CHILD-FIND CASES TO REMEMBER IN AN "RTI WORLD"

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Though pure "RtI challenges" have not yet made it to the reported court case level, there have been plenty of child-find violation cases that have. Based upon these cases, it is important to remember that the IDEA child-find duty to refer, evaluate and identify is triggered by a "reason to suspect or believe" that a child is a child with a disability and may be in need of special education services. As a result, the child-find cases must be observed in an "RtI world," particularly those that identify referral "red flags" that school personnel must keep in mind in general and particularly as they move to full implementation of an RtI model.

A. Sample Recent Child-Find Cases

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).

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.

Richard S. v. Wissahickon Sch. Dist., 52 IDELR 245 (3d Cir. 2009). District court's ruling that the district did not fail to timely identify student as disabled prior to the eighth grade is affirmed.

The district court properly found that the school 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.

D.G. v. Flour Bluff Indep. Sch. Dist., 56 IDELR 255 (S.D. Tex. 2011). Ninth-grader's ADHD diagnosis and behavioral problems should have prompted the school district to conduct a special education evaluation rather than continuing the student's ineffective Section 504 accommodations. The student, who previously had no history of academic or behavioral problems, began exhibiting hyperactivity, impulsive behavior and uncontrolled vocalizations in the ninth grade. These behavioral problems resulted in two removals to an alternative school for a total of more than 100 school days. In addition, the parent informed the district early in the year that the student had been diagnosed with ADHD, which should have given the district a reason to suspect a disability requiring special education services. However, the district waited one year to conduct an evaluation and only in response to a request by the mother and should have evaluated within a few months after his behavioral problems manifested. "[Student] should not have been allowed to languish in the disciplinary program at [the alternative school] for almost an entire academic year before he was evaluated for IDEA services."

Long v. District of Columbia, 56 IDELR 122, 2011 WL 1061172 (D. D.C. 2011). Where district did not evaluate student for three years and violated its child-find duty, case is remanded to the hearing officer to determine appropriate compensatory education. In this case, the district's child-find duty was triggered when a private psychologist diagnosed a learning disability in 2006. Contrary to the district's assertions and the hearing officer's findings, there was evidence that the district was aware of the evaluation in 2006 but did not conduct an evaluation until 2009. For instance, an IEP team member apologized for the district's delay in following through on the referral process that was "initiated in 2006" when the charter school, for which the district was the LEA, referred the student for the evaluation in 2006. In addition, the district's assertion that the student suffered no harm is rejected, where the IEP team determined that the student was eligible for services when it finally completed the evaluation in 2009. The district's argument that it was not on notice of the suspected SLD until the parent presented a copy of the 2006 evaluation at the 2009 IEP meeting is also rejected, as the district's child-find obligations are triggered "as soon as a child is identified as a potential candidate for services."

E.J. v. San Carlos Elem. Sch. Dist., 56 IDELR 159 (N.D. Cal. 2011). District did not fail to timely identify the student as eligible under IDEA. Rather, the district properly and timely responded to parental concerns by convening a student study team meeting when it learned that a private neuropsychologist had diagnosed the student with Asperger syndrome. In addition, the team made modifications to the student's educational program, including extended time for test taking, the use of relaxation techniques and the use of a sign if the student needed to take a break. Not only did the student complete the 5th grade with A's and B's, she performed well in the 6th grade as well. During the 7th grade, the student study team met twice, after she was diagnosed with anxiety and OCD and adopted additional modifications to instruction. In eighth grade, the district promptly referred her for a special education evaluation in response to her parents' request. Prior to that, the student's teachers had no reason to believe she needed special education services and the evidence supports the conclusion that her parents did not request

referral prior to the team meeting in November 2008. Thus, the due process decision in favor of the district is affirmed.

Lazerson v. Capistrano Unif. Sch. Dist., 56 IDELR 213 (C.D. Cal. 2011). Where a student became suicidal, her father requested an IEP, and two days later the district asked the parents to bring the student in for an evaluation, the district did not deny FAPE to the student. The district took affirmative steps to arrange an evaluation, but the parents refused and placed the student in a residential facility with only a day's notice followed by months of non-communication from the parents. At the same time, the district continued its efforts to arrange an evaluation after the student was placed in the residential program, but the parents expressed no interest. Though the parents were acting in response to a mental health emergency, districts are not responsible for providing emergency mental health services.

Oxnard (CA) Elem. Sch. Dist., 56 IDELR 274 (OCR 2011). School district discriminated against a first-grader diagnosed with ADHD, a seizure disorder and a mood disorder by delaying his IDEA evaluation and failing to evaluate for Section 504 services. The district violated 504 by referring the student to its student support team before conducting an evaluation, even when there was reason to suspect a need for special education services. Where the district placed the child on a half-day schedule and later excluded him from summer school due to his disruptive behavior, coupled with the knowledge of the medical diagnoses, there was enough there to have suspected a need for special education services.

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.

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.

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.

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]].

B. Referral "Red Flags" that May Trigger the Duty to Evaluate

Based upon the above cases (and other decisions rendered in the past), I have developed a running list of referral "red flags" that courts/agencies have found, in combination, sufficient to constitute a "reason to suspect a disability" that would trigger the child-find/evaluation duty under the law. Below is my list thus far. Remember, however, that not one of these "red flags" alone would typically be sufficient to trigger the child-find duty, but that the more of them that exist in a particular situation, the more likely it is that the duty would be triggered.

1. Academic Concerns in School

   - Failing or noticeably declining grades
   - Poor or noticeably declining progress on standardized assessments
   - Student negatively stands out from his/her same-age peers
   - Student has been in the Problem Solving/RtI process and data indicate little progress or positive response to interventions
   - Student is on a 504 Plan and accommodations have provided little benefit

2. Behavioral Concerns in School

   - Numerous or increasing disciplinary referrals for violations of the code of conduct
   - Signs of depression, withdrawal, inattention
   - Truancy problems or increased unexcused absences
   - Student negatively stands out from his/her same-age peers

3. Outside Information

   - Information that the child has been hospitalized (particularly for mental health reasons)
   - Information that the child has received a DSM-IV diagnosis (ADHD, ODD, OCD, etc.)
   - Information that child is taking medication
   - Information that child is seeing an outside counselor, therapist, physician, etc.
   - Private evaluator suggests the need for an evaluation or services

4. Teacher/other service provider suggests an evaluation

5. Parent requests an evaluation