there is question about continued eligibility and parent asserts claims against District, District has right to conduct reevaluation by expert of its choosing.

Marissa F. v. William Penn Sch. Dist., 46 IDELR 154 (3d Cir. 2006). Where parents never consented to a district evaluation and never enrolled LD student in a district school, district was not afforded the opportunity to provide FAPE to the student and, therefore, her parents' claim for tuition reimbursement for private schooling is barred.

DON'T suggest to parents that they are responsible for obtaining educationally-relevant evaluations.

N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had once been privately diagnosed with autism, but school district staff suggested that the parents arrange for an autism evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

DO utilize qualified personnel to administer evaluations.

DO seek input from parents regarding the evaluation and/or reevaluation.

DON'T use a single assessment to identify a disability.

> Draper v. Atlanta Indep. Sch. Sys., 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). Where the district failed to identify the student's SLD for five years and had determined that he was eligible for services as a mildly intellectually disabled student based upon just one assessment, the school district denied FAPE. The district court did not abuse its discretion in ordering the school district to pay up to $38,000 per year until 2011 for private placement as a remedy. The relief awarded was not disproportionate to the IDEA violations, as the district failed to identify the student's SLD for five years and transferred him from a self-contained class to a regular education program without considering his severe reading deficiencies. In addition, the district continued to use an ineffective reading program for three years, despite the student's clear lack of progress.

DO a comprehensive evaluation and **DO** evaluate in all suspected areas of suspected need, whether commonly linked to the suspected disability or not.

> G. "J."D. v. Wissahickon Sch. Dist., 111 LRP 41848 (E.D. Pa. 2011). School district's evaluation process was flawed when it found the child ineligible for IDEA services because IDEA eligibility does not turn on academic ability alone. Rather, the Third Circuit has held that a child's progress must be measured in light of his potential. The school psychologist's evaluation report focused solely on the child's superior academic performance and did not discuss the results of two private ADHD diagnoses, parent and teacher rating scales, and input from the kindergarten teacher. In addition, the evaluation report did not include the psychologist's own classroom observations of the student and the psychologist's statement to the parents that she "didn't do IEPs for students who have good skills" highlighted the flaws in the evaluation process. The district has an obligation to look beyond a child's cognitive potential or academic progress and address attentional issues and behaviors that a teacher has identified as impeding the student's progress. Thus, the district's evaluation was flawed and an award of compensatory education is warranted.

> D.B. v. Bedford County Sch. Bd., 54 IDELR 190 (W.D. Va. 2010). Student with ADHD and found eligible for services as OHI was denied FAPE where district did not properly consider and evaluate for possible SLD. Despite the fact that the evidence strongly suggested the student was SLD, the IEP team failed to assess for SLD or even discuss SLD. In addition and contrary to the hearing officer's finding, the student's services might well have changed had he been fully evaluated in *all areas of suspected disability*. "Although the [hearing officer] observed that [the student] was promoted a grade every year…this token advancement documents, at best, a sad case of social promotion" where, after four years, the student is unable to read near grade level. Thus, the parents are entitled to reimbursement for private schooling.

> Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6-year-old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district's failure to conduct an FAA prevented the IEP team from developing an appropriate IEP

and making an offer of placement that provided FAPE. An FAA would have enabled the Team to consider strategies to address the behavioral issues that impeded the student's learning.

DO remember that state evaluative requirements are typically *minimal* requirements for establishing eligibility and that an IEP Team can determine whether any additional assessment data are needed.

DO timely reevaluations and/or make timely decisions as to whether reevaluation is needed.

- ❖ When there's debate, re-evaluate!

DO consider results from independent educational evaluations that parents provide.

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester County, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

Marc M. v. Department of Educ., 56 IDELR 9 (D. Haw. 2011). Although parents of a teenager with ADHD waited until the very last moment of an IEP meeting to provide the team with a private school progress report, that was no basis for the team to disregard it. The Education Department procedurally violated the IDEA and denied FAPE when it declined to review the private report because it contained vital information about the student's present levels of academic achievement and functional performance. The document, which showed that the student had progressed in his current private school, contradicted the information placed in the IEP, but the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. Where the new IEP proposed that the student attend public school for the upcoming school year, the parents reenrolled the student in private school and sought reimbursement. Since the IDEA requires districts to consider private evaluations presented by parents in any decision with respect to the provision of FAPE, the coordinator's contention that because the document was provided at the end of the meeting, the team could not have considered and incorporated it into the new IEP, is rejected. As a result of failing to consider the private report, the IEP contained inaccurate information about the student's current levels of performance, such that these procedural errors "were sufficiently grave" to support a finding that the student was denied FAPE.

DON'T forget to inform parents of their right to request an Independent Educational Evaluation at public expense (IEE) *if* they disagree with an evaluation completed by and/or obtained by the school system.

P.L. v. Charlotte-Mecklenburg Bd. of Educ., 55 IDELR 46, 2010 WL 2926129 (W.D. N.C. 2010). Where parents obtained an IEE without waiting for the school district to respond and provide a list of approved evaluators, parents are not entitled to reimbursement for their IEE because they failed to follow IDEA's requirement for obtaining a publicly-funded IEE. In addition, the parents were not able to show that the district's response came too late and they

jumped the gun by obtaining and paying for an IEE eight days after mailing their request for an IEE. Although there was disagreement as to when the parents received the district's response that it would pay $800 for an IEE from its approved list of examiners, all of the asserted dates of receipt fall within the 60 days the district had to respond or request due process under North Carolina's statute of limitations.

D.Z. v. Bethlehem Area Sch. Dist., 54 IDELR 323 (Pa. Comm. Ct. 2010). Parent's request for an IEE was premature where the parent's disagreement with the school district's findings pertained to a district evaluation that was not complete. The parent first agreed to the district's reevaluation but later revoked her consent to it because she did not agree with the scope of the testing proposed. She subsequently e-mailed the district, asking for an IEE. The district refused and sought a due process hearing seeking permission to proceed with the reevaluation. The hearing officer was correct in refusing to consider the parent's request for an IEE as part of the hearing, as the parent's right to request an IEE does not vest until there is an evaluation completed by the district with which the parent disagrees. [NOTE: The court also ruled in a separate decision that where this parent had requested 14 due process hearings for her two children between 2001 and 2009 and the district was the prevailing party each time, there is a reasonable likelihood that the parent brought the requests for an "improper purpose." Thus, the district could proceed with its attorney's fee action against the mother. See, Bethlehem Area Sch. Dist. v. Zhou, 54 IDELR 311, 2010 WL 2928005 (E.D. Pa. 2010)].

C.S. v. Governing Bd. of Riverside Unif. Sch. Dist., 52 IDELR 122 (9th Cir. 2009) (unpublished). Parental request for IEE reimbursement was made before receiving an assessment from the school district and after obtaining the IEE. Thus, denying reimbursement to the parents for the IEE was not an abuse of discretion by the district court.

Letter to Zirkel, 52 IDELR 77 (OSEP 2008). School districts are not required to fund a parent's IEE obtained during the RTI process where the school district has not completed an evaluation. A parent is not entitled to an IEE at public expense before the district completes its evaluation simply because the parent disagrees with the district's decision to use data as to the child's RTI as part of its evaluation to determine whether the child is a child with a disability. OSEP added that its answer would be the same, even if the district notified the parent that the child responded successfully to RTI and that it would not proceed to a formal evaluation for SLD eligibility. In addition, when a parent requests reimbursement for an IEE prior to the completion of the district's evaluation, the district may deny the request for reimbursement without filing for due process.

DO respond to a request for an IEE within a "reasonable" period of time.

J.P. v. Ripon Unif. Sch. Dist., 52 IDELR 125 (E.D. Cal. 2009). Parent's argument that school district was tardy in its request for a due process hearing to show that its evaluations were appropriate is rejected. Though the parent requested the IEEs on December 21, 2006, the parties discussed the provision of the IEEs through a series of letters and did not reach a final impasse until February 7, 2007, less than three weeks before the district's request for a hearing. In addition, the district's Winter break began immediately after the parent's IEE request, which is a factor that must also be considered in determining the timeliness of the district's due process request. Given the circumstances here, the Court cannot find that "unnecessary delay" was present that would invalidate the underlying request made by the district.

School Bd. of Lee County v. Andrews, 49 IDELR 251, 2008 WL 687259 (M.D. Fla. 2008). Parent's letter simply requesting "independent evaluations," without specifying what evaluations

were being sought was too vague to trigger any obligation concerning an IEE by the School Board. The School Board's request for clarification and asking parent's counsel to specify the evaluations being requested was both reasonable and necessary and not a procedural violation. The Court also rejects the ALJ's view that a mere request for an IEE triggers the right to have the School Board comply with the request or seek a due process hearing. Rather, if the School Board does not comply with the request, the burden is on the parents to present a complaint and to request a due process hearing.

DON'T impose unreasonable conditions on independent evaluators.

Letter to LoDolce, 50 IDELR 106 (OSEP 2007). A school district does not have the right to dictate policies to independent educational evaluators that restrict the use of age and grade level scores in their reports because, in some cases and depending on a child's individual needs, it may be necessary for an evaluator to conduct an assessment that includes age and grade level scores in order to gather relevant information about the child that may assist in determining the content of the child's IEP, including information related to enabling the child to participate in the general education curriculum. Because a public agency cannot prohibit its own evaluators from including age and grade level scores in evaluation reports, it cannot prohibit independent evaluators from doing so. Similarly, if a public agency prohibits its own evaluators from making recommendations pertaining to specific methodologies and/or use of materials, it could preclude independent evaluators from doing so.

DON'T forget the responsibility to conduct a FAPE evaluation, even of a student placed by the parent in a private school located in another jurisdiction.

Letter to Eig, 52 IDELR 136 (OSEP 2009). The home district must evaluate a parentally placed private school student for FAPE upon parental request, even if the parent has placed the student in a non-profit private school located within the jurisdiction of another LEA. If a parent asks the home district to evaluate a private school student's eligibility for IDEA services (rather than eligibility for "equitable services"), the home district cannot refuse to do so on the grounds that the student attends private school in another LEA, even if the other LEA has done an evaluation for purposes of "equitable services."

DON'T forget those evaluation timelines and document compliance with them!

J.G. v. Douglas County Sch. Dist., 51 IDELR 119, 552 F.3d 786 (9th Cir. 2008). The school district did not violate the IDEA when it delayed evaluations of two preschoolers but not because it complied with Nevada's evaluation timeline, but because it was not aware that the young twins might have autism. The court was critical of the school system's defense that the evaluation, conducted within 38 days, fell within the state's required evaluation timeline of 45 school days. While the state's timeline is not inconsistent with the former IDEA, it did not provide the district with a "safe harbor" for conducting evaluations. "Regardless of compliance with a state regulatory requirement, [the] IDEA requires that districts act within a reasonable time to evaluate [a student suspected of having a disability]." Whether an evaluation is conducted within a reasonable time depends upon the child's circumstances and not whether the district complies with a state-established timeline. Under the circumstances here, the district conducted the evaluations on a timely basis once it was contacted by the twins' private service provider in July and told that the students might be autistic. Thus, the parents could not recover the cost of private services they obtained while the evaluations were pending. The Court also noted that it "makes sense to allow school districts a degree of leeway during summer vacation."

Integrated Design and Electronics Academy Pub. Charter Sch. v. McKinley, 50 IDELR 244 (D. D.C. 2008). District's failure to comply with D.C.'s 120-day timeline for completing an evaluation amounted to a denial of FAPE. The evidence did not support the school's claim that the parent was uncooperative in providing information and scheduling.

DO remember that where a parent has revoked consent to special education services and the student has been dismissed from services, if the parent subsequently asks for re-enrollment, the district must conduct an *initial* evaluation.

73 Fed. Reg. 73014-15 (OSEP Commentary to 2008 regulations).

DON'T forget that when a transfer student moves in from out of state, any evaluation conducted of the student by the new district is considered an initial evaluation.

71 Fed. Reg. 46682 (OSEP Commentary to 2006 regulations).

III. ELIGIBILITY DO'S AND DON'TS

DO adhere to applicable State eligibility requirements, such as definitions, criteria and minimally required evaluations.

DO thoroughly and accurately document adherence to State criteria and required evaluations.

DO make timely eligibility determinations.

Letter to Weinberg, 55 IDELR 50 (OSEP 2009). While there is no set timeframe for making an eligibility determination under the IDEA, it must occur within a "reasonable period of time" after the initial evaluation. While the IDEA does require an initial evaluation to be conducted within 60 days of receiving parental consent for the evaluation (or within a state's timeframe), the IDEA does not require that a district make an eligibility determination within a specific number of days after a parent requests an evaluation, after the district receives consent for it, or after the evaluation is completed. However, consistent with its child-find duties, a public agency must make an eligibility determination within a reasonable period of time after the evaluation is conducted to ensure the receipt of FAPE without undue delay. In addition, a parent who believes that the district is unreasonably delaying an eligibility decision may address the matter through the IDEA's dispute resolution procedures.

DO utilize an appropriate Eligibility Committee, with required participants, including the parent(s).

DO provide the parent an opportunity to fully and meaningfully participate in the eligibility decision.

DON'T forget to document attempts to involve the parent(s), including consideration of all information that parents bring to the meeting.

DO consider all relevant information when determining eligibility, in addition to the minimum evaluative components and results set forth by State requirements.

DON'T rely solely on test scores when determining eligibility/ineligibility.

Jaffess v. Council Rock Sch. Dist., 46 IDELR 246 (E.D. Pa. 2006). In a dispute as to whether a 16 year-old student diagnosed as LD continued to need specially designed instruction (SDI), it is

clear that the student did not. Expert witness testimony submitted by the parents relied heavily on test scores, but neither expert observed the student's in-class performance, which unequivocally demonstrated that the student did not need SDI. In addition, all of the student's teachers and district staff universally agreed that he did not require SDI to meaningfully benefit from his educational program. This conclusion was based upon data collected by classroom teachers, evaluation reports, reports regarding student's writing ability prepared by the State, report card grades, interim reports from teachers and conversations with all team members. In addition, student's chemistry, study skills, French, geometry, English and American Studies teachers all testified that he did not need SDI to succeed in their classrooms.

DON'T limit the definition of "educational performance" to academic performance when determining whether there is a condition that adversely affects educational performance (unless you are in the Second Circuit, perhaps).

Mr. I v. Maine Sch. Admin. Dist. No. 55, 47 IDELR 121, 480 F.3d 1 (1st Cir. 2007). In Maine, "educational performance" is more than just academics and there is nothing in IDEA or its legislative history that supports the conclusion that "educational performance" is limited only to performance that is graded. In addition, "adversely affects" does not have any qualifier such as "substantial," "significant," or "marked." Thus, district court's holding that *any* negative impact on educational performance is sufficient is upheld. Student with Asperger's Syndrome who generally had strong grades, had difficulty in "communication," which is an area of educational performance listed in Maine's law. That makes her eligible for special education services.

Board of Educ. of Montgomery County v. S.G., 47 IDELR 285, 230 Fed. Appx. 330 (4th Cir. 2007). 15-year-old student with schizophrenia is eligible for special education services because her emotional disturbance adversely affected her educational performance in a regular classroom. Therefore, school district must fund S.G.'s attendance at a therapeutic school.

C.B. v. Department of Educ. of the City of New York, 52 IDELR 121 (2d Cir. 2009). Though there is no dispute that the student has co-morbid bipolar disorder and ADHD, the conditions do not make her eligible as an OHI student because they do not adversely affect her educational performance. The student's grades and test results demonstrate that she continuously performed well both in public school before she was diagnosed, and at the private school thereafter. Relevant evaluations indicate that she tested above grade-level and do not find that her educational performance has suffered. Thus, the evidence is insufficient to show that she has suffered an adverse impact on her educational performance.

Williamson County Bd. of Educ. v. C.K., 52 IDELR 40 (M.D. Tenn. 2009). Gifted student with ADHD should have been made eligible for special education services as Other Health Impaired. "Under the law, it is not enough that C. managed to earn average to above average grades overall by the end of each school year in order to advance to the next grade level. Each state 'must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.'"

A.J. v. Board of Educ. of East Islip Union Free Sch. Dist., 53 IDELR 327 (E.D. N.Y. 2010), (unpublished). Where New York law does not define "educational performance" and "adverse effect," applicable authority provides that "educational performance" must be assessed by reference to academic performance "which appears to be the principal, if not only, guiding factor." Where the kindergartner with Asperger Syndrome was performing at average to above-

average levels and was making academic progress in the classroom, there was no adverse effect on educational performance for purposes of IDEA eligibility.

Maus v. Wappingers Cent. Sch. Dist., 54 IDELR 10 (S.D. N.Y. 2010). While neither the IDEA nor New York law define the term "adverse effect on educational performance," the Second Circuit has indicated that "educational performance" refers only to academics. Thus, where 7th grader with social and emotional difficulties as a result of ADHD, Asperger syndrome and generalized anxiety disorder consistently earned above-average grades in all of her classes and performed at an 8th grade level in reading and written expression and a 12th grade level in math, she is not disabled. While her conditions might impede her social and emotional functioning, they do not impede her ability to obtain an educational benefit.

DON'T forget about the third prong for determining eligibility: whether the student's condition adversely affects educational performance *to the degree that the student needs special education and related services.*

Loch v. Edwardsville Sch. Dist. No. 7, 52 IDELR 244 (7th Cir. 2009). Student's claim that her anxiety prevented her from attending classes at a public high school and that she was, therefore, disabled under the IDEA is rejected, as there is no evidence that the student required special education or related services. The student was not taking medication for her anxiety and had not seen her psychiatrist or her therapist in the previous six months. Moreover, the student received satisfactory grades until she stopped attending class in her sophomore year. There was no medical evidence that the student's anxiety or diabetes had progressed to the point that she was unable to attend school. "Indeed, [the student's] doctors reported that when she was not attending classes, her health was good and should not have interfered with her school attendance." In addition, the student left high school to enroll in community college courses, where she received A's and B's. Given the student's performance at the community college, she could not demonstrate that she needed special education services at the high school level to receive an educational benefit.

Pohorecki v. Anthony Wayne Local Sch. Dist., 53 IDELR 22 (N.D. Ohio 2009). The IDEA does not require children be classified by their disability. Rather, it requires that a child who needs special education and related services be regarded as a child with a disability and receive an appropriate education. The label assigned merely assists in developing the appropriate education provided. In addition, there was ample evidence that the student met the IDEA's definition of ED and that classification was a reasonable one.

E.M. v. Pajaro Valley Unif. Sch. Dist., 53 IDELR 41 (N.D. Cal. 2009). Where the student performed very well in class with the use of general education interventions, the district's determination that he is not SLD is upheld and the administrative decision in the district's favor is upheld. The student's performance showed that he did not require specialized instruction to receive an educational benefit. Though the student was distractible and failed to complete homework assignments, his performance improved when his teacher used interventions, such as small group settings. "When viewed as a whole, the observational and anecdotal evidence describes a student who was distracted easily but who also responded to various forms of classroom intervention."

Alvin Indep. Sch. Dist. v. A.D., 48 IDELR 240 (5th Cir. 2007). Student with ADHD is not a student with a disability because he does not need special education and related services. The "adversely affects a child's educational performance" standard is a subpart of the definition of "other health impairment" under the IDEA, but the student does not meet the second prong required to be eligible for special education—that is, "by reason thereof, needs special education

and related services." The determination of ineligibility was not just based upon academic success and the district court considered a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social, and cultural background.

Hood v. Encinitas Union Sch. Dist., 107 LRP 26108, 486 F.3d 1099 (9th Cir. 2007). Parents' reimbursement claim for placement at a private school for LD students is denied because student is not eligible for special education services. Prior to the student's removal from public school, she was consistently receiving average or above-average grades and she did not, therefore, need special education services to obtain a meaningful educational benefit. The student's 504 Plan (based upon a seizure disorder) included preferential seating, use of a graphic organizer and Alpha Smart keyboard, one-step directions, visual support for instruction and concepts, etc. Because any severe discrepancy reflected in testing could be corrected within the regular instructional program, she was not eligible as SLD or OHI.

M.P. v. North East Indep. Sch. Dist., 107 LRP 68824 (W.D. Tex. 2007). Student with undeniable ADHD is not a child with a disability under the IDEA because student could not prove that he has an educational need for special education services caused by the ADHD. Rather, student's behaviors were voluntary and, as several of his teachers testified, he could control his behavior when he wanted to.

Ashli and Gordon C. v. State of Hawaii, 47 IDELR 65 (D. Haw. 2007). School district's decision that student with ADHD was not eligible for services is upheld. Parent's argument that the school should have considered the effects of ADHD on student's educational performance without taking into consideration the fact that the classroom teacher provided differentiated instruction is rejected. Without a definition of "adversely affects" in state law, it refers to the ability to perform in a regular classroom designed for non-disabled students and if a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services. Adverse means "causing harm" and where a student is able to learn and function at an average level in the regular classroom and experiences only a slight impact on his educational performance, it cannot be said that the student is harmed.

DON'T forget that there is a difference between SED and BAD, but be careful!

Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist., 51 IDELR 149, 300 F. App'x 11 (2d Cir. 2008). Determination that student was not eligible as an SED student is affirmed. Student's inappropriate behavior fell short of qualifying him as SED, as an expert saw his drug use as the root of the student's problems in school. This conclusion is "more consistent with social maladjustment than with emotional disturbance." Parents did not produce enough evidence of an "accompanying emotional disturbance beyond the bad conduct."

Eschenasy v. New York City Dept. of Educ., 52 IDELR 66 (S.D. N.Y. 2009). Teenager diagnosed with mood disorder, conduct disorder, trichotillomania, borderline personality features and expressive language disorder should have been found eligible for special education services as an SED student. Clearly, the student exhibits inappropriate types of behavior or feelings under normal circumstances and has a generally pervasive mood of unhappiness or depression. Her symptoms clearly adversely affect her educational performance, as she had failing grades, repeated expulsions and suspensions and a need for tutors and summer school. The school district's assertion that her inappropriate behavior is just bad behavior is rejected. While it is

undisputed that the student repeatedly misbehaved in school by cutting class, taking drugs and stealing, she also engages in hair pulling and cutting herself, was diagnosed with a mood disorder, diagnosed with personality disorder and attempted to commit suicide. Thus, it is more likely than not that all of the student's problems, not just her misconduct, underlie her erratic grades, expulsions and need for tutoring and summer school. Thus, parents are entitled to reimbursement for placement at the Elan School, which was appropriate for her.

DON'T rely solely on medical diagnoses or recommendations for determining eligibility!

Marshall Joint Sch. Dist. No. 2 v. Brian and Traci D., 54 IDELR 307 (7th Cir. 2010). Where the ALJ's decision that the student continued to be eligible for special education under the IDEA focused solely on the student's need for adapted PE, the district court's decision affirming it is reversed. The ALJ's finding that the student's educational performance *could* be affected if he experienced pain or fatigue at school is "an incorrect formulation of the [eligibility] test." "It is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does.*" The evidence showed that the student's physician based her opinion that he needed adapted PE on information entirely from his mother and upon an evaluation that lasted only 15 minutes with no testing or observation of the student's actual performance. In contrast, the student's PE teacher testified that he successfully participated in PE with modifications. "A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team" and while the team was required to consider the physician's opinion, it was not required to defer to her view as to whether the student needed special education. Further, the student's need for PT and OT did not make him eligible for special education under the IDEA, as those services do not amount to specialized instruction.

Brado v. Weast, 53 IDELR 316 (D. Md. 2010). Although hospital/homebound teaching qualifies as specialized instruction, teenager with chronic pain is ineligible for IDEA services. Though the parents' argument is correct that in-home instruction amounts to specialized instruction under the IDEA, regardless of whether that instruction is altered in content or form, the evidence at the hearing indicates that the student does not need home-based instruction. Rather, all of the accommodations the student requires--frequent breaks, adjusted workloads, alternative test scheduling, and personalized instruction—can be provided under a Section 504 plan. "With the exception of [the student's] primary care physician..., no medical expert suggests that [the student] required [home and hospital teaching]…." As such, the district correctly found the student ineligible for IDEA services.

M.P. v. Santa Monica-Malibu Unif. Sch. Dist., 50 IDELR 220, 2008 WL 2783194 (C.D. Cal. 2008). Where everyone agreed that the student could perform well academically when motivated, the "Court agrees that the evidence shows that M.P. is capable of completing independent school work when motivated, but the evidence also shows that because of his ADHD he is not capable, without help, of being motivated. This is the very definition of a discrepancy between ability and achievement." Therefore, the student has demonstrated the requisite severe discrepancy in ability and achievement to become eligible for services as an SLD student.

Strock v. Independent Sch. Dist. No. 281, 49 IDELR 273, 2008 WL 782346 (D. Minn. 2008). The mere existence of ADHD does not demand special education services. When the student actually completed required work, he received average or above-average grades. "Children having ADHD who graduate with no special education or any §504 accommodation are commonplace." The fact that the student was required to take remedial courses when beginning at the community college is "neither unusual or evidence of 'unsuccessful transition,' an entirely undefined term."

Brendan K. v. Easton Area Sch. Dist., 47 IDELR 249, 2007 WL 1160377 (E.D. Pa. 2007). Evidence supports determination that student diagnosed with, among other things, ADHD is not eligible for special education services. Rather, "[t]eenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education."

P.R. v. Woodmore Local Sch. Dist., 46 IDELR 134 (N.D. Ohio 2006). Student diagnosed with ADHD is not eligible as a student with a disability or OHI under IDEA. Student's doctor based her conclusions that student was OHI on the mother's observations and never interviewed any of the student's teachers, the student's guidance counselor, or any of the school's special education personnel. District personnel's determination that his difficulties in school were no different than those of many boys in their junior year of high school is upheld.

DO ensure that reevaluation of eligibility occurs at least once every three years, unless the parent and the school system agree that a reevaluation is not necessary.

DO give parents a copy of the eligibility decision and all relevant evaluative and eligibility documentation.

DON'T forget to refer the child back to the appropriate Team when determined ineligible and provide appropriate notice/rights regarding the decision.