LOCATION, EVALUATION AND IDENTIFICATION: EVERYTHING LEGAL YOU NEED TO KNOW ABOUT CHILD FIND

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Especially in light of RTI, there has been a significant increase in litigation nationwide related to the overall issue of child find under the IDEA and Section 504. Specifically, this presentation will cover, in a practical fashion, everything legal (well, maybe not everything) that educators need to know about the issues arising under the law's child find requirements—from location and evaluation to identification of students with disabilities.

I. INTRODUCTION TO THE LAW'S OVERALL CHILD FIND REQUIREMENT

"Child find" is the term that is used under the law to describe the overall obligation of states and local school agencies to "identify, locate and evaluate" all children with disabilities residing within their jurisdictions who are in need of special education and related services. Both the IDEA and Section 504 have specific child find requirements.

In my view and based upon my experience, there are common legal issues that arise in all three segments of the overall child find duty: 1) the area of "locating" or timely referring a student for an evaluation; 2) the area of "evaluating" or appropriately conducting the evaluation itself; and 3) the area of "identifying" the student and appropriately determining eligibility. There are certain "things to know" with respect to all three of these segments of the child find duty.

A. The IDEA's Overall Child Find Language

The IDEA and its regulations require all states to have policies and procedures in place to ensure that all children with disabilities within that state who are in need of special education and related services are "identified, located and evaluated." 34 C.F.R. § 300.111(a)(i). This includes children with disabilities who are homeless or wards of the state and children attending private schools. In addition, the regulations note that "[c]hild find also must include—

> (1) Children who are *suspected of being a child with a disability…and in need of special education*, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

34 C.F.R. § 300.111(c) (emphasis added).

B. Section 504's Overall Child Find Language

The Office for Civil Rights (OCR) frequently investigates child find complaints brought by parents under Section 504. It is important to note that Section 504's regulations similarly contain the following language regarding the duty to evaluate:

> A [federal fund] recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation…of any person, who, because of handicap, *needs or is believed to need special education or related services* before taking any action with respect to the initial placement of the person in regular or special education….

34 C.F.R. § 104.35(a). See also, Dear Colleague Letter and Students with ADHD and Section 504: A Resource Guide, 68 IDELR 52 (OCR 2016) (hereinafter "ADHD Resource Guide").

Under the Section 504 regulations, public school agencies must identify, locate and conduct a free evaluation of any student who because of a disability "needs or is believed to need" special education or related services. If school staff perceive or receive information to lead them to suspect that a student has a disability—for example, that a student has ADHD and needs or is believed to need special education or related aids and services in addition to regular education—the school must evaluate under Section 504 to determine if the impairment substantially limits that student in a major life activity. According to OCR, it is important that schools consider conducting an evaluation when students demonstrate to teachers or parents signs of needing special education or related aids and services to meet their individual educational needs as adequately as the needs of their nondisabled peers are met. ADHD Resource Guide, pp. 9-10.

II. EVERYTHING LEGAL YOU NEED TO KNOW ABOUT THE LAW'S CHILD FIND REQUIREMENTS

A. The "Location" Requirements

1. The Duty to Refer for an Evaluation is an Affirmative Duty

The "location" segment of the child find duty relates to finding and timely referring students for an evaluation. As indicated previously, both the IDEA and Section 504 mandate an evaluation when there is sufficient "suspicion" or "reason to know" that a student is a child with a disability and needs special education or services under IDEA or Section 504. This is what makes the duty to "locate" those who are "suspected" to be in need of an evaluation an affirmative duty, which does not depend upon whether the parent has requested an evaluation or not.

> Jana K. v. Annville Cleona Sch. Dist., 63 IDELR 278 (M.D. Pa. 2014). The parent's failure to notify the district that a physician had diagnosed his daughter

with depression did not excuse the district's failure to conduct an IDEA evaluation. The duty to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as "bullying"; she visited the school nurse on at least 54 occasions for injuries, hunger, anxiety or a need for "moral support"; the student's grades, which had been poor to average in previous school years, plummeted when she began 7th grade; and the district was aware of at least one on-campus act of self-harm where she swallowed a metal instrument after using it to cut herself. This "mosaic of evidence" clearly portrayed a student who was in need of a special education evaluation.

Compton Unif. Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010), cert. denied, (2012). 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).

2. Courts and Agencies Recognize Certain "Referral Red Flags" that Trigger the Duty to Refer for an Evaluation

There have been many court and agency decisions regarding the failure to timely refer a student for an evaluation pursuant to the child find duty under IDEA and Section 504. Based upon existing case law and agency opinions issued over the years, I have developed a running checklist of "referral red flags" that courts/agencies could find, in combination, sufficient to constitute a "reason to suspect" a disability and need for services that would trigger the IDEA's or 504's child find duty to refer a student for an evaluation.

Important Notes: When using this list, it is very important to remember that not one of these triggers alone (or even several together) would typically be sufficient to trigger the child find duty to refer a student for an evaluation under Section 504 or IDEA. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered.

It is also important to note that it is more likely that the child find duty will be triggered under Section 504 before it would be under the IDEA, because the definition of disability is much broader and all-encompassing than it is under IDEA. Under the IDEA, it is rare that a court has found it sufficient to trigger the duty to evaluate if there are no referral red flags in the area of academic concerns. However, OCR is likely to find that the 504 duty to evaluate has been triggered, even in the absence of any academic or learning concerns.

Referral Red Flags Checklist

a. Academic Concerns in School

- ☐ Failing or noticeably declining grades
- ☐ Retention
- ☐ Poor or noticeably declining progress on standardized assessments
- ☐ Student negatively "stands out" academically from his/her same-age peers
- ☐ Student has been in the Problem Solving/RTI process and progress monitoring data indicate little academic progress or positive response to interventions
- ☐ For IDEA child find purposes, student already has a 504 Plan and accommodations have provided little academic benefit

b. Behavioral/Social/Emotional Concerns in School

- ☐ Numerous or increasing disciplinary referrals for violations of the student code of conduct
- ☐ Signs of depression, withdrawal, inattention/distraction, organizational issues, anxiety, mental illness or mental health issues
- ☐ Truancy problems, increased/chronic absences or skipping class
- ☐ Student negatively "stands out" behaviorally/socially/emotionally from his/her same-age peers
- ☐ Student has been in the Problem Solving/RTI process and progress monitoring data indicate little behavioral progress or positive response to interventions
- ☐ For IDEA child find purposes, student has a 504 Plan and/or BIP and accommodations or strategies have provided little behavioral/social/emotional benefit

c. Outside Information Provided

- ☐ Information that the student has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- ☐ Information that the student has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- ☐ Information that the student is taking medication

- Information that the student is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or special services

d. Internal Information from School Personnel

- Teacher or other school service provider requests or suggests a need for an evaluation or special services or special education under 504 or IDEA

e. Parent Request for an Evaluation or Services

- Parent requests an evaluation or services and other listed item(s) above is/are present

3. The Duty to Timely Refer for an Evaluation is not Contingent upon Participation in the RTI Process

While RTI data may be informative in determining whether the duty to refer a student for an evaluation has been triggered, it is important that educators understand that the duty to refer a student for an evaluation cannot be based upon whether or how long a student has been participating in an RTI framework or receiving RTI interventions. Rather, the duty is legally triggered when there is sufficient reason to suspect or believe that a student is a child with a disability and needs special 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 provision 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.
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> Letter to State Directors of Special Education, 61 IDELR 202 (OSEP 2013). School districts cannot use RTI as a reason to expand the timeline for completing an initial evaluation of a transfer student who was in the process of being evaluated by the former district. Districts must complete evaluations for such students, including highly mobile students, without undue delay and, preferably, on an expedited basis. When a highly mobile child changes districts after the prior district has begun but not completed an evaluation, the new district may not postpone the evaluation until its own RTI process has been completed. While the new district may choose to provide interventions while it is in the process of completing its evaluation, it is inconsistent with IDEA to delay completing it because a child has not participated in an RTI process in the new district.
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> 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.

4. The Duty to Timely Refer for an Evaluation Applies to Students Placed in Private Schools Too

As noted in the IDEA/504 language, the duty to timely refer a student for an evaluation applies to students who have been placed in private schools by their parents. However, the requirements are a bit different under IDEA and Section 504.

a. The IDEA

Under the IDEA and in carrying out the child find requirement for private school students, school agencies are to undertake activities similar to the activities they undertake for the agency's public school students. 34 C.F.R. § 300.131(c). With respect to conducting evaluations for and determining "equitable services" under the IDEA (as opposed to FAPE) for private school students, the district *in which the private school is located* is responsible. Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools, 111 LRP 32532 (OSERS 2011). This duty even extends to parentally placed private school students whose parents reside outside of the U.S. Letter to Sarzynski, 66 IDELR 51 (OSEP 2015).

It is important to note that while the district in which the private school is located is responsible for identifying a student in need of "equitable services" (i.e., a service plan), the home district continues to be responsible for referring and evaluating a student for FAPE under the IDEA upon the parent's request. Letter to Eig, 52 IDELR 136 (OSEP 2009) and District of Columbia v. Abramson, 48 IDELR 96 (D. D.C. 2007).

Another important thing to remember is that, in conducting an evaluation of a student placed in private school where RTI data has not been generated or does not otherwise exist, a school agency cannot require the student to participate in the RTI process before conducting an evaluation:

> 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."

b. Section 504

Section 504 contains no specific requirements regarding child find requirements for students in private schools. However, there has been some OCR authority suggesting that child find requirements apply, but that it is the student's home district, not the district in which the private school is located, that is responsible for conducting an evaluation. See, e.g., West Seneca (NY) Sch. Dist., 53 IDELR 237 (OCR 2009) [student's home district is required to conduct 504 evaluation of student with migraine headaches]. It is important to note that while the duty to conduct an evaluation under 504 may apply, 504 does not contain a requirement for 504 services to be provided to a student in a private school when the district has made FAPE available in a public school and the parent has chosen to keep the student in private school. Unless state law makes the same entitlements available to parentally placed private school students under Section 504, the requirements are different.

5. When a Decision is Made Regarding Whether an Evaluation will be Conducted, Appropriate Notice is Required

Under the IDEA, "prior written notice" (PWN) must be provided to parents anytime a school agency proposes or refuses to initiate or change the identification, evaluation or educational placement of or provision of FAPE to a child. 34 C.F.R. § 300.503. This PWN must contain specific components as set forth under the IDEA regulations and advise the parents of their procedural safeguards should they wish to challenge the agency's action/inaction. 34 C.F.R. § 300.503(b)(1)-(7). Thus, when a school agency proposes or refuses to conduct an evaluation, PWN is triggered.

Under Section 504, "notice" is required with respect to "actions regarding the identification, evaluation or educational placement" of students who need or are believed to need special instruction or related services. 34 C.F.R. § 104.36. While "written notice" is not required, it has become "best practice" to provide some sort of notice of action or inaction via the provision of an actual 504 notice form or the provision of copies of documentation reflecting a decision to refer (or not) a student for a 504 evaluation.

The bottom line is this: While school agencies can refuse a request to conduct an evaluation, most do not. More often than not, it is best practice to go forward with an evaluation and focus on the question of identification/eligibility rather than the question of whether an evaluation should be conducted.

B. The "Evaluation" Requirements

The "evaluation" segment of the child find duty encompasses many requirements. Obviously both IDEA and Section 504 require appropriate evaluations to be conducted once it is decided that a student should be referred for an evaluation.

1. The IDEA and Section 504 Requirements Applicable to Conducting an Evaluation are Different

The provisions regarding what constitutes an appropriate evaluation under the IDEA and Section 504 are different. While the IDEA contains fairly extensive provisions regarding evaluations, Section 504 does not.

a. The IDEA's initial evaluation requirements

Under the IDEA and once appropriate informed written parental consent is obtained, a school agency is required to conduct a "full and individual" evaluation before the initial provision of special education and related services to a child with a disability. 34 C.F.R. § 300.301(a). The evaluation must consist of procedures to determine if the child is a disability (under the definitions and timelines provided under federal and more specific state laws/guidelines) and to determine the educational needs of the child. 34 C.F.R. § 3003.301(c).

Specific evaluation procedures must also be in place under the IDEA and written notice to the parents must be provided that describes any evaluation procedures the agency proposes to conduct. 34 C.F.R. § 300.304(a). In conducting the evaluation, the school agency must:

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the parent that may assist in determining whether the child is a child with a disability and the content of the child's IEP (including information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities;

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 300.304(b). In addition, school agencies must ensure that:

(1) Assessments and other evaluation materials used to assess a child are selected and administered so as not to be discriminatory on a racial or cultural basis; are provided or administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do

academically, developmentally and functionally, unless it is clearly not feasible to so provide or administer; are used for the purposes for which the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instructions provided by the producer of the assessments;

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient;

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual or speaking skills (unless those skills are the factors that the test purports to measure);

(4) The child is assessed in all areas related to the suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations;

(6) In evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category with which the child has been classified; and

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304(c).

b. <u>504's evaluation requirements</u>

Section 504's evaluation requirements are not nearly as specific or detailed. In conducting a "504 evaluation," the 504 regulations set out the following requirements:

A school agency shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

i. Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producers;

ii. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

iii. Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure).

34 C.F.R. § 104.35(b). Further, in interpreting evaluation data and in making placement decisions, the 504 regulations require that school agencies (i) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and (ii) establish procedures to ensure that information obtained from all such sources is documented and carefully considered. 34 C.F.R. § 104.35(c). Under Section 504, collecting all of this information may be sufficient to constitute an appropriate "evaluation."

2. Formal Assessments May Not Always be Required as Part of an Evaluation

Though it is rare under the IDEA, it is clear that as part of an initial evaluation (if appropriate), a "review of existing data" could be sufficient to constitute an evaluation to determine whether the child is a child with a disability and the educational needs of the child without the administration of additional formal assessments. 34 C.F.R. § 300.305(a). According to the IDEA regulations, such "existing data" for review includes evaluations and information provided by the parents; current classroom-based, local or State assessments and classroom-based observations; and observations by teachers and related service providers. 34 C.F.R. § 300.305(a)(1). Based upon the review of existing data, the IEP team and other qualified professionals determine what additional data, if any, are needed to determine IDEA eligibility and the educational needs of the child. 34 C.F.R. § 300.305(a)(2). If none are needed, it is conceivable that an IDEA "evaluation" could consist of a review of all existing data. However, as stated previously, it is rare that additional formal assessment would not be required as part of an initial evaluation under the IDEA.

Under Section 504, it is less likely that formal tests or assessments are needed to conduct an "evaluation" of whether the student at issue has a disability—i.e., whether the student has a physical or mental impairment that substantially limits a major life activity. However, if "tests" are administered as part of a 504 evaluation, they must comply with the 504 regulatory requirements set forth above.

3. It is Important that School Agencies use a Variety of Assessments when Conducting Evaluations and That a Single Assessment is Not Used

As set forth previously, both IDEA and Section 504 require that a variety of assessments be used and considered as part of the evaluation process. It is particularly important that agencies refrain from using a single assessment to identify a disability and the needs of the student, particularly an IQ score.

> 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.

4. The Requirement to Conduct Comprehensive Evaluations Requires Evaluations in all Suspected Areas of Need, not Just Suspected Disability

As set forth previously, the IDEA regulations require, among other things, that in evaluating each child with a disability, a school agency must ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304.

> Timothy O. v. Paso Robles Unif. Sch. Dist., 822 F.3d 1105, 67 IDELR 227 (9th Cir. 2016). When a district has reason to suspect that a child has a disability, it must conduct a full and individual initial evaluation that ensures the child is assessed in all areas of suspected disability using a variety of reliable and technically sound instruments. Here, the district was aware that the student displayed signs of autistic behavior at the time of the initial evaluation. However, the district chose not to formally assess him for autism because a psychologist, who observed the student for 30 to 40 minutes, concluded that the student merely had an expressive language delay and that he could not diagnose the student with autism "off the top of my head." As a result, the district was unable to design an IEP that addressed the student's needs and, therefore, denied FAPE to the student. The district's fundamental procedural violations in this regard deprived the IEP team of critical evaluative information about the student's developmental disabilities as a child with autism and it was impossible for the team to consider and recommend appropriate services necessary to address his individual needs. Thus, the district deprived the student of critical educational opportunities and substantially impaired his parents' ability to fully participate in the IEP process.

A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D. Pa. 2015). District's delay in comprehensively evaluating teenager with an anxiety disorder is a denial of FAPE and entitles the student to compensatory education. The IDEA requires districts to conduct a "full and individual" initial evaluation of a student who is suspected of having a disability and districts must use a variety of assessment tools and strategies to gather relevant information about the student's functional, developmental and academic needs. Here, the district sought parental consent only to conduct a psychiatric evaluation of the student. The evaluation information did not include information from which the district could develop a positive behavior plan or IEP goals or to rule out SLD. From the outset, the district knew that the psychiatric evaluation would not address educational matters and should have known that it would need to conduct additional assessments to determine the full scope of the student's needs. In addition, the district did not convene the IEP team until 13 months after it first had reason to suspect that the student had a qualifying disability and the student went without appropriate services in the interim.

D.B. v. Bedford Co. Sch. Bd., 54 IDELR 190 (W.D. Va. 2010). Student with ADHD 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 [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.

5. School Agencies Should Exercise the Right to Conduct Their Own Evaluations While Considering Evaluations that Parents Bring to the Table

There is a long line of case authority that supports the school agency's right to conduct evaluations by experts of the agency's choosing. In some cases, where a parent has denied the school agency the right to conduct its own evaluation, that denial is considered a bar to the parent's ability to

obtain requested services or other relief. Thus, even where parents have obtained their own evaluations, the school agency may wish to seriously consider exercising its right to conduct its own, while still considering any information that the parents have provided.

> 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 required to fund IEE.
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> Shelby S. v. Kathleen T., 45 IDELR 269 (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.
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> 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.
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> G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Parents did not show a denial of FAPE to their child with autism and a brain injury based upon a failure to reevaluate his special education needs during his kindergarten year. Here, the parents effectively denied consent for the district's proposed reevaluation when they imposed significant conditions upon their consent for reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential. The district court was correct when it held that the parents effectively withheld their consent for the reevaluation. Clearly, the parents' conditions "vitiated any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." In addition, the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense.

It is important that school agencies remember to "consider" evaluative information that parents bring to the table. Although not bound by the recommendations made by outside evaluators or parental requests for particular services, school agency team members must consider such information as part of any evaluative or decision-making process.

> 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. Where 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.

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.

6. Schools May Not Delegate the Duty to Conduct an Evaluation to Parents

Under both IDEA and Section 504, it is important that school agencies not suggest to parents that they are the ones responsible for bringing evaluative information to the school's attention or that that educational decisions will be made "if you'll just bring us the doctor's report." Once a school agency has made it a requirement that a particular evaluation or assessment be done before decision-making can occur (in other words, the evaluation has become educationally necessary), the school agency is required to ensure that the evaluation is conducted at no cost to the parent.

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.

ADHD Resource Guide, p. 23. While there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's determination that the student has a disability and requires special education or related aids and services, due to his or her disability, if the school determines that a medical assessment *is* necessary to conduct the 504 evaluation, the school district must ensure that the student receives this assessment at no cost to the student's parents. Even where the parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment instead.

7. Once Evaluations are Conducted and Completed, School Agencies Must Fully Share All Relevant Evaluative Information and Results With the Parents

Part of ensuring that parents are provided the procedural right to meaningfully participate in all educational decision-making regarding their child is to ensure that they are provided with all bases for the decisions made, including access to and explanation and review of all evaluation results and other evaluative information used to support the recommendations.

M.M. v. Lafayette Sch. Dist., 64 IDELR 31 (9th Cir. 2014). District committed a procedural violation that denied FAPE when it did not share over a year's worth of RTI data with the child's parents during the eligibility meeting, even though it does not use the RTI model for determining LD eligibility. The duty to share RTI data does not apply only when a district uses an RTI model to determine a student's IDEA eligibility. This procedural violation was not harmless where the other members of the IEP team were familiar with the RTI data but the parents were not and, therefore, did not have complete information about their child's needs. "Without the RTI data, the parents were struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the [initial offer of special education services], and thus unable to properly advocate for changes to his IEP."

Amanda J. v. Clark County Sch. Dist., 160 F.3d 1106 (9th Cir. 2001). Because of the district's "egregious" procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the student's time within the district. Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to

enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

8. Parents May Request an IEE if They Believe that the District's Evaluation Did not Evaluate in All Areas of Need

Occasionally, parents may disagree with an evaluation conducted by the school agency and exercise their procedural right to request an Independent Educational Evaluation (IEE) at public expense. This can happen, even if the school agency did not conduct an evaluation in a certain area of need but the parent wants that done. In such cases, the school agency must, without unnecessary delay, decide to fund the requested IEE or request a due process hearing to show that its evaluation is appropriate. A response such as, "let us do that evaluation first, then you can ask for an IEE" will not suffice.

> Letter to Baus, 65 IDELR 81 (OSEP 2015). If a parent disagrees with a district's evaluation based upon the district's failure to assess the child in a specific area of need, the parent has the right to request an IEE at public expense in that area to determine whether the child has a disability and the nature and extent of the special education and related services the child needs. At that point, the district is required to either request a due process hearing to show that its evaluation is appropriate or provide the requested IEE at its expense.
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> Letter to Carroll, 68 IDELR 279 (OSEP 2016). The question posed to OSEP was whether, once a district's evaluation is complete and the parent then communicates a desire for a child to be assessed in a particular area in which the parent has not previously expressed concern, would the district have the opportunity to conduct an evaluation in the given area before a parent invokes the right to an IEE? A parent has the right to invoke the right to an IEE even if the reason for the parent's disagreement is that the district did not assess the child in all areas related to the child's disability. Once a parent requests an IEE, a district must either defend its evaluation in a due process hearing or fund an IEE (assuming the IEE meets agency criteria). There is no third option that allows the district to simply conduct the missing assessments. Thus, it would be inconsistent with IDEA to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either grating the parents' request for an IEE or filing a due process complaint to show that its evaluation was appropriate.
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> Avila v. Spokane Sch. Dist. 81, 69 IDELR 204 (9th Cir. 2017) (unpublished). District has shown that its reevaluation of student for SLD was appropriate and parents' request for an IEE is rejected. The fact that the school district's reevaluation of the student with autism did not specifically evaluate for dyslexia and dysgraphia did not make it inappropriate. The reading and writing assessments conducted covered a variety of disorders in addition to SLDs and satisfied the district's duty to evaluate the student in all areas of suspected disability. The district did not refer to specific reading and writing disorders but,

instead, evaluated for "specific learning disabilities," which covers a number of reading and writing difficulties.

9. The Duty to Conduct Reevaluations is as Important as the Duty to Conduct Initial Evaluations

Both the IDEA and Section 504 contain a requirement for schools to conduct reevaluations.

Under the IDEA, "reevaluation" is to be conducted when the school agency determines that the educational or related services needs of the child, including improved academic achievement and function performance warrant a reevaluation or if the child's parent or teacher requests a reevaluation. 34 C.F.R. § 300.303. The IDEA regulations note that a reevaluation may not occur more than once per year, unless the parent and the public agency agree otherwise, and that reevaluation must occur at least once every 3 years, unless the parent and the public agency agree that reevaluation is not necessary.

Under Section 504, "reevaluation" is required to be done "periodically," and the 504 regulations provide that a reevaluation procedure consistent with IDEA is one means of meeting this requirement. 34 C.F.R. § 104.35(d). Under Section 504, it seems to have become a national practice that review of the disability and plan/services determinations occurs at least annually. However, a "reevaluation" of disability or needed services could happen whenever warranted.

Both under IDEA and Section 504, it is particularly important to note that "reevaluation" does not necessarily mean the administration of formal assessments. Rather, and like the "evaluation" requirements, a review of existing evaluation data to determine whether additional data are needed to determine whether a child continues to be a child with a disability and to determine the student's educational needs could suffice. In the case of an IDEA reevaluation, if it is decided that additional data are not needed upon reevaluation, the school agency is required to notify the parents of that determination and their right request an assessment be done. If a parent requests an additional assessment as part of reevaluation under IDEA, the school agency is to conduct it. 34 C.F.R. §300.305(d).

What is important is that IEP and 504 teams meet to review existing data and "problem-solve" when a student is not performing well or noticeable changes have occurred with the student that may require a change in services or placement.

> Phyllene W. v. Huntsville City Bd. of Educ., 66 IDELR 179 (11th Cir. 2015) (unpublished). Case is reversed and remanded to the district court to determine an appropriate remedy where school district did not reevaluate an SLD student when it clearly had reason to suspect that the student might have a hearing impairment. The district was aware that the student had undergone 7 ear surgeries, was being fitted for a hearing aid and had difficulty communicating with others. Although the parent did not ask the district to evaluate the student's hearing, the IDEA does not require parents to ask for evaluations of suspected disabilities. Rather, districts have a continuing obligation to evaluate all students suspected of needing IDEA services and there was good reason to suspect that this student might have a

hearing impairment. Notification by the parent that the student was being fitted for a hearing aid alone should have raised a red flag that an evaluation was necessary to determine whether she had a hearing impairment necessitating further services.

Student R.A. v. West Contra Costa Unif. Sch. Dist., 66 IDELR 36 (N.D. Cal. 2015). District made numerous attempts to schedule reevaluation of 11 year-old with autism and it had no obligation to accept the mother's demand for an evaluation location to be identified with a one-way mirror that would allow her to see and hear the assessments. In addition, the parent failed to respond to an email from the district stating that it would interpret the mother's lack of contact as a refusal to make the student available for reevaluation. The mother's request to observe the assessment was unreasonable, given the district's longstanding policy of precluding parental observations in an effort to prevent an alteration of the testing environment that might skew results. In addition, neither the IDEA nor its regulations give parents the right to observe an evaluation.

Brock v. New York City Dept. of Educ., 65 IDELR 135 (S.D. N.Y. 2015). Existing evaluative data did not support the IEP team's recommendation that the student be placed in a public 12:1+1 public school program. The failure to conduct a reevaluation in the previous six years resulted in substantive harm, as the district's reliance upon information from the student's private school was misplaced. Not only did the student's progress reports use broad grading criteria and "rudimentary grading differentials," the private school's data did not include any educational testing or standardized assessments that supported the district's proposed change in placement. Thus, these were insufficient substitutes for the mandatory triennial reevaluation where the existing data did not indicate how the student might perform in a public school setting. Where the district did not challenge the appropriateness of the private placement or argue that the equities in the case would preclude reimbursement for the private placement, the district is ordered to reimburse the mother and grandmother for private school tuition costs.

West-Linn Wilsonville Sch. Dist. v. Student, 63 IDELR 251 (D. Ore. 2014). School district should have re-evaluated a student's behavioral needs and convene an IEP meeting before changing his educational placement. When the student began punching, shoving and using threatening gestures during his third-grade year, the district should have evaluated the student rather than discontinuing his participation in a mainstream music class, removing him from an inclusion PE class with others in his self-contained autism program and delivering his one-to-one instruction in a room next to the principal's office. Clearly, the district had notice of the need for a reevaluation by April 6, 2011, when the principal informed the director of student services that the special education teacher felt unsafe around the child. Although the district argued that it was merely implementing short-term solutions to accommodate the child until the end of the school year, its response "essentially turned the reevaluation process on its head." Thus, the district is ordered to reevaluate the student, convene an IEP meeting and

identify an appropriate placement for the upcoming school year. The ALJ's award of tuition reimbursement, however, is denied based upon the parents' failure to provide the 10-day notice of private school placement to the district and their lack of cooperation with the district's efforts to develop an IEP for the child's 4th grade year.

S.D. v. Portland Pub. Schs., 64 IDELR 74 (D. Me. 2014). School district must fund private school tuition for a 6th grader with a variety of reading and anxiety disorders based upon its failure to reevaluate the student. When the student's IEP team drafted his IEP, it was with the understanding that he was reading at level 7 in the Wilson Reading System. However, the student's new Wilson-certified instructor discovered early in the school year that the student was actually reading at a level 2. This discovery should have triggered a reevaluation of the student's IEP, rather than simply to continue instruction at a lower level. The district's failure to determine whether the student's decline stemmed from his previous teacher's failure to follow the Wilson program, a memory retention deficit, flawed proficiency assessments or some other reason amounted to a denial of FAPE.

10. The Timelines for Completing Evaluations are Extremely Important

There are specific timelines for completing initial evaluations under the IDEA:

- ❖ days to completion of initial evaluation from receipt of parental consent to evaluate.
- ❖ days from completion of initial evaluation to eligibility determination.
- ❖ days from eligibility determination to IEP development.

There is no timeline for completing reevaluations under the IDEA where consent has been obtained to conduct additional assessments but it is presumed that a "reasonable" timeline would be applied.

OCR has acknowledged that Section 504 does not contain an evaluation timeline but has recently opined that an evaluation must be done without "unreasonable delay."

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.

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.

Charlotte-Mecklenburg (NC) Schs., 117 LRP 4122 (OCR 2016). While there is no specific deadline for 504 evaluations, the district evaluated the student 211 days after receiving notice of the existence of the transfer student's prior 504 plan. This constituted an "unreasonable delay."

C. The "Identification" Requirements

The "identification" segment of the child find duty relates to making appropriate eligibility determinations under the IDEA or Section 504. Obviously, for special education services under the IDEA and state law, appropriate eligibility teams must adhere to and document reliance upon applicable State eligibility requirements, including definitions, criteria and minimally required evaluations and other data.

1. Parents Must be Given the Opportunity to Participate in Making Eligibility Decisions

Under the IDEA, a determination of eligibility upon completion of the administration of assessments and other evaluation measures is to be made by a "group of qualified professionals" and the parent. In addition, the school agency is to provide a copy of the evaluation report and documentation of the determination of eligibility at no cost to the parent. 34 C.F.R. § 300.306(a).

The 504 regulations require that the "disability" and "placement decision" are made by a "group of persons including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. § 104.35(c). In the ADHD Guide, OCR notes that this is often called "a Section 504 Team." ADHD Guide, p. 25. While parents are not included as a required member of the "504 Team," it has become best practice to invite parents to be a part of the 504 Team rather than to provide them notice of 504 actions and decisions after the fact and without their participation or input.

Under the IDEA particularly, it is important that "eligibility teams" not "pre-determine" their decisions regarding eligibility:

Shafer v. Whitehall Dist. Schs., 61 IDELR 20 (W.D. Mich. 2013). District staff committed a procedural error by deciding, prior to the eligibility meeting, that the student's IEP would classify him primarily as SLD and secondarily as OHI and speech-language impaired and that he would not be classified as autistic. However, a procedural error constitutes a denial of FAPE only if it impedes the child's right to FAPE, significantly impedes the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or causes a deprivation of educational benefits. The ALJ was correct in distinguishing between predetermination of a student's classification and

predetermination of an IEP and correctly concluded that the procedural misstep was not fatal because the IEP nevertheless put the student in other eligibility categories and provided him with appropriate services. In addition, the evidence reflected that the parent fully participated in the development of the IEP and the team considered the relevant data, creating an IEP that addressed the student's unique needs. Thus, the failure to classify the student as autistic did not amount to a denial of FAPE.

2. The Eligibility Decision is to be Made by Drawing upon Information from a Variety of Sources, not Just Test Scores

The IDEA and Section 504 require "eligibility teams" to draw upon information from a variety of sources when making their determinations. Specifically, the IDEA regulations refer to such sources as aptitude and achievement tests, parent input and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior. 34 C.F.R. § 300.306(c)(1). In addition, teams must ensure that information obtained from all of these sources is documented and carefully considered. 34 C.F.R. § 300.306(c)(2). In essence, and has been set forth previously, Section 504 requires the same.

It is important, then, that test scores are not relied upon as the sole source of information for making eligibility decisions:

> 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.
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> K.S. v. Fremont Unif. Sch. Dist., 56 IDELR 190 (9th Cir. 2011) (unpublished). An IQ score is not a "legal prerequisite" for determining that a student has an intellectual disability. Where the student's distractibility and limited ability to maintain social interaction prevented the district from relying upon an IQ test to assess her cognitive ability, other evidence reflected that she had an intellectual disability, including expert testimony, results on alternative cognitive tests, the student's IEPs and her progress reports from school. Given the nature and severity of her disabilities, the district court's finding that the student's progress was meaningful and significant is affirmed. In addition, the district had no

obligation to use an ABA-based teaching methodology when the student could benefit from an eclectic approach.

3. The Eligibility Determination under the IDEA Requires Three Prongs

In making an eligibility determination under the IDEA, it is my view that teams must make three determinations:

1) Based upon all relevant evaluative data and information from a variety of sources, does the student have a condition that constitutes a disability under state special education criteria?

2) Does the condition adversely affect educational performance?

3) If yes, does the condition adversely affect educational performance to the degree that the student needs special education services in order to successfully participate in the general curriculum?

There are several important and commonly addressed legal considerations in making this 3-pronged determination. First of all and with respect to the second prong, it is important that teams do not limit the definition of "educational performance" to academic performance when determining whether there is a condition that adversely affects educational performance. Social/emotional, behavioral, language and communication considerations should also be made.

> A.A. v. District of Columbia, 70 IDELR 21 (D. D.C. 2017). District's argument that the fifth-grader's good grades disqualified her from IDEA eligibility is rejected. Clearly, this child's anxiety, mood disorder and inability to regulate her emotions that resulted in her removal to the kindergarten classroom for approximately 20 days during the school year, caused her to fall behind in classroom instruction. As such, her parents demonstrated that her disability impeded her educational performance. Based upon the fact that the child tried to jump out of her second-floor bedroom at least two times while saying she wanted to kill herself surely meets the criteria of "a general pervasive mood of unhappiness or depression" or "inappropriate types of behavior or feelings under normal circumstances" sufficient to meet eligibility for ED.
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> 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.

With respect to the third prong for determining eligibility, it is clearly important to determine whether the student actually *needs* special education and related services. While the student technically may have a disability that in some ways affects educational performance, it may not be to the degree that the student needs special education:

> Durbrow v. Cobb Co. Sch. Dist., 72 IDELR 1 (11th Cir. 2018). Student with ADHD was not a student with a disability because he did not demonstrate a need for special education services. A student is unlikely to need special education if, inter alia: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to understand course material. Here, the student met or exceeded academic expectations during the first three years of high school. Not only was he selected for his school's rigorous magnet program based on his achievement in math and science, but he earned straight A's in his honors and Advanced Placement courses and achieved high scores on college entrance exams. In addition, the student's teachers did not believe he needed special education and several testified that his ADHD did not impede his learning and that he was able to make progress when he put forth sufficient effort. The work the student completed during his senior year showed that he was able to absorb material and maintain focus. The low grades that he received stemmed from his failure to complete homework or take advantage of the accommodations in his Section 504 plan. Thus, the district court did not err when finding that the student's poor grades did not result from his inability to concentrate. Rather, it stemmed from neglect of his studies.
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> G.D. v. West Chester Sch. Dist., 70 IDELR 180 (E.D. Pa. 2017). Intellectually gifted third-grader with an anxiety disorder is not eligible under the IDEA for services and the district's determination that there is no need for services is upheld. The school psychologist's evaluation report was not deficient, when the psychologist spoke with the student's therapist two weeks before issuing an evaluation report. The psychologist testified that the therapist did not tell her that the student could not return to school but, instead, told her that the student was able to hold it together at school and that the behaviors at issue were displayed in the home. Further, the therapist's characterization of the school as "an unhealthy environment" for the student was based on the student's mistrust of her assigned school counselor. The school psychologist recognized, however, that the student needed a trusted adult on campus and indicated that the district could put that support in place. Thus, the school psychologist properly considered the private therapist's input, and the district adequately addressed the student's anxiety by developing a Section 504 plan.
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> D.A. v. Meridian Jt. Sch. Dist. No. 2, 65 IDELR 286 (9th Cir. 2015) (unpublished). The district did not err in finding that the student was not eligible for services under the IDEA. High schooler's Asperger syndrome does not have an adverse effect on his educational performance (which in Idaho includes

academic areas such as reading, math and communication, as well as nonacademic areas such as daily living skills, mobility and social skills). Although the parents allege that the district focused too much on academic performance, the hearing officer and district court noted that the student had done well in classes that emphasized pre-vocational and life skills.

M.P. v. Aransas Pass Indep. Sch. Dist., 67 IDELR 58 (S.D. Tex. 2016). Where student was diagnosed privately with ADHD and a mood disorder, an impairment alone will not qualify a student for special education. A parent must also show that the student needs special education services to receive educational benefit. Prior services provided pursuant to a 504 Plan and diagnosis of Asperger's appeared to be roughly the same as the efforts made for the general student population and the student was abundantly successful. Without evidence that the student needs specialized instruction, the student is not eligible under the IDEA.

4. While "Social Maladjustment" Does not Qualify a Student as Eligible Under the IDEA, it Sometimes Cannot be Separated from ED Eligibility

H.M. v. Weakley Co. Bd. of Educ., 65 IDELR 68 (W.D. Tenn. 2015). An ALJ's ruling that the frequently truant high schooler was "socially maladjusted" did not mean that the student was not IDEA-eligible. The student's lengthy history of severe major depression coexists with her bad conduct and qualifies her as an ED child. Social maladjustment does not in itself make a student ineligible under the IDEA. Rather, the IDEA regulations provide that the term "emotional disturbance" does not apply to children with social maladjustment unless they also meet one of the five criteria for ED. Since age 9, this student has been diagnosed with severe major depression and later medical and educational evaluations stated that she had post-traumatic stress disorder in addition to a recurrent pattern of disruptive and negative attention-seeking behaviors. Further, the depression was marked, had lasted a long time and affected her performance at school. Thus, it is "more likely than not" that her major depression, not just misconduct and manipulation, underlie her difficulties at school. Thus, the hearing officer's decision finding her ineligible under the IDEA is reversed.

5. Under Both IDEA and Section 504, a Medical Diagnosis is Not Sufficient, by Itself, for Eligibility

No matter what the doctor diagnoses or the clinical psychiatrist or psychologist "prescribes," it is still not sufficient for determining eligibility under Section 504 or the IDEA.

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.

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."

6. At the End of the Day, Disability Label is not What Matters Legally

Many disputes have arisen regarding the label given to the disability rather than eligibility itself. Legally, courts have found that it's the provision of services to meet the student's individual needs—FAPE—that matters legally.

D.B. v. Ithaca City Sch. Dist., 70 IDELR 1(2d Cir. 2017). Parent's contention that the district's proposed IEP was not appropriate because it did not recognize the student's disability specifically as a "nonverbal learning disorder" is rejected. NVLD is not formally recognized as a psychiatric diagnosis by medical literature or by the state of New York. Accordingly the district's failure to specifically identify the disability in the IEP does not compel a finding that the district does not understand the nature of the student's disability or the extent of her needs. Thus, the lower court's dismissal of the parent's private residential school reimbursement claim is affirmed.

Lauren C. v. Lewisville Indep. Sch. Dist., 70 IDELR 63 (E.D. Tex. 2017). District's refusal to add autism eligibility to the student's IEP is upheld where the student does not meet the criteria for autism eligibility. Reportedly, the parents wanted autism added to the IEP because it would help them obtain services from outside agencies. While the district knew in 2002 that the student's physician diagnosed her with autism, the district evaluated the student within a reasonable

time after learning of that diagnosis and found her not eligible as a child with autism. The fact that the district did not classify her with autism did not mean that it violated its child find duty. To the contrary, the multiple evaluations that it conducted demonstrate compliance with child find requirements. Further, the IDEA does not require districts to affix a student with a particular label. Rather, the question is whether the district offered an IEP that is sufficiently individualized to address the student's needs and to provide meaningful educational benefit to the student. The district has met that standard by providing the student with ABA and other services that have resulted in academic, social and behavioral progress.

Dear Colleague Letter, 66 IDELR 188 (OSEP 2015). In response to concerns that districts are hesitant to reference or use the terms dyslexia, dyscalculia and dysgraphia in IEPs and other related documents, it is noted that nothing in the IDEA forbids districts from using such terminology. Using such terms may be helpful for districts at times, even though it is not a legal requirement to do so. In the IDEA regulations, a non-exhaustive list of examples of SLD includes dyslexia, but not dyscalculia or dysgraphia. However, this does not matter, since what is most important is that districts conduct an evaluation to determine whether a child meets the criteria for SLD or any other disability and to determine the need for special education and related services. Information about a student's learning difficulties may be helpful in determining educational needs. In addition, since a child's IEP must be accessible to the regular education teacher or other school personnel responsible for implementation, noting the specific condition involved might be a way for districts to inform personnel of their specific responsibilities related to implementing the IEP. It may also serve as a way for districts to ensure that specific accommodations, modifications and supports are provided in accordance with the IEP. Thus, districts are encouraged to consider situations where it would be appropriate to use specific terms like dyslexia, dyscalculia or dysgraphia to describe a child's unique needs through evaluation, eligibility and IEP documentation.

W.W. v. New York City Dept. of Educ., 63 IDELR 66 (S.D. N.Y. 2014). The failure to explicitly mention a diagnosis of dyslexia in the IEP goals for an LD student is not fatal to the IEP because the IEP goals were adequately designed to address the student's learning challenges, which include not only dyslexia, but also dyscalculia and dysgraphia.

Torda v. Fairfax Co. Sch. Bd., 61 IDELR 4 (4th Cir. 2013) (unpublished), cert. denied, (3/24/14). The district did not deny FAPE to a teenager with Down syndrome based on its failure to list auditory processing disorder as his secondary disability in his IEP. This is so, because the IEP addressed all of the student's needs, regardless of his classifications. Teachers gave detailed testimony on how they simplified lessons, paired visual material with oral instruction and checked for comprehension. Thus, there is no reason to disturb the district court's decision that the student received FAPE.