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EVALUATIONS AND ELIGIBILITY: MAKING SUCCESSFUL DETERMINATIONS FOR STUDENTS

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Child Find Obligations

A school district must conduct child find in order to seek out and identify all students with disabilities residing within its jurisdiction and attending private schools within its jurisdiction.

It is not sufficient to handle the student exclusively through the RTI process if there is a request for an evaluation.

The delay in making a decision regarding the referral and the need for an evaluation can result in an obligation to provide compensatory education services.

Culley ex rel. J.C. v. Cumberland Valley Sch. Dist., 73 IDELR 170 (3rd Cir. 2018).

The school district was informed of the diagnosis in 2007 but did not take any action.

After reviewing the case, the court concluded, contrary to the school district's position, that J.C. was eligible under the IDEA and that the school district erred in treating "the disease as something discrete and isolated rather than the defining condition of J.C.'s life."

Barney v. Akron Bd. of Educ., 73 IDELR 251 (6th Cir. 2019).

Student with a cognitive disability and a peanut allergy was appropriately accommodated by use of a Health Care Plan.

Is a Health Care Plan sufficient?

Harrison (CO) Sch. Dist. Two, 57 IDELR 295 (OCR 2011).

School district violated its child find requirement when it delayed for 18 months in conducting an evaluation, did not evaluate the student at the request of the parent and continued the RTI process.

Mr. P. and Mrs. P. ex rel. M.P. v. West Hartford Bd. of Educ., 885 F.3d 735, 118 LRP 11253 (2d Cir. 2018).

A sophomore student had trouble with suicidal and homicidal ideation and was hospitalized and ultimately diagnosed with Asperger's Syndrome. The student was provided accommodations under Section 504 upon his return to school, but no consideration was given to IDEA eligibility.

Held: the school district responded to the student's changing needs. He was initially served through a child study team and later under Section 504. The student was found eligible under the IDEA within 60 days of his referral following the second hospitalization.

Krawietz ex rel. Parker v. Galveston Indep. Sch. Dist., 72 IDELR 205 (5th Cir. 2018).

Ashley has suffered from behavioral problems since birth. She was identified with a disability under the IDEA early in her school career, but withdrew from the school district in 2008. She returned in August 2013, but the IDEA paperwork in her file was lost.

The court found that a disability should have been suspected by October 2014 as a result of the hospitalization, her academic decline and the thefts. The school district was required to develop an IEP and pay attorneys' fees.

Burnett ex rel. SB v. San Mateo Foster City Sch. Dist., 72 IDELR 147, 739 Fed. Appx. 870 (9th Cir. 2018).

The procedural violations did not result in a denial of FAPE because S.B. was not eligible for services under the IDEA and, therefore, there was no loss of educational opportunity.

Definition of Evaluation and Other Aspects of Evaluations

An initial evaluation must be “full and individual.”

An evaluation must “... determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.”

An evaluation may be conducted at the request of a parent or at the request of the LEA.

The types of assessments to be conducted should be decided by members of the IEP team, but not necessarily in a meeting.

The components can be determined by surveying the team, including the parents.

Informed consent from the parent is needed for an initial evaluation. If the parent does not consent, then a due process hearing or mediation can be utilized to gain consent for most students except for parentally placed private school students.

Informed parental consent must be sought for a reevaluation.

What if consent is not given?

Parentally-placed private school students with disabilities cannot be forced into an evaluation over parental objection.

A reevaluation should be conducted:

- 1) once every three years;**
- 2) earlier if the LEA determines a reevaluation is warranted due to changing needs; or**
- 3) at the request of a parent or teacher, except not more frequently than once a year unless agreed to by the LEA and parents.**

The team can determine that no additional data is needed for a reevaluation, but must provide notice to the parents of this determination and of the reasons.

Evaluations must be conducted before finding an eligible child is no longer eligible.

The timeframe for an evaluation and eligibility in federal law is 60 days after receipt of parent consent.

The timeframe may be extended if the student transfers during the evaluation period and the new school division “...is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and the subsequent local educational agency agree to a specific time when the evaluation will be completed....”

The evaluation may be conducted by school personnel or by outside personnel at the request of the school district.

The parents cannot be required to obtain and provide the evaluations.

Taking too long to complete the evaluation can give rise to a claim for compensatory education services.

Scope and Content of Evaluation

Need information to determine whether a child is a child with a disability and the educational needs of such child.

Use a variety of assessments and strategies.

No single measure may be used.

Screenings and observations are not necessarily evaluations.

School districts are entitled to conduct their own evaluations and cannot be forced to rely solely on private evaluations.

Section 504 evaluations:

“Notwithstanding the availability of private evaluations that identify a student as having a disability, the Section 504 regulation allows districts the opportunity to conduct its own evaluation in accordance with 34 C.F.R. Section 104.34.”

Failing to conduct an evaluation for six years can result in a lack of sufficient information for IEP planning and for FAPE. See *Brock, et al. ex rel. S.B. v. New York City Dept. of Ed.*, 117 F. Supp. 3d 355, 65 IDELR 135 (S.D.N.Y. 2015).

Issues with the content of the evaluations.

- Do not identify a disability within the evaluation. Leave that determination to the eligibility committee.
- Do not give as the purpose for the evaluation “referred by attorney” or “parent is threatening a due process hearing.”
- Be careful not to link behaviors with the disability. For example, do not suggest that the student is likely to be aggressive as a result of his emotional disability.
- Do clarify, when appropriate, that the behaviors or characteristics exhibited by the student are not necessarily attributable to a disability.
- Do clarify that any recommendations are not necessarily linked to a disability or required for FAPE.

Cases Discussing Legal Issues with the Scope of Evaluations

L.C. ex rel. A.S. v. Issaquah Sch. Dist.,
119 LRP 18751 (W.D. Wash. 2019).

The recommendations of the parents' private evaluator were not given a lot of weight because she did not observe the student in an educational setting and did not talk with the student's teachers.

Torda, ex rel. Capuano Torda and Torda, et al. v. Fairfax Cnty. Sch. Bd., 112 LRP 32614 (E.D. Va. 2012).

The school district was not required to evaluate for an auditory processing disorder until it was raised as an issue by the parents or suspected by the school division.

The private assessments identifying the auditory processing disorder were refuted by the position of ASHA that questioned this diagnosis for students whose mental age is below seven years, the lack of normative data on auditory processing for students under age seven and the fact that the APD should not substitute for problems associated with ID.

H.C. and J.C., ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist, 59 IDELR 108 (S.D.N.Y. 2012).

“Plaintiffs would have this Court measure M.C.’s progress by comparing her test results to the mean average of the educational abilities of children her age. This approach misconstrues the purpose of the IDEA. It is clear that a ‘child’s academic progress must be viewed in light of the limitations imposed by the child’s disability.’”

Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 2011).

Students in the process of an evaluation under RTI must be evaluated upon request of a parent if there is reason to suspect a disability. The use of RTI cannot delay a needed evaluation.

*Memorandum to State Dirs. of Special Educ., 65
IDELR 181, 115 LRP 18455 (OSEP Apr. 17, 2015).*

**OSEP stated that students who have high cognition,
have disabilities and require special education and
related services are protected under the IDEA.**

Independent Educational Evaluations (IEEs)

IDEA Federal Regulation 34 CFR 300.502(a):

- *The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.*
- *Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.*

- *For the purposes of this subpart—(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and (ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.*

The school division can establish IEE criteria regarding location, suggested personnel and qualifications.

Letter to Anonymous, 56 IDELR 175 (OSEP 2010).

- The criteria must be waived if the criteria will prevent the receipt of an IEE.
- Make sure that the school division's list of evaluators includes individuals who are capable of assessing the student with any presenting conditions that may make assessment difficult. Those conditions can include physical limitations and cognitive, visual and auditory and language impairments. Also, the inability of the student to understand English could be a factor.

It is important to verify that the individuals on the school division's list of IEE sources will actually conduct the evaluations and for the agreed-upon cost.

Be sure to establish written criteria for IEEs.

Make clear that no payment is made for the IEE until the evaluation is received by the school division. Get a release executed as part of the IEE process, either directly by the school division or by the private evaluator.

Right to an IEE

Parents have the right to obtain an IEE at public expense each time the district conducts an evaluation with which the parents disagree, unless:

- The district demonstrates in a due process hearing that its own evaluation of the child was appropriate.

When a parent requests reimbursement for an IEE before the completion of the district's own evaluation, the district can deny the request for an IEE without filing for a due process complaint.

Federal Regulations Regarding Eligibility

34 CFR § 300.8 - Child with a disability.

- **(a) General.** *(1) Child with a disability means a child evaluated in accordance with § § 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.*

- *(2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under § 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part. (ii) If, consistent with § 300.39(a)(2), the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.*

- *(b) Children aged three through nine experiencing developmental delays. Child with a disability for children aged three through nine (or any subset of that age range, including ages three through five), may, subject to the conditions described in § 300.111(b), include a child— (1) Who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (2) Who, by reason thereof, needs special education and related services.*

- Emotional disturbance *means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:*
 - *(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.*
 - *(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.*
 - *(C) Inappropriate types of behavior or feelings under normal circumstances.*

- *(D) A general pervasive mood of unhappiness or depression.*
- *(E) A tendency to develop physical symptoms or fears associated with personal or school problems.*
- *(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section*

W.G. and M.G. ex rel. K.G. v. N.Y. City Dept. of Educ., 56 IDELR 260 (S.D.N.Y. 2011).

The student's behaviors of truancy, substance abuse, refusing to learn and defiance were not occurring as the result of a disability or depression, but were attributable to social maladjustment. The student was not eligible as ED.

Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659 (4th Cir. 1998).

Truancy, theft, drug use and mild depression did not qualify student as ED where student did not require special education services even if the conditions did qualify the student as ED.

Letter to Anonymous, 213 IDELR 247
(OSEP 1989).

To a marked degree and over a long period of time means frequent, intense and enduring and lasting for as short as two months or as long as nine months.

(9) Other health impairment means *having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that— (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child's educational performance.*

Durbrow v. Cobb Cnty. Sch. Dist., 887 F.3d 1182 (11th Cir. 2018).

Connor acknowledged his own “lack of effort.” child with a disability under the IDEA because “...he did not, on account of ADHD, require special education. For starters Connor met or exceeded academic expectations. He was admitted into Wheeler High School’s selective Magnet Program based on his achievements in math and science.” He demonstrated “college readiness.” None of the teachers recommended special education services and the court agreed he was not eligible under the IDEA. When a school district uses measures besides special education to assist struggling students, it is even less likely in breach of its child-find duty.

Letter to Anonymous, 34 IDELR 35
(OSEP 2000).

A medical evaluation is not required for identifying as ADHD, but may be required by the state.

(10) Specific learning disability —(i) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Daniel P. v. Downingtown Area Sch. Dist., 57 IDELR 224 (E.D. Pa. 2011)

School district did not improperly delay in finding student eligible for LD services under the IDEA. Student was making progress under RTI and found ineligible. Subsequently, student was found eligible due to increasing academic difficulties. The school district acted appropriately when it found the student eligible at the time he required special education services.

R.Z.C. ex rel. David C and Dianna C. v. North Shore Sch. Dist., 118 LRP 50704 (9th Cir. 2018).

Student with handwriting, grammar, punctuation and spelling difficulties was not eligible for identification under the IDEA. The school district appropriately evaluated the student and concluded that he had good written expression and was able to receive average grades in his classes.

34 CFR § 300.307 Specific learning disabilities.

- *(a) General. A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State— (1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10); (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10). (b) Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability.*

34 CFR § 300.308 - Additional group members.

- *The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in § 300.8, must be made by the child's parents and a team of qualified professionals, which must include— (a)(1) The child's regular teacher; or (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or (3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and (b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.*

34 CFR § 300.310 - Observation.

- *(a) The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty. (b) The group described in § 300.306(a)(1), in determining whether a child has a specific learning disability, must decide to— (1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or (2) Have at least one member of the group described in § 300.306(a)(1) conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with § 300.300(a), is obtained. (c) In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age.*

What Do Adverse Educational Impact and Special Education Services Entail?

Pocono Mountain Sch. Dist. v. T.D. ex rel. S.D.L., 118 LRP 30227 (M.D. Penn. 2018).

The court acknowledged that TD performed well academically, but found that he was eligible under the IDEA as ED due to the diagnosed behavioral and social problems such as “vision problems, frequent nurse visits, an altercation with other students, assignment incompleteness, and disrespectful behavior towards his fourth grade teacher.” The court felt these problems were causing him to miss instructional time.

Springer v. Fairfax Cnty. Sch. Bd., 134 F.3d 659 (4th Cir. 1998).

Although Edward had average to superior intelligence, he failed three of seven classes in the eleventh grade. The failure was due mostly to incomplete assignments. He missed his final exams during a week of joy-riding in a stolen car with his friends.

In its decision it held that Edward was socially maladjusted and might require a residential placement in order to attend school but that this result did not make him ED.

Chelsea D. by Robert D. and Joanne D. v. Avon Grove Sch. Dist., 61 IDELR 161 (E.D. Pa. 2013).

The testing revealed some math weaknesses, but not sufficient to require special education services.

“Chelsea’s grades and testing showed that she did not need special education by reason of any specific learning disability she may have had in math reasoning.” The student had consistently met the district’s educational standards without special education services.

L.J., ex rel. Hudson v. Pittsburg Unified Sch. Dist., 68 IDELR 121 (9th Cir. 2016).

Parent requested that student be found eligible under the IDEA for many years. Student had tried to commit suicide, been hospitalized and placed on medication. The position of the school district was that he did not require specialized instruction.

The Ninth Circuit held that the provision of a one-to-one paraeducator, mental health services, clinical interventions by a behavior specialist as support for the general education teacher and accommodations such as “persistent teacher oversight, additional time to complete classwork or tests, shortened assignments, discretion to leave the classroom at will, or the options to complete classwork or tests in other rooms or with one-on-one support...” were not part of general education. The effect of his behaviors that occurred outside of the school environment interfered with school performance.

Eligibility Team Meeting

An eligibility team should include the following individuals:

- Qualified professionals; and
- The parent(s).

Have all members of the team review the assessments in advance of the meeting.

Give the parents a copy of the evaluation reports and eligibility determination.

Offer the parents an opportunity to have their questions about the assessments addressed prior to the eligibility meeting.

Rule out lack of appropriate instruction in reading and math and IEP.

Make decisions on a consensus basis.

Make decisions on a timely basis.

THE END