



# AVOIDING PITFALLS IN THE IEP PROCESS

Stephanie Weaver  
Pingora Consulting, LLC

Winter 2021



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# WHO WE ARE



## Stephanie Weaver

Stephanie is a partner at Pingora Consulting with Lenore Knudtson. Formerly an Administrator for the Wyoming Department of Education, Stephanie is currently a special education consultant dedicating her career to improving outcomes for children with disabilities. Pingora provides professional development and dispute resolution services to states, school districts, and advocacy organizations across the country.



Technical Assistance Specialist



Complaint Investigator & Mediator



**Pingora  
Consulting**

Dedicated to improving  
outcomes for children  
with disabilities.

# TODAY'S TOPICS



## Child Find

- Obligations
- Triggers
- Interventions
- Considerations
- Referral



## Evaluation & Eligibility

- Plan
- Comprehensive
- Communicate
- Eligibility



## Link Special & General Education

- Specially Designed Instruction
- General Curriculum
- IEP Implementation



## Accommodations

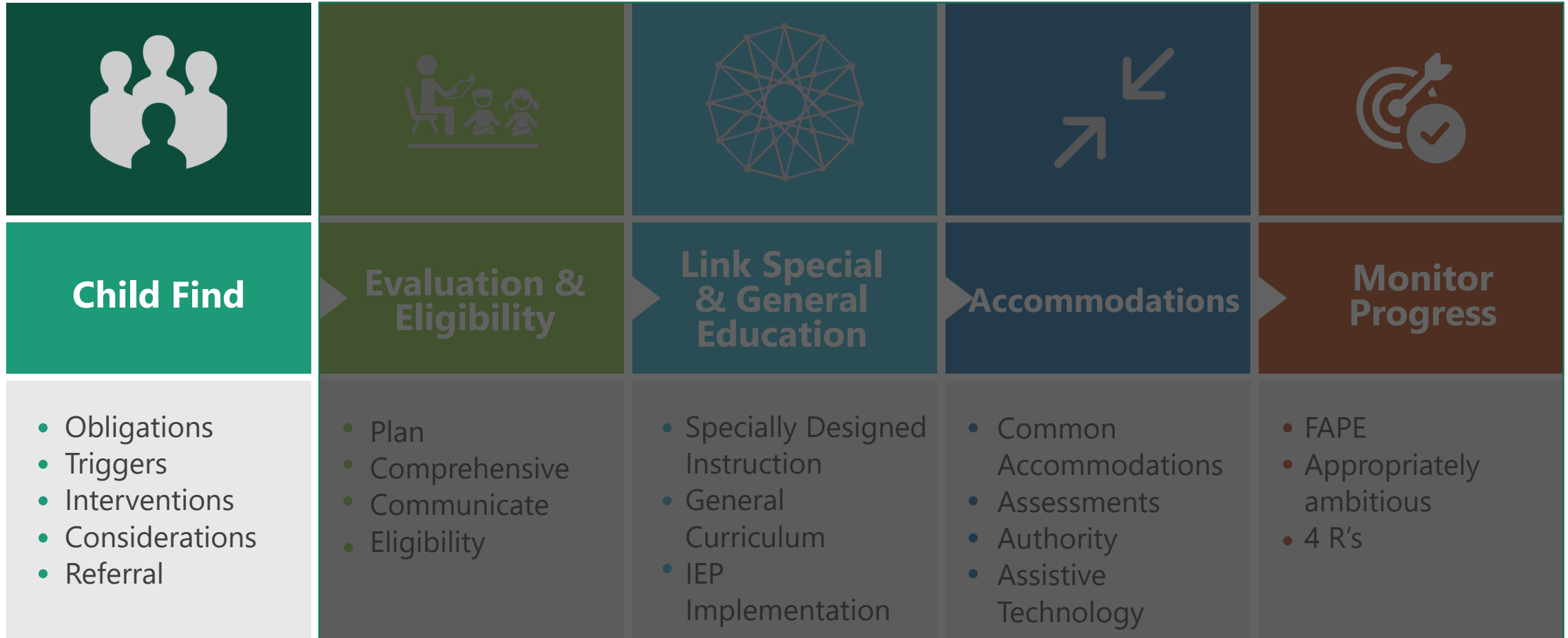
- Common Accommodations
- Assessments
- Authority
- Assistive Technology



## Monitor Progress

- FAPE
- Appropriately ambitious
- 4 R's

# TODAY'S TOPICS





# The Child Find Journey

It starts with a suspicion.

## 34 C.F.R. §300.111

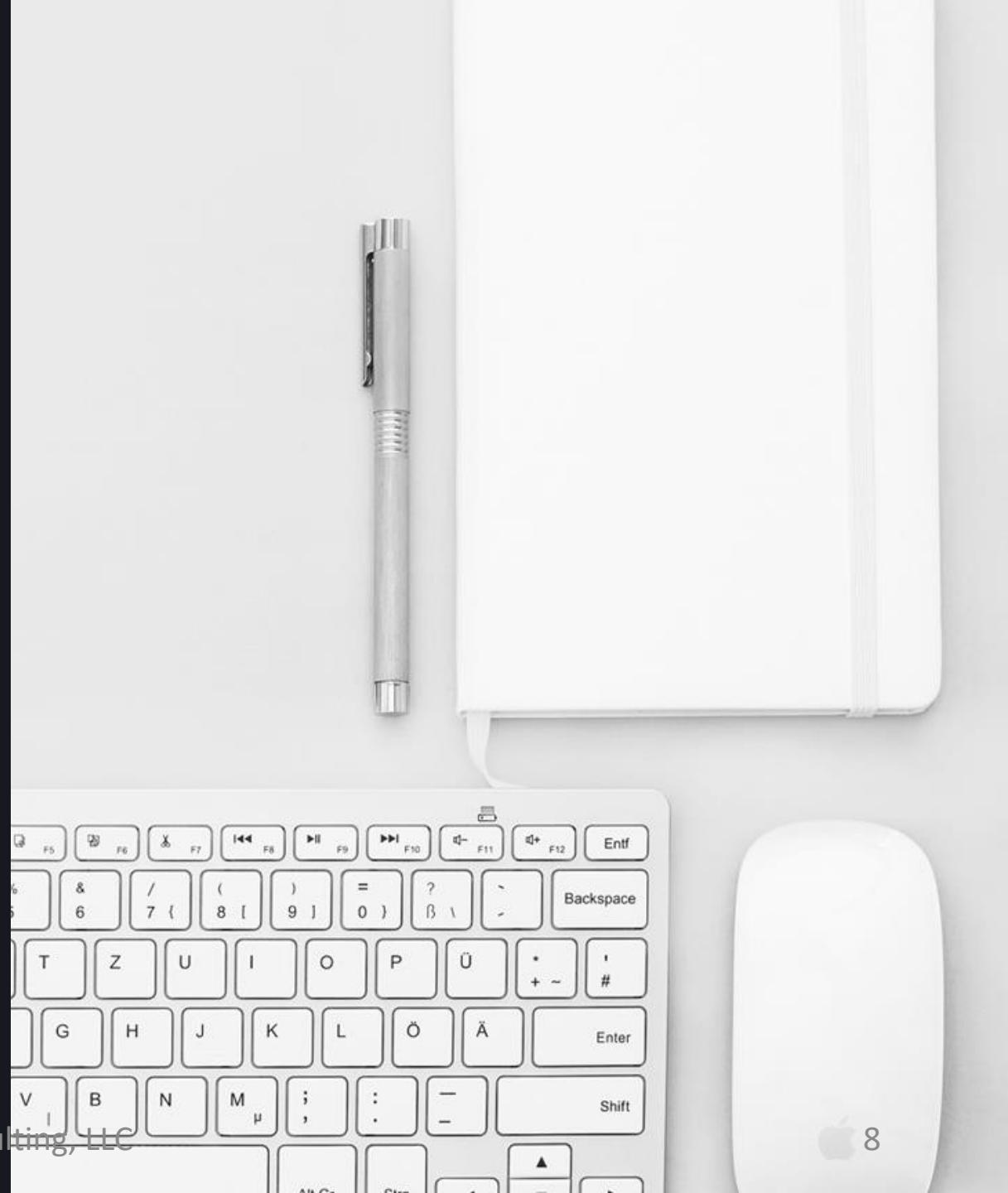
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- Child find must include children who are **suspected** of being a child with a disability and in need of special education.

# SUSPICION

Suspicion is NOT the same as certainty. Certainty is NOT the standard under IDEA. Suspicion of an IDEA disability and need for special education results in a mature child find obligation.

**NO DELAY!**





# Affirmative Duty

Although the request for initial evaluation to determine whether a student is a child with a disability can be made by either the parent or the school district (See 34 C.F.R. §300.301(b)), because the child find obligation is an **affirmative one**, a parent is not required to request that a district identify and evaluate a child.

*Robertson County Sch. System v. King*, 24 IDELR 1036 (6<sup>th</sup> Cir. 1996), *see also D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5<sup>th</sup> Cir. 2012).

## Failure NOT Required

Children do not have to fail or be retained in a course or grade in order to be considered for special education and related services.

Children who have not failed, are making academic progress, and are passing from grade to grade must be considered in the child find process as any other child suspected of having a disability.

*71 Federal Register 46584.*

# Two Prong Test

SUSPECT IDEA DISABILITY



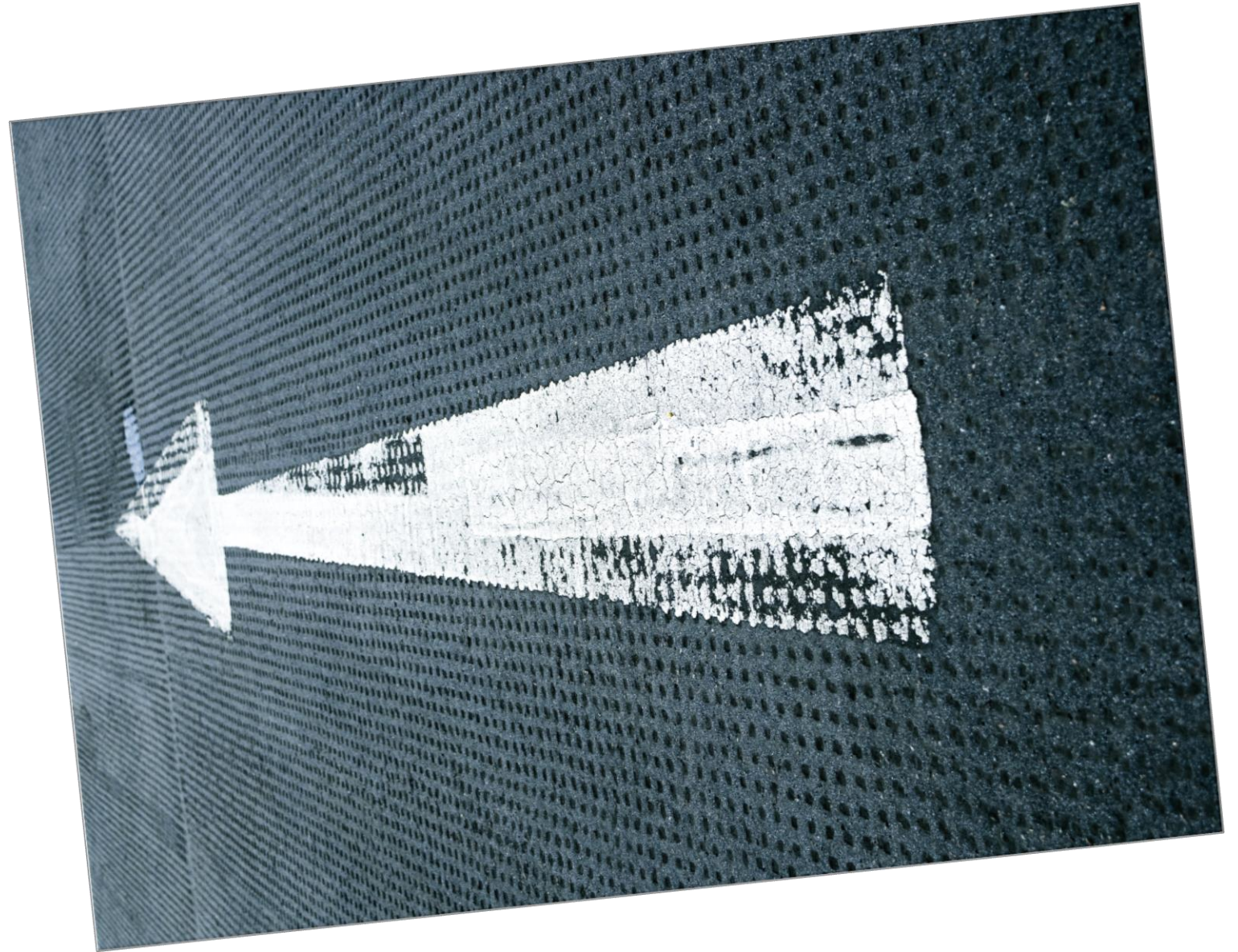
SUSPECT A NEED FOR SPECIAL  
EDUCATION



MATURE CHILD FIND  
OBLIGATION



**Procedural  
Safeguards  
Attach  
here!**



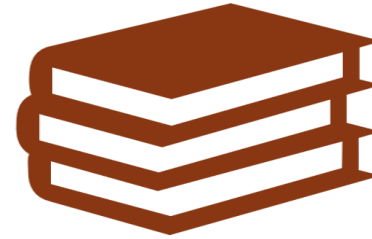
# Child Find Triggers



IF THE REGULAR EDUCATION STUDENT CONTINUES TO NEED THE INCIDENTAL BENEFIT OF SPECIALLY DESIGNED INSTRUCTION OVER A LONG PERIOD OF TIME, I.E. THE GAP IS NOT CLOSING.



IF THE REGULAR EDUCATION STUDENT HAS ADHD, DEPRESSION, OR OTHER DIAGNOSED CONDITION THAT MAY RAISE THE SUSPICION OF AN IDEA DISABILITY.



IF THE REGULAR EDUCATION STUDENT NEEDS INDIVIDUALIZED INSTRUCTION OR OTHER ADDITIONAL SUPPORTS IN ORDER TO BE ABLE TO BENEFIT FROM THE INSTRUCTION.



IF THE PARENT REQUESTS AN EVALUATION.



# CAST A BROAD NET



Create systems to find children.

# Screening

The screening of a student by a teacher or specialist **to determine appropriate instructional strategies for curriculum implementation** shall not be considered to be an evaluation for eligibility for special education and related services.

*71 Federal Register 46785.*

# Interventions

- A district may not reject a referral or delay an initial evaluation on the basis that pre-referral interventions have not been implemented with a particular child if there is a basis for suspecting the child has a disability and needs special education.

*Memorandum to State Directors of Special Educ., 67 IDELR 272 (OSEP 2016).*



# OSEP GUIDANCE

- The regulations at 34 C.F.R. §300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability.
- The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation to a child suspected of having a disability under 34 C.F.R. § 300.8.

# INTERVENTIONS

A district can violate its child find duty by repeatedly referring a student for interventions rather than evaluating the student's need for special education and related services.

The district maintained that it provided interventions recommended by its Student Teacher Team. Those interventions included Section 504 accommodations and additional tutoring.




The interventions did not demonstrate positive academic benefits. The student continued to struggle in reading, math and science, but also failed the statewide test for three years.


*El Paso Indep. Sch. Dist. v. Richard R.*, 50 IDELR 256 (W.D. Tex. 2008), *aff'd in part, rev'd in part*, 53 IDELR 175 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 3467, 110 LRP 44853 (2010).

A.P. v.  
Woodstock  
Bd. of Educ.,  
50 IDELR 275 (D.  
Conn. 2008), aff'd  
55 IDELR 61 (2nd Cir.  
2010).


The student was previously eligible as a student with a speech-language disability in preschool. He was exited from special education after preschool.



The student had behavioral and academic difficulties. The student was screened for ADHD at the request of the parents.




In fourth grade, he received classroom interventions, and the school reported reasonable academic and behavioral performance.




The student received A's, B's and C's on his report card, and met expectations on statewide tests.

A.P. v.  
Woodstock Bd.  
of Educ.,  
50 IDELR 275 (D. Conn.  
2008), aff'd 55 IDELR 61  
(2nd Cir. 2010).

The student's fifth grade teacher had concerns about his progress. Child study teams were convened in October and December. Intervention plans were developed and revised.



In the in the spring of fifth grade, parents obtained an independent evaluation due to continued concerns.



The school convened a meeting as a result of the evaluation, determined the student eligible under the IDEA, and created an IEP for the student's 6th grade year.

# The Court Ruled:



## Interventions

Although the student had some difficulty in the classroom, the evidence showed he responded well to interventions.



## Progress

The Student was not merely advancing from grade to grade, he was making progress.



## No Child Find Violation

# Parent Requests for Evaluation

34 C.F.R. §300.301(b)





# Responding to a Parent Request

If the school district agrees with the need for evaluation (NOTE: the school suspects and IDEA disability and a need for special education), it must promptly propose a comprehensive evaluation, seek parental consent, and conduct the evaluation adhering to appropriate timelines.

If the school district DOES NOT suspect an IDEA disability and the need for special education, it may decline the parent's evaluation request. However, the school MUST issue prior written notice documenting the reasons for the refusal. The parent has the right to challenge the school's refusal through dispute resolution. *Letter to Combs*, 52 IDELR 46 (OSEP 2008).

# Referral for Evaluation

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IDEA requires that if a child has not made adequate progress after an appropriate period of time, a referral for evaluation must be made. *34 C.F.R. §300.309(c)*.

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“It would generally not be acceptable to for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the LEA suspects the child to be a child with a disability.”

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*Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR 196 (OSERS 2007).*

# Referral for Evaluation

- With a multi-tiered instructional framework (RTI), schools identify students at risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, and adjust the intensity and nature of those interventions depending on a student's responsiveness.
- It would be inconsistent with the evaluation provisions in the IDEA to reject a referral and delay provision of an initial evaluation on the basis that a child had not participated in an RTI framework.
- *Letter to Zirkel*, 62 IDELR 151 (OSEP 2013), see also *Memorandum to: State Directors of Special Education*, 56 IDELR 50 (OSEP 2011).

# Child Find Critical Points

- A district's obligation to evaluate students in order to determine special education eligibility is a component of its Child Find obligation.
- The following points are critical:
  - The affirmative obligation is ongoing and exists for all students within your district's geographic boundaries.
  - The obligation extends to private school students attending private schools within your boundaries.
  - Child Find requires coordination with Building Intervention Teams and RTI experts within your district.

# Pay attention



## Triggers



## Delays



## Requests



# TODAY'S TOPICS



				
<b>Child Find</b>	<b>Evaluation &amp; Eligibility</b>	<b>Link Special &amp; General Education</b>	<b>Accommodations</b>	<b>Monitor Progress</b>
<ul style="list-style-type: none"><li>• Obligations</li><li>• Triggers</li><li>• Interventions</li><li>• Considerations</li><li>• Referral</li></ul>	<ul style="list-style-type: none"><li>• Plan</li><li>• Comprehensive</li><li>• Communicate</li><li>• Eligibility</li></ul>	<ul style="list-style-type: none"><li>• Specially Designed Instruction</li><li>• General Curriculum</li><li>• IEP Implementation</li></ul>	<ul style="list-style-type: none"><li>• Common Accommodations</li><li>• Assessments</li><li>• Authority</li><li>• Assistive Technology</li></ul>	<ul style="list-style-type: none"><li>• FAPE</li><li>• Appropriately ambitious</li><li>• 4 R's</li></ul>

# EVALUATION

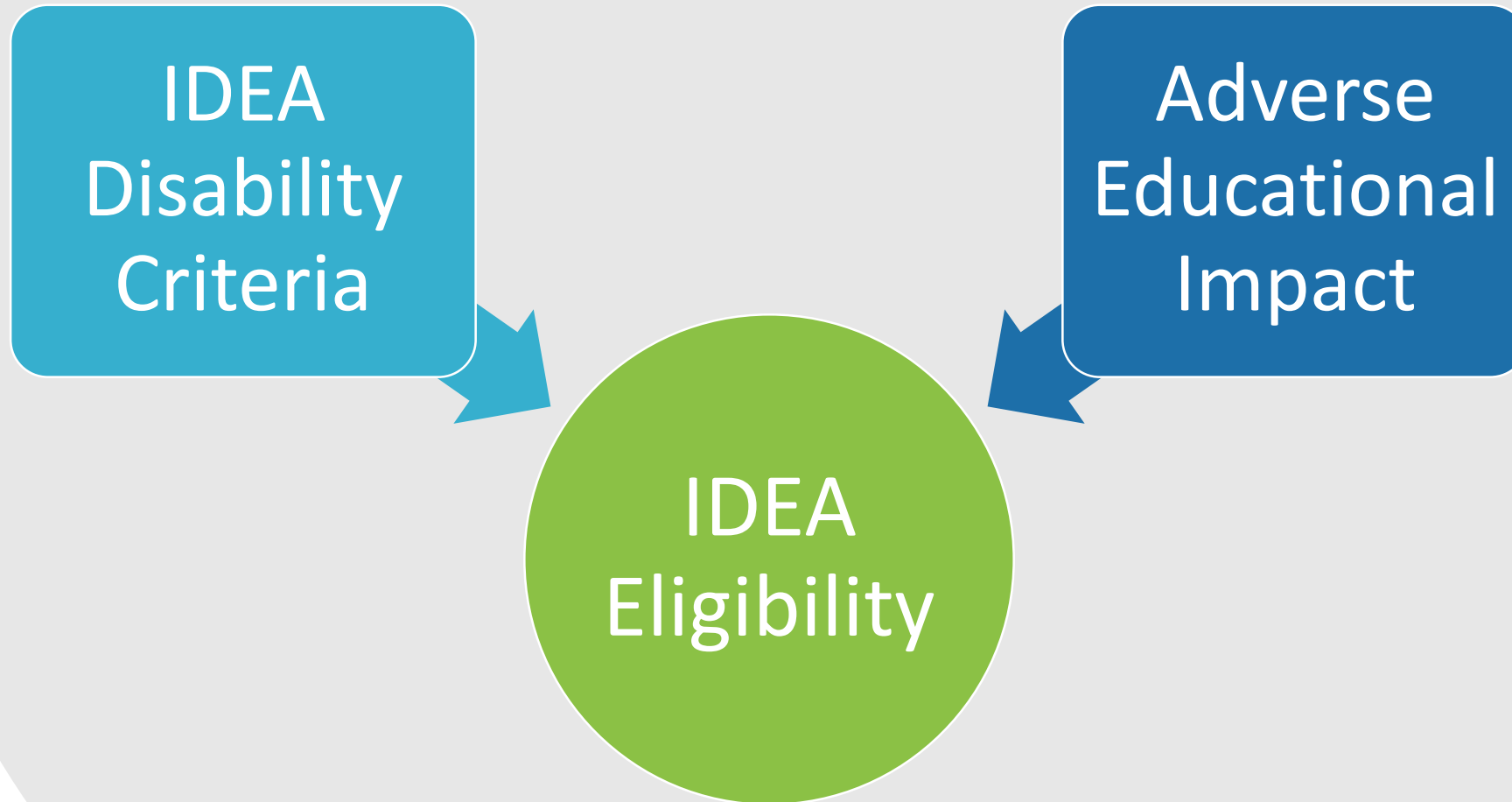
An evaluation under the IDEA serves TWO purposes:

- Identifying students who need specialized instruction and related services because of an IDEA-eligible disability; and
- Helping IEP teams identify the special education and related services the student requires.

*71 Federal Register 46548.*



# Eligibility Determinations



## *The Evaluation Starts Here*



# Evaluation Wheel



# Consent to Evaluate

- Once the team determines what additional data, if any, is necessary to answer the remaining evaluative questions, then it must propose a plan to collect that information.
- The parent must be asked for informed consent.
- Consent is *informed* when the parent has received written notice about the action proposed. HINT: PWN!

*34 C.F.R. §300.300.*

# Evaluation Components

01

Not use any single measure

02

Evaluate in all areas of suspected disability

03

Technically sound instruments

04

Assessment tools provide relevant information to assist in determining educational need



# What about an evaluation report?

- The parents must be provided a copy of the evaluation report and the documentation of determination of eligibility.

*34 C.F.R. 300.306(a).*

# Evaluate to determine PLAAFP.

- Each IEP must contain: A statement of the child's present levels of academic achievement and functional performance, including --
  - How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
  - For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities.

*34 C.F.R. §300.320(a).*

# Court Interpretations

The failure to conduct a comprehensive evaluation of the student's educational needs resulted in a finding that the IEP was inappropriate and the PLAAFP were invalid. *Pinto v. District of Columbia*, 64 IDELR 103 (D.D.C. 2014).

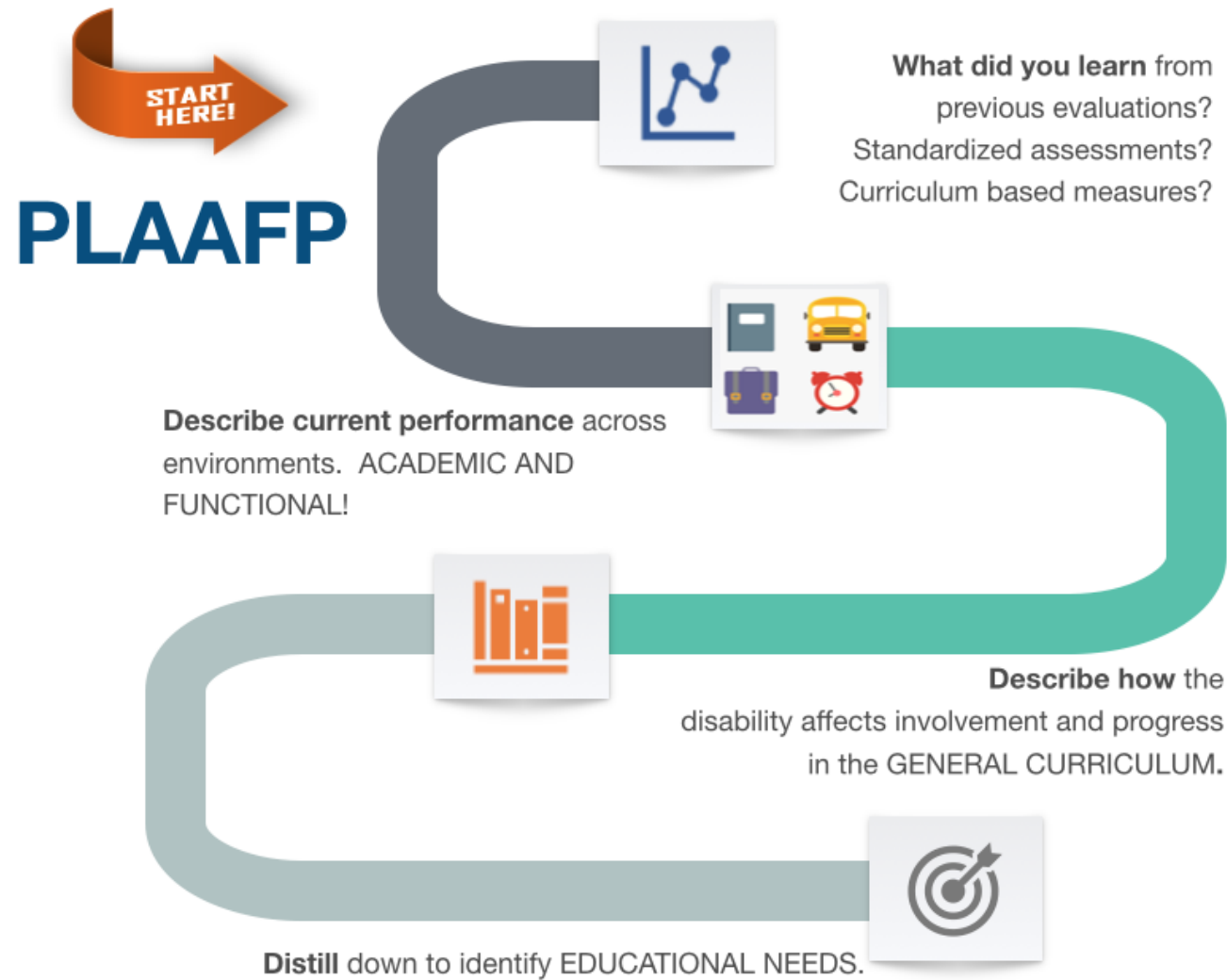
# PLAAFP = Needs

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The statement of **PLAAFP** should be individualized and reflect the student's unique abilities.

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*Letter to New, 211 IDELR 464 (OSEP 1987).*



*D.O. v.  
Escondido  
Union Sch. Dist.,  
73 IDELR 180 (S.D.  
Cal. 2018).*

- A district denied a student FAPE when it failed to timely conduct an autism assessment.
- Due to escalating behavior issues of the 10-year-old with an emotional disturbance and ADHD, the student's IEP team met in December 2016.
- At the meeting, the student's therapist reported that she completed an assessment and the student appeared to meet criteria for autism spectrum disorder.

## *D.O. v. Escondido Union Sch. Dist.*

- The district conducted an autism assessment in April 2017.
- Here, the court found that the district had sufficient notice of the student's suspected autism, pointing to the record of the December 2016 IEP meeting.
- **The court determined that the student was deprived of educational benefits, musing that his IEP goals were likely inappropriate because they were made without sufficient evaluative information about his individual capabilities as a child with autism. Because the district waited approximately four months to begin the process of obtaining information that might reflect an autism diagnosis and the student's resulting differing needs, the court found that it was "impossible" for the district to provide FAPE to the student.**



*D.H.H. v. Kirbyville Consolidated Indep. Sch. Dist.*,  
75 IDELR 4 (E.D. Tex. 2019).

- A district correctly determined that an eighth-grade student did not qualify for special education under the IDEA's emotional disturbance category.
- **To be eligible for IDEA services as a student with ED, the student's behavior must adversely affect her educational performance to a marked degree. To determine whether educational performance has been adversely affected, courts may look at the student's grades, behaviors, and peer relationships.**
- Here, the student demonstrated behavior characteristics of ED, but maintained A's and B's, had friends, and was liked by her teachers, which demonstrated that her behavior was not adversely affecting her educational performance.



Designed  
by the IEP  
Team

Comprehensive  
Evaluation

Present Levels  
& Needs

Measurable  
Goals

IEP  
Services

Least  
Restrictive  
Environment  
(LRE)

Educational  
Benefit

# TODAY'S TOPICS







# THE LINK BETWEEN SPECIAL & GENERAL EDUCATION

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It is critical.



Since 1975 in the EDUCATION  
FOR ALL HANDICAPPED  
CHILDREN ACT, Special  
Education has been defined as  
—

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SPECIALLY  
DESIGNED  
INSTRUCTION

---

“

Special education is a place  
where innovation occurs.





## 34 C.F.R. §300.39(a)

- *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—
  - (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
  - (ii) Instruction in physical education.

# 34 C.F.R. §300.39(b)

- *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
  - (i) To address the unique needs of the child that result from the child's disability; and
  - (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.





What is the  
general  
curriculum?

**It is the same  
curriculum as for  
nondisabled  
children.**

*34 C.F.R. §300.320(a)(1)(i).*

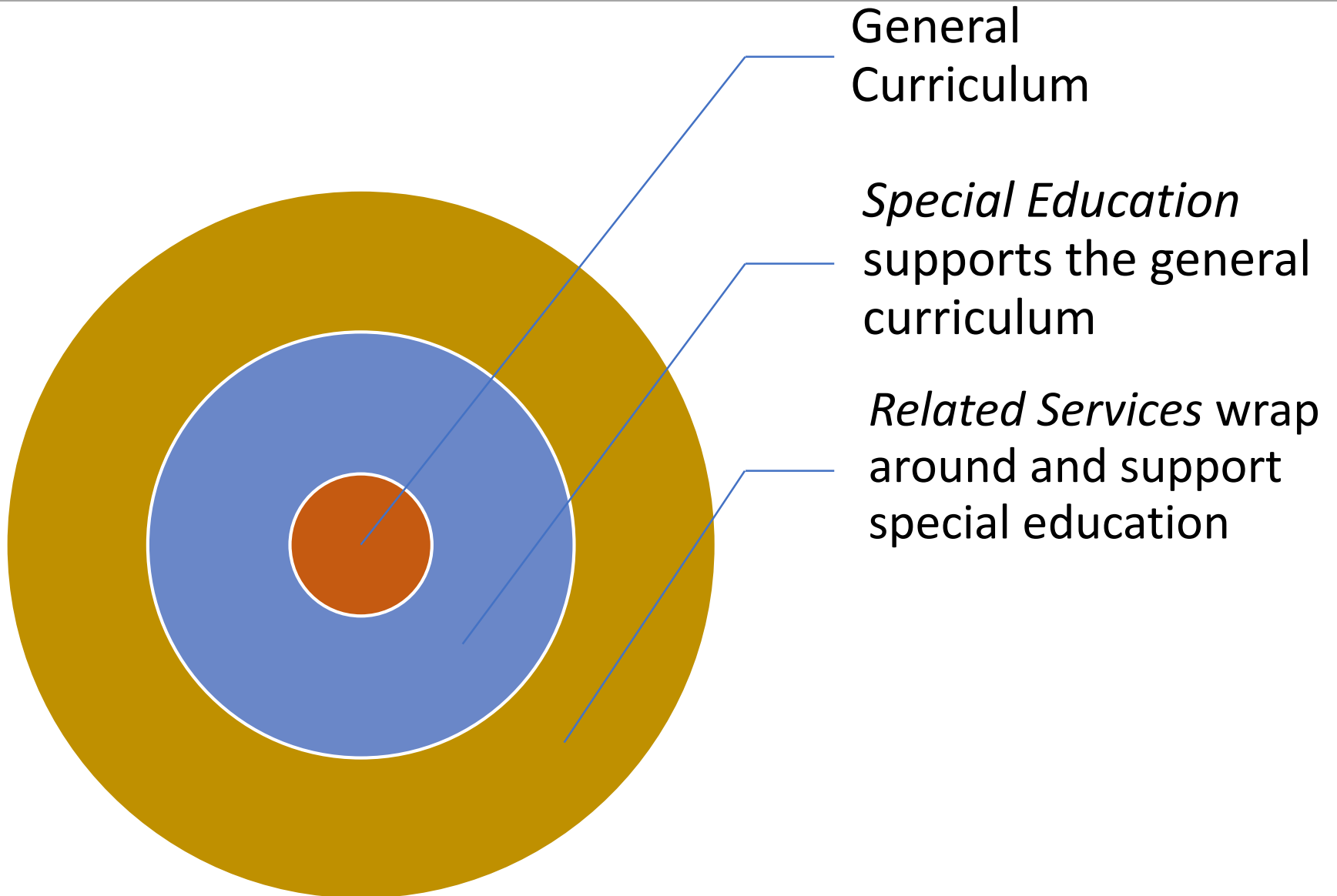
## What is the general curriculum?

- The Department interprets “the same curriculum as for nondisabled children” to be the curriculum that is based on a State’s academic content standards for the grade in which a child is enrolled.
- **Based on the interpretation of “general education curriculum” set forth in this letter, we expect annual IEP goals to be aligned with State academic content standards for the grade in which a child is enrolled.**

# What is the general curriculum?

- The standards must be clearly related to grade-level content, although they may be restricted in scope or complexity or take the form of **introductory or pre-requisite skills**.
- In a situation where a child is performing significantly below the level of the grade in which the child is enrolled, an IEP Team should determine annual goals that are ambitious but achievable. In other words, the annual goals need not necessarily result in the child's reaching grade-level within the year covered by the IEP, but the goals should be **sufficiently ambitious** to help close the gap.

*Dear Colleague Letter, 66 IDELR 227 (OSERS 2015).*





## The Link

General education and special education link together through the IEP.

## Discretion vs. The IEP

- IEPs must be implemented across all environments, throughout the school day, throughout the school year.
- Implementation failures happen when individuals, not teams, make decisions.
- How much discretion does a principal, teacher, paraprofessional, or bus driver have?

# Who Can Deliver Special Education?



**SPECIAL EDUCATION &  
GENERAL EDUCATION ESSA  
QUALIFIED TEACHERS!**



**SPECIAL EDUCATION TEACHERS  
PROVIDE SPECIALLY DESIGNED  
INSTRUCTION.**

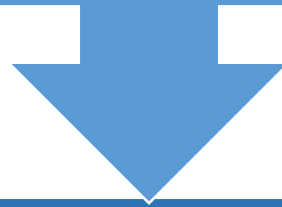
THINK *TYPE*,  
NOT *WHO*





# Who Can Deliver Special Education?

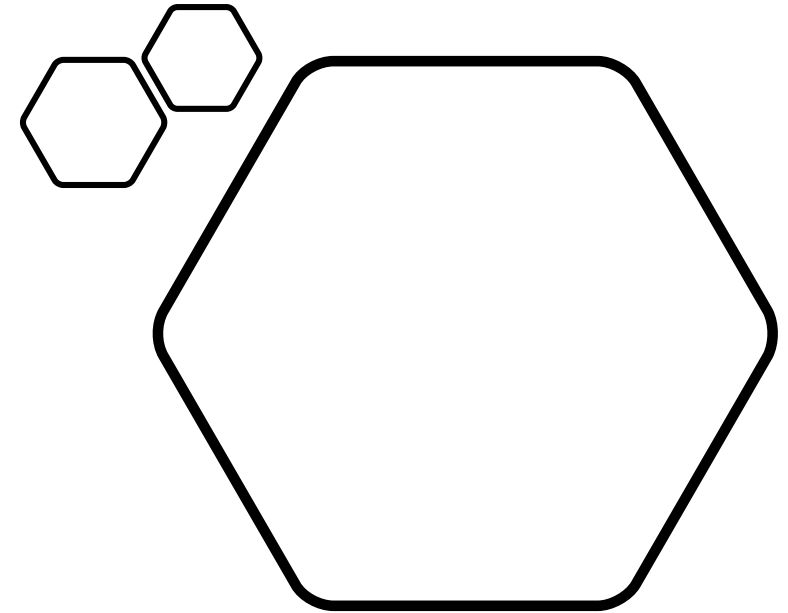
General education teachers can also provide specially designed instruction in consultation with a highly qualified special education teacher.



A highly qualified special education teacher **MUST** be involved in the planning and implementation monitoring of special education services.

# OSEP Guidance

- OSEP recognizes that classrooms across the country are changing as the field of special education responds to innovative practices and increasingly flexible methods of teaching.
- While the needs of many learners can be met using such methods, they do not replace the need of a child with a disability for unique, individualized instruction that responds to his or her disability and enables the child to meet the educational standards within the jurisdiction of the public agency that apply to all children.



# What is your model?

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Who provides special education in your schools?

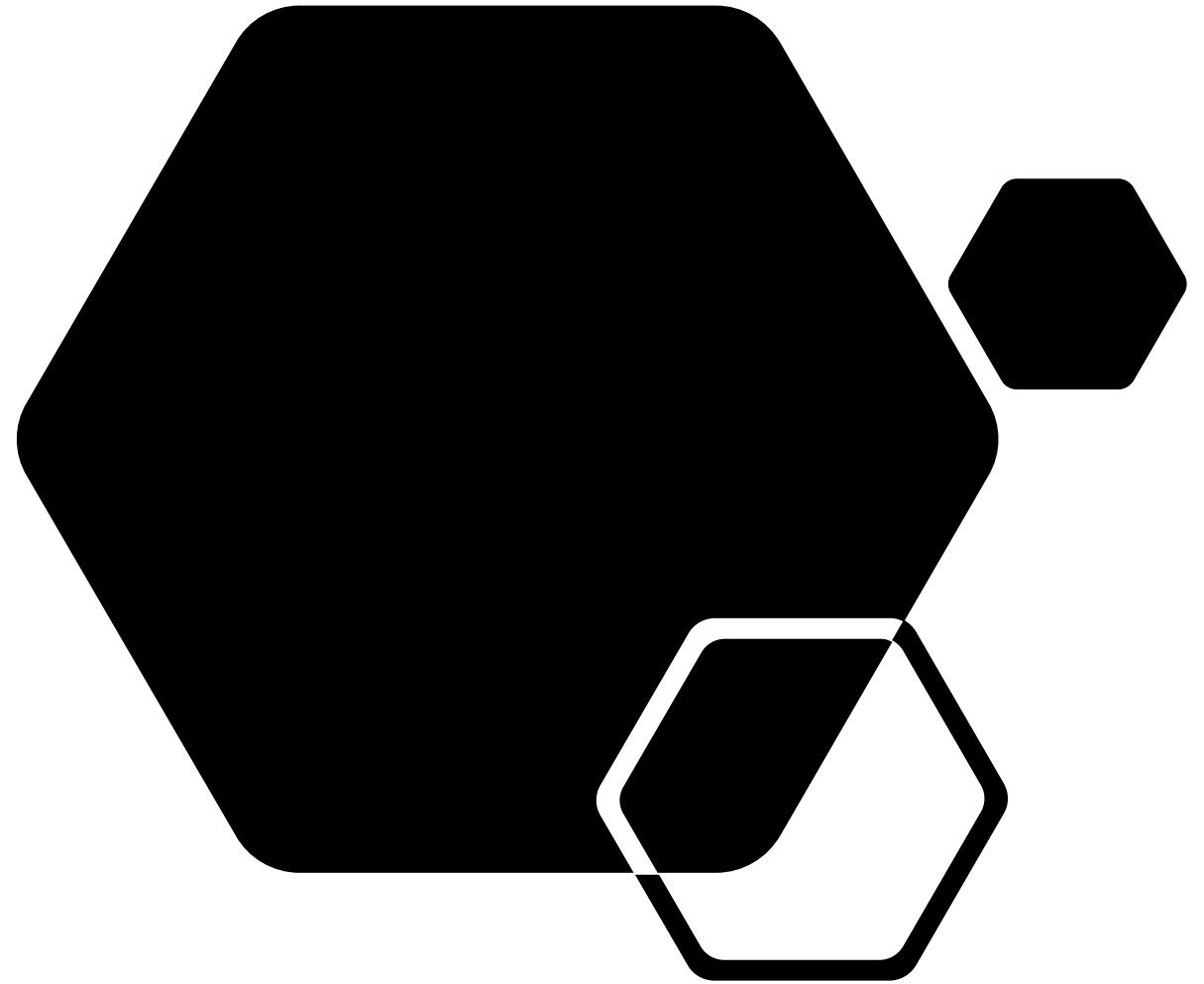
In summary, special education was defined by the type of service provided, not the licensure of the person providing it, as long as it was a state accredited education program with adequately licensed teachers.

***Jefferson County Sch. Dist. R-1 v. Elizabeth E, 60 IDELR 91 (10<sup>th</sup> Cir. 2012)***

## Jefferson County Case

# What if . . .

Your school provides differentiated instruction for all students? Is an IEP still needed?




The LEA must provide a child with a disability specially designed instruction that addresses the unique needs of the child that result from the child's disability, and ensures access by the child to the general curriculum, even if that type of instruction is being provided to other children, with or without disabilities, in the child's classroom, grade, or building.

YES!



The fact that some of those services may also be considered *best teaching practices* or part of the district's regular education program does not preclude those services from meeting the definition of *special education* and being included in the child's IEP.

*Letter to Chambers, 59 IDELR 170 (OSEP 2012).*



Once determined by  
the team,

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**SERVICES MUST BE PROVIDED IN ACCORDANCE WITH  
THE IEP!**



# TODAY'S TOPICS



# Accommodations

- If the IEP determines that accommodations are necessary in order for a student to receive FAPE, you must implement across environments!
- All the more important for a regular education teacher to be at the table when the plan is developed!



# The IRIS Center

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Barrier Related to:	Accommodation Category	Examples
The way information is presented (e.g., text, lecture, video)	<b>Presentation accommodations</b> <ul style="list-style-type: none"> <li>Allow a student to access information in ways other than standard visual or auditory means</li> <li>Change the way that instruction, directions, and information are presented</li> </ul>	<ul style="list-style-type: none"> <li>Books and materials with large print</li> <li>Visual cues (e.g., color-coded text)</li> <li>Audio books</li> <li>Close-captions on videos</li> </ul>
The way in which the student is required to respond (e.g., writing, speech)	<b>Response accommodations</b> <ul style="list-style-type: none"> <li>Allow students to complete assignments or assessments through ways other than typical verbal or written responses</li> </ul>	<ul style="list-style-type: none"> <li>Speech-to-text software</li> <li>Orally dictate responses (using a scribe or digital recorder)</li> </ul>
The characteristics of the setting (e.g., noise level, lighting)	<b>Setting accommodations</b> <ul style="list-style-type: none"> <li>Allow for a change in the environment or in how the environment is structured</li> </ul>	<ul style="list-style-type: none"> <li>Preferential seating (e.g., near the teacher)</li> <li>Testing in a separate location</li> </ul>
The timing and scheduling of the instruction (e.g., time of day, length of assignment)	<b>Timing and scheduling accommodations</b> <ul style="list-style-type: none"> <li>Allow for changes to when and how long students have to complete assignments or assessments</li> <li>Allow assignments to be broken down into smaller sections</li> </ul>	<ul style="list-style-type: none"> <li>Extended time to complete task</li> <li>Frequent breaks</li> <li>Shorter testing sessions</li> </ul>



# The LINK BETWEEN SPECIAL EDUCATION & ASSESSMENTS

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# Why does this matter?

- Under the IDEA, all students with disabilities must be included in all general and statewide assessment programs, with appropriate accommodations if necessary, as outlined in the child's IEP. *34 C.F.R. §300.160(a)*.
- The IEP team selects the appropriate **assessment accommodations** for a student with a disability. The IEP team includes the parents, and if appropriate, the student. *Letter to Anonymous, 54 IDELR 172 (OSERS 2009)*.



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When testing, don't we  
really want to know what  
the student knows vs.  
what the student can  
access?

An assessment accommodation is a tool or procedure that enables students with disabilities to participate in assessments.



Accommodations lessen the effects of the student's disability; they do not alter or lessen the learning expectations related to the assessment.



*North Carolina (NC) Dep't of Pub. Instruction, 43 IDELR 229 (OCR 2005).*



# Kansas Accommodations Manual 2018-2019

- Some instructional accommodations may not be appropriate for use on certain statewide assessments. In other cases, accommodations provided on assessments may be slightly different from those provided in the classroom.
- It is important that educators help students become familiar with supports provided through technology platforms so that students are not using these tools for the first time on test day.
- It is critical that educators become familiar with state requirements about the appropriate use of accommodations during assessments. This is the job of all educators.





# Bottom Line

01

Break down  
barriers.

02

Provide  
access.

03

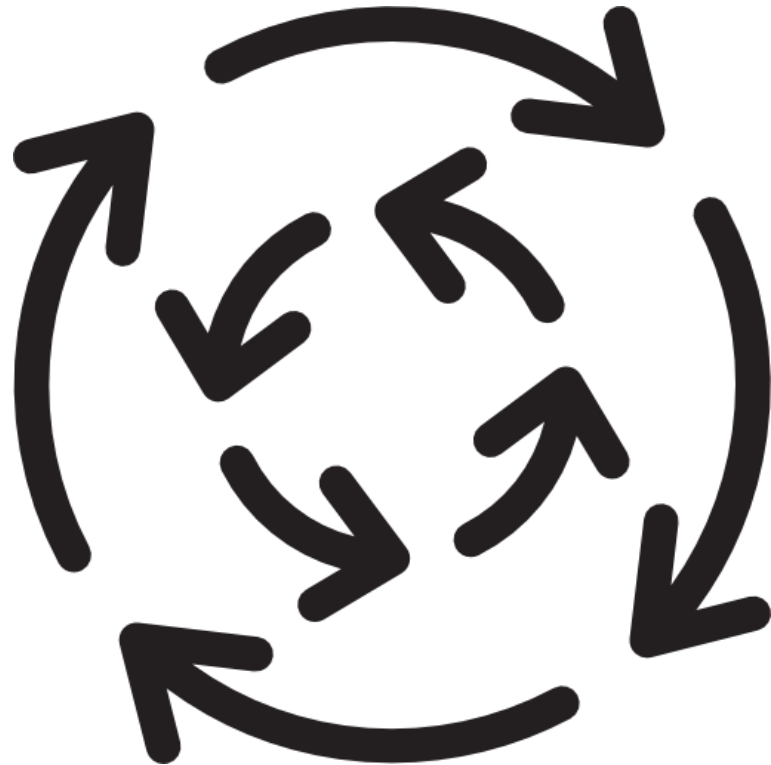
Test to  
measure what  
students  
know.

# TODAY'S TOPICS



# The Story Progress Tells

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*Andrew F. v.  
Douglas County  
Sch. Dist.,  
69 IDELR 174 (2017).*

- Every child should have the chance to meet challenging objectives.
- When all is said and done, a student offered an educational program providing "merely more than de minimis" progress from year to year can hardly be said to have been offered an education at all.

*Andrew F. v.  
Douglas County  
Sch. Dist.,  
69 IDELR 174 (2017).*

- The IDEA demands more. **It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.**
- An educational program must be **appropriately ambitious** in light of his circumstances, just as advancement from grade to grade is **appropriately ambitious** for most children in the regular classroom.

# Andrew F. v. Douglas County Sch. Dist.

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An IEP must aim to enable the child to make progress; the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.



And the degree of progress contemplated by the IEP must be appropriate in light of the child's circumstances.

## *E.G. v. Great Valley Sch. Dist.,* 70 IDELR 3 (E.D. Pa. 2017).

- Although the court acknowledged that the reading progress a fifth-grader achieved under his IEP was "maddeningly slow," it nonetheless concluded that the IEP was specifically tailored to the student's severe learning disability.
- It found that the child received FAPE.
- A district must ensure that the IEP of a student with a disability is reasonably calculated to provide FAPE.

# *E.G. v. Great Valley Sch. Dist.*

- In this case, the parents alleged that the IEP failed to address their child's severe reading deficits. They claimed that over the course of several years, the student achieved little progress in reading.
- However, the court found that the reading program outlined in the IEP was individualized to the student's intensive needs and met the *Endrew F.* standard.



# *E.G. v. Great Valley Sch. Dist.*

- The court noted the reading program taught the student new reading skills and techniques that he regularly applied in the classroom.
- Although the parents argued that the student was still reading at the second-grade level, the court opined that this did not render the student's IEP inappropriate.

# The Message . . .



*Ambitious*

**Ambitious in light of the  
child's unique circumstances.**

# How will IEP teams know?

- PROGRESS!
- Appropriately ambitious progress!
- It will be appropriately ambitious if the team:
  - Comprehensively evaluates;
  - Identifies PLAAFP;
  - Designs measurable annual goals;
  - Provides services in the LRE;
  - **AND**
  - Documents growth or progress.

No Progress?

Go back to the FAPE continuum and find the broken link.

Answer new  
evaluative  
questions.

Refine PLAAFP  
to reflect  
current needs.

Revise goals to  
align with  
current needs.

Adjust  
services to  
align with  
needs.

Scrutinize the  
environment.  
Is it the right  
one?

FAILING TO RESPOND TO A LACK OF PROGRESS IS  
A FAPE VIOLATION!

## IN CLOSING



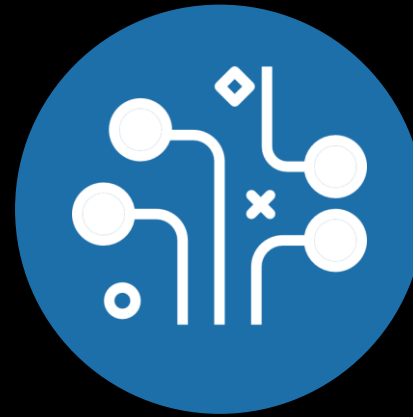
**CHILD FIND**



**EVALUATION  
&  
ELIGIBILITY**



**SPECIAL  
EDUCATION  
LINKED TO  
GENERAL  
EDUCATION**



**ACCOMMO-  
DATIONS**



**MONITOR  
PROGRESS**



Thank  
You