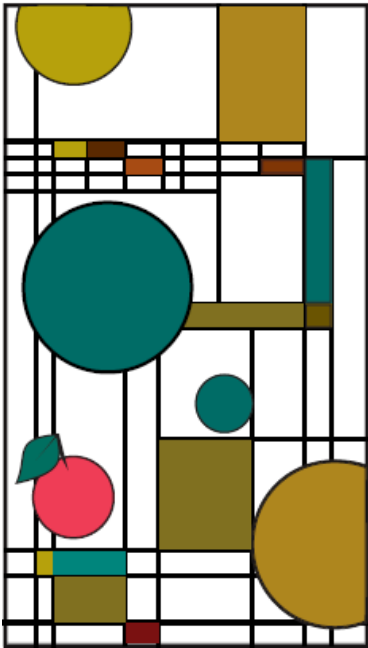

Child Find: OK Grades but Bad Behavior – What Should a School Do?



**2014 Wyoming Department
of Education
Special Education
Leadership Symposium**

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WHO AM I?

- **Parent**
- **Private Student/Parent Lawyer and Mediator**
- **Former State DOE Compliance Staff**
- **Former P & A Staff Attorney**
- **Former Legal Aid Lawyer**
- **High School Dropout**
- **Student/Parent Perspective**

WHO ARE YOU?

- **Parents**
- **Students**
- **Teachers**
- **School administrators**
- **Other school personnel**
- **Service providers**
- **Attorneys and advocates**

THE QUANDRY

- *What* triggers the child find obligation?
- *When* is it triggered?
- *How serious* must problems get?
- *How long* must they persist?
- *What is the nexus* between behavior and grades?
- *Who* initiates the discussion of evaluation?

HYPOTHETICAL

- **Drew is in fourth grade**
- **Drew has been diagnosed with ADHD**
- **Drew demonstrates problems with impulsivity, hyperactivity and executive functioning**

REFER FOR AN EVALUATION?

- **Yes**
- **No**
- **Seek more information**

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- **Drew is getting As and Bs**
 - **Drew is performing at grade level on statewide assessments**
 - **Drew is distracted and needs redirections in class**

REFER FOR AN EVALUATION?

- **Yes**
- **No**
- **Seek more information**

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- **Drew is inconsistent in completing classroom tasks within routine timelines**
 - **Drew sometimes sits alone at lunch**
 - **Drew has twice gotten into scuffles on the playground at recess**

REFER FOR AN EVALUATION?

- **Yes**
- **No**
- **Seek more information**

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- **Drew's grades drop to Bs and Cs**

REFER FOR AN EVALUATION?

- **Yes**
- **No**
- **Seek more information**

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- **Drew is putting his head on his desk during class**
 - **Drew is arguing more with peers**
 - **Drew is found crying at recess twice**

REFER FOR AN EVALUATION?

- **Yes**
- **No**
- **Seek more information**

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- **Drew gets two Ds**
 - **Drew gets suspended from school for fighting twice**
 - **Drew shoves a teacher trying to break up a fight**

REFER FOR AN EVALUATION?

- **Yes**
- **No**
- **Seek more information**

THIS IS SCHOOL AFTER ALL . . .

- **Underlying assumptions**
 - **Special education is for learning problems**
 - **Social, emotional and behavior problems are parent obligations**
 - **Over-identification and labelling harms**
 - **Behavior is volitional**

CHILD FIND OBLIGATION

- **The Individuals with Disabilities Education Act requires all children with disabilities in need of special education and related services to be identified, located and evaluated**
 - 20 U.S.C. § 1412(a)(3)

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- **Specifically includes:**
 - **Homeless children**
 - **Wards of the state**
 - **Children attending private schools**
 - **Regardless of the severity of the disabilities**

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- Child find also *must include* children who are *suspected* of being eligible for and in need of special education, *even though they are advancing from grade to grade*
 - 34 C.F.R. § 300.111(c)

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- **“We also believe it is important to clarify that a child suspected of having a disability but who has not failed, is making academic progress, and is passing from grade to grade must be considered in the child find process as any other child suspected of having a disability . . . “**

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- **The child find regulation “has been revised to clarify that children do not have to fail or be retained in a course or grade in order to be considered for special education and related services.”**
 - **OSERS Analysis of Comments and Changes, 71 Fed. Reg. 46584 (Aug. 14, 2006)**

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- Child find also *must include* homeless children and highly mobile children, including migrant children
 - 34 C.F.R. § § 300.111(a) and (c)

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- ❑ Every child of school age in the state of Wyoming having a mental, physical or psychological disability which impairs learning, shall be entitled to and shall receive a free and appropriate education *in accordance with his capabilities*
 - Wyoming Statutes § 21-2-501

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- Each LEA and IEU must establish policies and procedures for child identification and evaluation, including identifying, locating and evaluating each child *suspected of having a disability*, birth through 21 years of age, who resides within their jurisdiction
 - Wyoming Rules and Regulations, Ch. VII, § 9(a)(i)

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- **Wyoming State Rules specifically include children who are:**
 - ❑ **In private schools**
 - ❑ **In facilities such as residential treatment centers, day treatment centers, hospitals, mental health institutions, detention and correctional placements**
 - ❑ **Highly mobile**
 - ❑ **Advancing from grade to grade**

THE PRIMARY OBLIGATION

- The U.S. Supreme Court recognized the “child find” requirement as fundamental to the IDEA in *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484 (2009)

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- “A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress’ acknowledgement of the *paramount importance* of properly identifying each child eligible for services.”

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- **T.A. was a 12 year old student with a history of a communication disorder**
 - **During 6th grade his grades dropped from As and Bs to Cs, Ds, and Fs**
 - **Beginning of 7th grade and mid-year his parents told school of ADHD diagnosis**

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- **District wrote a § 504 Plan in January**
 - **District sought IDEA evaluation in February**
 - **T.A. had missed 29 days of school, had 24 discipline referrals and was expelled**

OREGON SEA DECISION

- **Ample reason to suspect disability**
- **Trouble focusing in class, poor grades, poor work completion habits, skipping school, defiant and disruptive**
- **By time of referral failing classes and disciplined frequently**

INITIATING THE PROCESS

- Child find is an affirmative, ongoing obligation
- Child find obligation *does not depend* on parental request for an evaluation
- Parental failure to request identification or evaluation *does not* relieve a school district of *its* child find obligation

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- **Either a parent or a public agency may initiate a request for an initial evaluation to determine if the child is eligible**
 - **34 CFR § 300.301(b)**

HAWAII v. CARI RAE S. (D. Hawaii 2001)

- **Leading child find case cited frequently**
- **Numerous warning signs of emotional impairment and need for evaluation**
- **Failure to evaluate was violation of child find requirement**
- **Graduation from high school did not matter**

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- **Student identified late in 11th grade**
 - **Before that, was ranked low in her class**
 - **Absent from school 159 days in 10th grade**
 - **Numerous behavior referrals in 11th grade**
 - **Showed signs of drug use and behaviors related to parent-child problems**

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- **Student was hospitalized after threatening to kill her mother after confrontation regarding drug use**
 - **At hospital tested positive for marijuana and was diagnosed with ODD and chemical dependency**
 - **Court involvement, detention center and residential treatment followed**

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- Court described the IDEA child find provisions as an “affirmative duty”
 - Court cited to regulation regarding passing grades and other decisions to establish a child find trigger based on *suspicion*

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- **“That is, the child-find duty ‘is triggered when the [state or LEA] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.’”**

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- The Court cited with approval the hearing officer's note that "the threshold for 'suspicion' is relatively low, and that the inquiry was not whether or not she actually *qualified* for services, but rather, was whether she should be *referred* for an evaluation."

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- The Court specifically rejected application of the “reason to know” standard borrowed from the “pre-identified student” provisions of IDEA, as it mistakenly concluded was engrafted by the Third Circuit into the general child find provision in *W.B. v. Matula* (3rd Cir. 1995)

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- **Rejection of these migrating standards seems correct for at least three reasons**
 - **Notice of behavior likely to indicate a disability is too narrow to be generally applicable**
 - **The “reason to know” provisions are limited because they create an exception to general placement rules**

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- **These protections have since been narrowed to eliminate the provision that knowledge can be based on behavior or performance demonstrating a need for services**

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- **The Court rejected the State's argument that her graduation proved she was not harmed despite the child find violation**

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- **“The State misses the point. It puts the proverbial cart before the horse.”**
 - **The *Rowley* FAPE standard “is not dispositive, especially if instruction is not provided under an appropriate IEP. No IEP; no FAPE under the *Rowley* standard.”**

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- **The school system was on notice of a possible disability when her teacher “realized there was a real problem”**

ELIGIBILITY

- **“Child with a disability” is defined as:**
- **(1) a child evaluated as having one of thirteen specified disabilities categories; and**
- **(2) who, by reason thereof, needs special education and related services**
 - **34 C.F.R. § 300.8(a)**

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- **Federal regulations require that the condition “adversely affects a child’s educational performance”**
 - **Wyoming state rules require that the condition “adversely affect the student’s educational performance”**

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- To “adversely affect” is simply to cause a “negative impact”
 - No quantitative limit was supplied by Congress to restrict or modify the term
 - Not a *significant, substantial, serious* or *marked* degree
 - These restrictive modifiers should not be engrafted on to narrow the gate

EDUCATIONAL PERFORMANCE

- **Not defined in IDEA**
- **Understood in special education to be broader than academics alone**
- **Encompasses social, emotional, behavioral, communication and functional skills**
- ***Must be an established link to educational performance***

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- **Legislative history cited with approval in *Jefferson County Sch. Dist. R-1 v. Elizabeth E.* (10th Cir. 2012)**
 - **The term “unique educational needs” includes the child’s academic, social, health, emotional, communicative, physical and vocational needs**

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- ***Letter to Clarke (OSEP 2007):*** the IDEA and federal regulations “clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child’s academic performance”

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- ***Letter to Pawlisch* (OSEP 1995):** students making progress within the regular education environment may require special education services; and the meaning of the terms “educational performance” and “adversely affects” must be established on a case-by-case basis in light of particular facts and circumstances

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- ***Letter to Anonymous (OSEP 2010):*** students with high cognition and disabilities who require special education are protected under IDEA; a student with high ability and ADHD could be eligible under OHI to address the lack of organizational skills, homework completion and classroom behavior

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- **The Second Circuit decided an adverse affect on educational performance could be determined solely by reference to two indicators of academic performance in *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.* (2nd Cir. 2008)**

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- **Student did not fail any classes**
 - **From 9th to 10th grade his GPA declined only nine points**
 - **Court could not conclude that decline was attributable to an emotional disturbance instead of drug use**

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- **The First Circuit decided a student with ASD was eligible despite good grades and generally non-disruptive classroom behavior in *Mr. I and Mrs. I v. Maine Sch. Admin. Dist. No. 55* (1st Cir. 2007)**

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- **ASD adversely affected the student's ability to communicate**
 - **ASD adversely affected her ability to interact with her peers**
 - **State regulations define the term “educational performance” to include communication and nonacademic skills**

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- **Nothing in the IDEA or its legislative history supports a conclusion that “educational performance” is limited only to performance that is graded**

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- **Neither the IDEA nor its regulations restrict eligibility to students whose disability *significantly* impacts educational performance**

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- **State special education regulations do not set a specific degree of impact on a child's educational performance as a threshold for IDEA eligibility**

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- **“[E]ducational performance in Maine is more than just academics”**
 - **Any negative impact, regardless of degree, qualifies as an “adverse effect” under federal and state regulations**

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- **The Third Circuit denied a child find claim when the child's behavioral problems were typical for students in early grade school, and there was evidence of intermittent progress and some above-average performance, in *D.K. v. Abington Sch. Dist.* (3rd Cir. 2012)**

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- **The Court was convinced it would be wrong to find a child find violation because the District offered him substantial accommodations, special instruction, additional time to complete assignments, one-to-one and specialist attention**

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- **Student struggled with reading and misbehaved regularly in kindergarten**
 - **Student repeated kindergarten**
 - **Second year his teacher expressed concern about his behavior, rushing through work, turning in incomplete assignments, difficulty controlling himself**

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- **Teacher reported student threw temper tantrums (43 documented over six week period), was defiant and extremely argumentative**
 - **Continued social and behavior problems over first and second grade**
 - **Parents obtained private evaluations and ADHD diagnosis**

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- **The IDEA's child find provision does not demand that schools conduct a formal evaluation of every struggling student**
 - **Some disabilities are notoriously difficult to diagnose and even experts disagree about whether some should be considered a disability at all**

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- **Student's misbehavior was typical of boys his age**
 - **His parents approved and cooperated with behavioral plans designed by teachers**
 - **His teachers discussed the results of the private evaluation**
 - **The private evaluator did not press for formal accommodations**

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- **“In sum, schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.”**

OTHER CASES

- ***Moore v. Hamilton Southeastern Sch. Dist.*** (S.D. Ind. 2013): child find claim could proceed after student suicide, where history of behavioral and discipline problems and diagnosis of depression, and despite average grades for student with above average ability

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- *E.J. by Tom J. and Ruth J. v. San Carlos Elementary Sch. Dist.* (N.D. Cal. 2011): school district knowledge of middle school student's anxiety disorder for years before referral for evaluation insufficient to show child find violation

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- **When it learned of private diagnosis of Asperger's school made a number of modifications to instruction and she completed fifth and sixth grades with high marks**

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- **Evaluation team met twice in seventh grade year after new diagnosis of anxiety and OCD and adopted new modifications**
 - **Once parents requested evaluation district provided it**

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- ***E.S. v. Konekti Unified Sch. Dist.*** (N.D. Cal. 2010): child find claims survived dismissal where student demonstrated aggression, defiance, emotional outbursts, inattentiveness and low frustration tolerance since kindergarten and parents provided ADHD diagnosis

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- **When his grades and test scores began to decline in the third grade and parents asked for special education services, school district declined, stating his behavior was volitional and so he did not qualify**

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- **School district knew or had reason to know student had a disability, and had reason to believe that special education may be necessary**

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- ***Ashli and Gordon C. v. State of Hawaii, Dept. of Educ.*** (D. Haw. 2007): student's ADHD lacked adverse impact on education to qualify under OHI where he performed at average achievement level, and teacher's need to adapt the regular education program did not demonstrate adverse effect

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- **“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”**

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- ***Venus Ind. Sch. Dist. v. Daniel S.* (N.D. Tex. 2002):** student was eligible under SED and OHI criteria where his academic performance was well above average, but he showed significant levels of opposition, hyperactivity, restlessness and impulsivity

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- **Parents supplied private ADHD diagnosis**
 - **Over twenty suspensions**
 - **Persistent refusal to do homework and disrespect toward staff led to IAES placement**

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- **Despite academic success he needed counseling, social skills training and a BIP to address behavior leading to removal from classroom**

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- **“It is undisputed here that Daniel’s academic performance was well above average, however, a true measure of a child’s educational performance is not strictly limited to an evaluation of his performance in academics”**

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- **“[e]ducational need’ is not strictly limited to academics, but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement . . . “**

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- **“With over 20 in- and out-of-school suspensions, the documentary evidence showed that Daniel’s behavior was a constant challenge to himself, his teachers . . . and his parents; and thus required some sort of attention”**

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- ***Carrollton-Farmers Branch Ind. Sch. Dist.***
(TX SEA 2013): report cards, test scores and teacher reports of student with ADHD defeated child find claim; student who performed typically in academics, behaviors and socially within general education classroom does not lead to suspicion of special education eligibility

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- **Insufficient that student did not always complete classwork, once complained about the lack of friends to sit with at lunch, and had a couple of bad school days from time to time, because these are typical**

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- ***District of Columbia Pub. Sch. (D.C. SEA 2012):*** despite preschooler's tantrums, lack of response to teacher instructions, and other misbehaviors, school did not violate child find duty because the behaviors were not unusual for his age and did not affect his grades

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- **“The IDEA does not dictate that every child with behavioral problems in school must be suspected of having an emotional or other disability”**

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- **“To the contrary, the IDEA expressly cautions that the ‘emotional disturbance’ disability category ‘does not apply to children who are socially maladjusted’ unless they meet the specific criteria for emotional disturbance”**

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- ***In re: Student with a Disability*** (NM SEA 2012): child find violation where middle school student had poor interactions with peers, injured himself by scratching, and missed more than 200 hours of instruction with visits to the nurse's office

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- **School was aware the student failed to complete schoolwork, cried in class, felt hopeless and self-mutilated when it interviewed him in response to suicide threat**

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- **Regular visits to the nurse's office caused him to fall behind in class because missing assignments impacted his grades and work**

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- ***Walker County Bd. of Educ. (AL SEA 2011):***
child find violation where school district declined parent request for evaluation because student was passing his courses despite behavioral problems

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- **Only when the student was admitted to a psychiatric hospital due to an emotional breakdown was an evaluation provided despite having been placed in an IAES several times the previous school year and failing his classes**

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- ***District of Columbia Pub. Sch. (D.C. SEA 2011):*** student's ADHD adversely affected his educational performance where he made careless mistakes with schoolwork, had difficulty paying attention, and acted aggressively towards peers and staff, despite high grades and above-average ability

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- **Educational performance is not limited to academics**
 - **“Instead, the team must consider the totality of the student’s educational performance, which includes academic performance, behaviors, and socializing skills”**

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- **“A proper gauge of a child’s educational performance consists of more than an evaluation of his grades and test scores. The focus should be upon the Student’s individual needs”**

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- ***Konecti Unified Sch. Dist. (CA SEA 2010):***
no child find violation where ten year old with ADHD and history of defiance and disciplinary referrals was making adequate educational progress

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- **While the threshold for suspecting a disability is relatively low, the student controlled his behavior when he wanted to and targeted his defiance to those seeking to enforce rules, leading to the conclusion that not all behaviors were related to ADHD**

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- ***Montgomery County Pub. Sch.*** (MD SEA 2010): child find claim failed where student was described as happy, popular and capable and he was academically successful despite absences due to school phobia

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- **School district has a duty to evaluate when it has knowledge that a student is a child with a disability, and it has “knowledge” when it knows or reasonably should know that the student is a student in need of special education**

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- **“It is often difficult to draw a bright line as to when a local school system should suspect that a student is a child with a disability”**

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- ***Newman-Crows Landing Unified Sch. Dist. (CA SEA 2008):*** child's kindergarten registration form provided "red flags" to which school district should have responded with evaluation when he missed nearly half of the first 120 days of school

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- **Form stated the child had cerebral palsy, toileting difficulties and was susceptible to respiratory infections**
 - **School district asserted that it need not assess because he was making adequate educational progress and it was first exhausting regular education resources**

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- **IHO rejected both claims**
 - **Adequate educational progress is not a valid reason not to assess the student**
 - **Exhaustion of regular education resources before referral could lead to unreasonable delays “as the LEA tries one regular education resource after another”**

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- ***Sherwood Sch. Dist. (OR SEA 2002):*** child find violation resulted in private school reimbursement where student had been diagnosed with **ADHD** and depression, a long history of behavior problems, suspension, poor social skills, and inability to get along with peers

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- **Parent had also sought assistance by bringing the student's struggles to the attention of the administrator**
 - **It was then reasonable for the administrator to have suspected eligibility**

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- **Once eligibility was suspected, it was the responsibility of the school district, not the parents, to determine whether an evaluation was necessary, and if it was, to offer to conduct it**