



The Child-Find Obligation of IDEA: Legal Requirements, Caselaw Examples, and Helpful Practices

Presented by

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IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of special education

20 USC §1412(a)(3); 34 CFR §300.111

Also called “identification,” which leads to offers of evaluation

Applies from ages 3 to 21

IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Applies even if students are passing their classes, homeless, wards of state, or in private schools (within LEA boundaries, see 34 C.F.R. §300.131(a))

Duty triggered by *residency*, not enrollment

Applies from ages 3 to 21



IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Applies to children that have complex medical conditions that reside in nursing homes or similar care facilities that are located within the district's boundaries (*Dear Colleague Letter, 67 IDELR 245 (OSERS 2016)*)



IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Applies to students served remotely or virtually, although that service model may make child-find more challenging (*Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016))



IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Why child-find efforts for private school students? To afford parents the data they need to best make their decisions on where to place their children



IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

A coordinated set of activities (notices, postings, websites, handbooks, pamphlets, and outreach efforts to homeless shelters, private schools, pediatricians, head start agencies)



IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

A proactive, ongoing, and affirmative duty of each school district

Child-find requires “knocking on doors,” sometimes literally, to find students that may be eligible under IDEA

Special Wyoming Child-Find Issues

Schools without Pre-K have to make special efforts on child-find for young children

E.g, outreach to pediatricians, Head Start agencies, daycares, homeschool organizations, postings on social media, newspaper ads, website postings, pamphlets

While the regional CDCs perform the screenings and evaluations, districts must engage in their own efforts to actually find the students that may need referral

Special Wyoming Child-Find Issues

If there is a child-find claim on a 3-year-old in an IDEA due process hearing, the claim will be against the school district

Again, the child-find legal responsibility is on the individual school districts



Child-Find and Regular Interventions


Main Modern Child-Find Challenge

Using Rtl and reg ed intervention programs in ways that do not compromise LEAs' child-find duties under the IDEA

Meaning, ensuring that implementation of regular ed interventions for struggling students does not result in delays or denials of IDEA evaluations


What is “RtI”?

- Providing high-quality research-based interventions to regular ed students that are struggling with regular curriculum
- Then, assessing how they respond to those interventions to make educational decisions
- **Purpose:** to improve performance of struggling students and better identify students that may have SLDs and need sped



34 C.F.R. §300.309—Basic SLD Identification (4-part process)

1. Failure to achieve
2. **Rtl analysis** or strength-and-weakness assessment-based analysis
3. Traditional exclusionary clauses
4. Appropriate instruction “filter”



34 C.F.R. §300.309—Basic SLD Identification (4-part process)

Thus, in the second part of the SLD analysis, there can be a determination of whether a student failed to “respond” to interventions, which can indicate SLD

But, use of Rtl is discretionary, as schools can also use assessments to look for “patterns of strengths and weaknesses” indicative of SLD

Rtl-Related Child-Find Complexities

- **New Questions:**

At what point in the RTI process should schools suspect SLD and refer?

How long should interventions be tried?

What if the child is moving thru RTI tiers with some improvement, but also deficits?

How do schools handle parent referrals?



Rtl-Related Child-Find Complexities

What role do campus assistance teams play?

Ultimate question: How to make effective use of regular ed interventions while also timely complying with child-find?



Rtl-Related Child-Find Complexities

Areas of complication:

Timeliness of interventions

Monitoring of progress in interventions

Rate of progress in interventions

Intervention periods and tiers

Schools overly encouraging interventions

Inflexible intervention/referral practices

Use of Rtl for non-academic deficits



- ***Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)***

“It has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, **LEAs may be using RTI strategies to delay or deny a timely initial evaluation for children suspected of having a disability.**”

States and LEAs have an obligation to ensure that child-find and evaluations are not delayed or denied “because of implementation of an RTI strategy.”



- ***Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)***

OSEP “supports” State and LEA implementation of RTI strategies, but to ensure early identification and timely provision of effective assistance.

“It would be inconsistent with the evaluation procedures [of the IDEA regulations] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework”

Note—Does this statement apply to parent referrals or any referral?...



- ***Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)***

Although the regulations specifically address use of Rtl for SLD evaluations, “information obtained through RTI strategies may also be used as a component of evaluations for children suspected of having other disabilities, if appropriate.”

Note—But, given that the research basis for Rtl primarily focuses on SLD, probably safest to use Rtl in situations where student exhibit academic difficulties




- ***Letter to Ferrara, 60 IDELR 46 (OSEP 2012)***

“The implementation of an RTI process is not a reason to fail to respond to a parent’s request for an initial evaluation.”

Note—Thus, LEAs can’t wait until completion of Rtl tiers before responding to a parent request for an initial evaluation. What about with staff referrals?...

Note—See *Artichoker v. Todd Co. Sch. Dist.*, 60 IDELR 58 (D.S.D. 2016) for an example of a school responding to parent request for eval with Rtl services instead.



- **What About §504 Child-Find?—OCR ADHD Resource Guide, 68 IDELR 52 (OCR 2016)**

Addresses a variety of §504 and IDEA issues related to students with ADHD


States that while early interventions can be “very effective and beneficial,” if there is suspicion of disability, it would be a violation of Section 504 to delay the evaluation in order to first implement interventions



- **What About §504 Child-Find?—OCR ADHD Resource Guide, 68 IDELR 52 (OCR 2016)**

OCR states that districts tend to “run afoul” of their §504 child-find obligations when they:

1. “rigidly insist on first implementing interventions before conducting an evaluation”, or
2. “categorically require that data from an intervention strategy be collected and incorporated as a necessary element of an evaluation.”



See OCR decisions on point: *Polk Co. (FL) Pub. Schs.*, 56 IDELR 179 (OCR 2010)(School required Rtl for struggling ADHD student); *Cherokee (TX) ISD*, 59 IDELR 18 (OCR 2012)(school provided Rtl after parent requested eval); *Indian River County (FL) Sch. Dist.*, 111 LRP 70055 (OCR 2011)(4-mos. Rtl for Tourette's); *Bristol-Warren (RI) Regional Sch. Dist.*, 56 IDELR 303 (OCR 2010)(Rtl for student with anxiety and ADHD); *Harrison (CO) Sch. Dist. Two*, 57 IDELR 295 (OCR 2011)(long Rtl for ADHD student with multiple suspensions); *Forest Hills (OH) Local Sch. Dist.* 111 LRP 70117 (OCR 2011)(“diabetes Rtl” required prior to eval!).

Problem Areas in Rtl/Child-Find

- **Overly rigid approaches to Rtl implementation at the local level**

Insistence on Rtl participation in most cases

Viewing Rtl as a “prerequisite” to referral

Failure to inform parents of options

Failure to consider parental input

Overly-lengthy intervention cycles

Rigid adherence to tiered practices

Academic Rtl for non-academic issues

Problem Areas in RtI/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—
Hearing Officer Danna Young**

10-year-old is passing her classes, but parents worry about her academics, low reading scores

Teachers ask for referral, the request is rejected, District adds dyslexia services (unspecified)

Parents get independent eval, which finds ASD and LDs

Problem Areas in RtI/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—Hearing Officer Danna Young**

After review of IEE, District decides not to refer to sp ed, but rather initiate a §504 plan with accommodations

Parent was back and forth on sp ed vs. IDEA, but had an attorney

District evaluates student, finds LDs, but evaluation drags past timeline

Problem Areas in RtI/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—
Hearing Officer Danna Young**

District conducted ASD evaluation piecemeal, after original eval was completed

IEP did not include specific services, and had one goal for ELA

HO faults the District for not initiating sped eval upon receiving “thorough” IEE

Problem Areas in RtI/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—
Hearing Officer Danna Young**

HO noted child-find can apply to students that are passing, and here, the student was academically behind, despite passing

Then, HO noted delays in evals and weaknesses in IEP, finding a denial of FAPE, and ordering relief, including 50 hrs comp services in reading and spelling

Problem Areas in RtI/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—
Hearing Officer Danna Young**

Lessons? Teacher referral plus worried parent plus IEE showing disability =
District better evaluate

Schools should not be lulled into a false sense of security when a child is passing classes, but behind in reading scores

Problem Areas in RtI/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—
Hearing Officer Danna Young**

Lessons? Why not dyslexia intervention *while* initial sp ed eval is pending

Is it a problem that a student might be evaluated and not qualify?... Not at all; child-find is triggered by suspicion of disability plus need for sp ed, **not** absolute certainty that student will qualify



- ***Avaras v. Clarkstown Cent. Sch. Dist.*, 73 IDELR 50 (S.D.N.Y. 2018)**

1st-grader went through 7 months of Rtl despite struggling in Tiers 1 and 2 in K

District decided to do Tier 3 for 9 months (total 16 months of Rtl), arguing that student was making some progress

Ultimately, school agreed to IDEA evaluation after 1st grade year was almost over, and student qualified SLD

Court found child-find violation

- ***Avaras v. Clarkstown Cent. Sch. Dist.*, 73 IDELR 50 (S.D.N.Y. 2018)**

Court noted that child-find obligation extends to students that are advancing from grade to grade

District decided to continue Rtl for extended period only because student passed to 1st grade

Since Rtl ran in 8-wk periods, Court found that school should have evaluated after 8 wks of Rtl in 1st grade

After parent requested evaluation, student qualified LD, so he missed out on services (“Rtl services are not special education services”)

- ***Avaras v. Clarkstown Cent. Sch. Dist.*, 73 IDELR 50 (S.D.N.Y. 2018)**

Note—Many times, schools are reluctant to evaluate younger students for sp ed, although the child-find requirement applies equally to ages 3-21.

But, if a court finds a failure to identify due to lingering too long in Rtl, it will order compensatory education from the time the school should have evaluated the student

Just because a student is passing, does not mean they are doing great with Rtl and don't need referral (underlying achievement scores could be really weak and not improving...)

Suggested RtI/Child-Find Protocol

1. Provide parents all intervention policies/process info
2. Meet with parents to discuss options (can be part of an RtI or child study committee)
3. Make clear parents' right to request IDEA evaluation *at any time*
4. Try to reach consensus on course of action
5. Share progress monitoring data with parents
6. Follow-up on progress or lack thereof without delay
7. Have review meetings that include parents
8. Document steps taken and consensus decision-making

Suggested RtI/Child-Find Protocol

Goal of Protocol—Achieving a proper balance of RtI implementation, respect for informed parental input, and the IDEA's child-find obligation

When in doubt, safest course of action is to evaluate...

How should we handle parent requests for referral?... Probably safest to agree to evaluate, even if school does not agree there is suspicion of disability or need for sp ed



- **Common, but NOT good justifications to decline referral**

Lack of participation in all Rtl tiers (not mandatory, can implement during IDEA eval)

Potential presence of exclusionary factors (absences, educational disadvantage, language difference), as they must be addressed *in eval process, not at referral stage* (34 CFR 300.309(a)(3))

Lack of access to appropriate instruction (again, addressed *in eval*—34 CFR 300.309(b))

Child too young, too old (FAPE ages are 3-21)



- **Common, but NOT good justifications to decline referral**

Student is passing their classes (although there are indications of below grade-level performance, difficulty in class, informal accommodations, lots of work at home, anxiety related to academics, parents nervous about student's performance)

Rtl/Child-Find Improvement Ideas

- Focus on **child-find compliance** in Rtl programs, rather than on stringent implementation of Rtl program

While Rtl implementation is a matter of practice, child-find is a *legal* requirement

Sp Ed staff must work with Rtl programs with an eye to observing child-find, not reducing or delaying referrals

Rtl Improvement Ideas

- **Data analysis on Rtl program results**

What percentage of Rtl students respond well, cease interventions, and continue to perform well without additional interventions?

What percentage of students do not respond well and wind up getting referred for evaluation?

What percentage of non-responding students eventually qualify under IDEA as SLD?

How carefully is Rtl data used as part of SLD evaluations? Is it just a child-find “assistant”?



- **Sp ed departments must have eyes on both the district's Rtl and §504 programs**

They are a major source of IDEA child-find “targets”

And, they can be a source of child-find liability, if timely referral decisions are not made

Districts should avoid over-compartmentalization of sp ed, §504, and Rtl programs, as they must work in a coordinated fashion

Sp ed depts must be open to referrals from these programs

Child-Find and Eligibility

- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tx. 2020)**

6th-grader with reading difficulties received Rtl Tier 2 interventions in 1st, 2nd, and 3rd grade.

Main issue appeared to be problems with reading comprehension

Student placed in §504 for “reading difficulty”

Child-Find and Eligibility

- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**


§504 plan did not include services for reading (student may have been assessed for dyslexia and not qualified, although not clear from the decision)

In 4th grade, he failed to meet benchmark standards and failed the STAAR reading (bottom 2 percentile), although he was passing his classes

- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**

He continued to struggle with reading in 5th grade, but was not referred to special education until the middle of the school year (and only after parents requested referral)

FIE determined he was eligible as LD in reading comprehension, and was provided 3.75 hrs/wk “co-teach” and 30 mins/wk dyslexia services (because an advocate demanded dyslexia services)



- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**

Parents filed a sp ed due process hearing request

HO determined student was **not** dyslexic, and the IEP failed to address student's reading comprehension issues

On appeal, Court found District referred the student to sp ed very late, and thus violated the child-find requirement of IDEA

- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**

Court agreed the IEP services were insufficient, did not address the student's specific problems in reading comprehension

Court awarded compensatory services and about \$71,000 in attorneys' fees and costs (there would have been more comp services, but the parents delayed in filing the DP request and could only make claims back to 1 yr before the DP filing)

- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**

Comments—Three years in Rtl Tier 2? And then, only a referral to §504, not sped? That seems an inordinately long time receiving the same Rtl services without success...

And, §504 committee qualifies student due to “reading difficulty,” since he apparently did not qualify as dyslexic, and provides accommodations (student does not improve in reading comprehension)

- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**


Why didn't the §504 committee refer the student to sped in 3rd grade, knowing he had received 3 yrs of Rtl without success, was not dyslexic, and he would only receive accommodations in his 504 plan?

Why didn't the §504 committee refer the student in 4th grade, knowing that he failed all benchmarks and STAAR reading at a really low percentile?

- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**

Perhaps the District was misled by the fact that the student was making passing grades, but inescapably, his reading issues were only getting worse...

Then, in sp ed, the IEP only contains some “co-teach” and minimal dyslexia services that weren’t even appropriate, as he was not dyslexic (notice that not every LD reading student is necessarily dyslexic)




- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**

Thus, the child-find failure was compounded by an insufficient IEP

Why was this happening? School may not have known what to do with a student that did not neatly fit into the dyslexia program or the sp ed program offerings.

The lesson for §504 is the committee should have assertively moved to refer the student to sp ed much earlier (it may have)



- ***D.C. v. Klein Ind. Sch. Dist.*, 76 IDELR 208 (S.D.Tex. 2020)**

The lesson for the District's gen ed program is that a student cannot linger in an Rtl program, even for months, without making good progress, without referral

The lesson for sp ed is that sometimes, students don't fit into neat categories of existing services, and may need *highly* individualized sp ed services, not just inclusion/co-teach

- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

After years in private school, 5th-grader enrolled in District and immediately began struggling behaviorally, despite high IQ

Upon enrollment, parents submitted a psychiatrist's letter indicating he had ADHD and needed §504 accommodations

The first day he attended, teachers found he had drawn disturbing images of murder, anti-semitic imagery, and obscenities

- ***Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)***

The next day, student shot the finger at staff, refused directions, cussed at administrators, and threw objects at the Asst Principal

Parents now indicated student had ODD, Mood Disorder, Anxiety, and Depression

School contacted staff from prior private school to consult about student, but serious behaviors persisted

- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

School offered a §504 evaluation, although the parent provided a new private evaluation and specifically asked about sped

Student was placed in §504 (October 2014) with a BIP, which had little impact on his behavior, while his grades dropped

In January 2015, student hit a staffmember with a jacket, assaulted his 5th grade teacher (kicked and hit with a closed fist), resulting in police charges

- ***Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)***

After a full semester of increasingly serious problems, the school agreed to refer the student to sp ed in a §504 meeting

Student qualified under IDEA as ED, and he was provided a BIP after a FBA, and placement in an “adaptive behavior program” on another campus

In that program, he was restrained 8 times due to aggression, and police were called 4 times

- ***Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)***

On May 15, 2015, police were called after student repeatedly hit teacher with his fist and he was restrained

Officer threatened to take him to jail (parents alleged this traumatized student)

The day after, school and parents agreed to shorten his day by 90 mins, and later, to a three-hour school day, without a prior IEPT meeting

- ***Spring Branch Ind. Sch. Dist. v. O.W.,***
76 IDELR 234 (5th Cir. 2020)

Parents placed student in a private school, and later, after he was removed until he received “intervention,” he was placed in a residential school out-of-state

Parents filed for IDEA due process, where an HO found a child-find violation and a failure to provide a FAPE (due to shortened day, restraints, time outs, and police intervention)

- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

On appeal to the 5th Circuit, the Panel found that there was a child-find violation.

“We in no way suggest that a school district necessarily commits a child-find violation if it pursues RTI or §504 accommodations before pursuing a special education evaluation. We instead recognize that determining whether a child find violation occurred is a fact-intensive inquiry and highlight that §504 accommodations are not a substitute for evaluation once a school district is ‘on notice of acts or behavior likely to indicate a disability.’”

- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

In this case, the behaviors were highly serious and started immediately upon enrollment, and were unaffected by the §504 plan, which was an unreasonable intermediate step that delayed special education evaluation.


“Based on the severity of O.W.’s behavior, it was not reasonable to try intermediate measures to determine whether special education testing was appropriate...”



- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

“We, of course, do not suggest that the School District’s §504 plan was unreasonable. It is only to say that, under the circumstances, it was not reasonable for the §504 plan to be a preliminary, rather than concurrent step in pursuing an evaluation”

Note—Thus, it would have been OK to go with §504, but only *while* sped testing was taking place, not before referral for testing



- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

Court also found that use of time-out had to be in student's IEP if used on a recurrent basis, and it was not on the student's IEP

Finding of denial of FAPE was proper, in light of grades dropping, shortening of school day to 3 hrs/day

Restraints were proper under State law

- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

Use of police was not inconsistent with IEP, as staff “took steps to avoid police interaction and O.W.’s behavior posed a substantial risk of serious injury”

Comments—It seems that some districts have a hard time acknowledging that, at times, the only proper course of action is an *immediate* sped referral, and not trying Rtl or §504 first. Is §504 really designed for students that exhibit highly serious and recurring behaviors due to psychological conditions that may in fact require specialized placement?...



- ***Spring Branch Ind. Sch. Dist. v. O.W.*, 76 IDELR 234 (5th Cir. 2020)**

Comments—If you're shortening a student's school day due to behavior, you're more than likely losing the case. More on the dangers of shortened school day in another case covered later...



- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

8th grader with anxiety and OCD had problems with homework and oral presentations

School provided §504 plan that allowed student to provide alternate work if he did not want to make a class presentation, extra time for homework, and some teacher assistance with homework

He was then found to have encouraged a fight in the cafeteria, for which he was arrested and given probation



- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

Within 10 weeks after the 504 plan was implemented, staff felt it was not fully meeting student's needs, and they offered the parents a sped evaluation

Instead, the parents placed the student in an out-of-state wilderness program, after which they placed him in a Utah residential facility

Parents sued for failure to provide FAPE under §504 and child-find failure under IDEA



- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

Court applied the more lenient FAPE standard used in federal courts, requiring only that the school “reasonably accommodate the needs of the handicapped child to as to ensure meaningful participation in educational activities and meaningful access to educational benefits.”

Court found that the §504 plan mods reasonably addressed the student’s anxiety-related problems and improved his attendance (anxiety appeared to manifest more at home)

- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

It rejected the parents' arguments that the §504 evaluation regulations incorporated the IDEA evaluation requirements

“IDEA, facially, mandates a more sweeping, thorough, and precise evaluation than §504 does”

Court found that, at its time, the §504 plan was appropriate (“District’s duty under §504 was to mitigate the impact of H.D.’s disability, not to erase it”)



- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

Note—Crucially, the District was wise to offer a sped evaluation at the first signs that the §504 plan might not be meeting the student's needs

But, Court found that at the time it was written, the §504 plan reasonably addressed the student's problems with anxiety over homework and class presentations, which the parents themselves cited as the main issues

- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

Takeaway—The child-find question is a bifurcated one: should a child that is suspected of having a disability and needing services be referred to §504 or IDEA?

Key data point: What does the student appear to need? If the needs could be met with accommodations and light services (e.g., behavior interventions, counseling), the §504 may be appropriate. If the student appears to need specialized instruction, then sped referral may be warranted.



- **Navigating §504 and IDEA Child-Find**

Students that are struggling despite implementation of good §504 plans that have been properly revised are potential IDEA child-find candidates

Lines of communication must be established and maintained with sp ed depts regarding these students

Issue becomes crucial if the district's IDEA eligibility numbers are low



- **Navigating §504 and IDEA Child-Find**

Think of child-find as a “radar” that should constantly be operational, looking for potential §504 and IDEA students that are suspected of having disabilities and need for services

How well is your “radar” operating? And how well is the §504 radar cooperating with the sped radar?...

Is it getting to kids on health plans, those showing signs of reading disabilities, behavior problems, indications of ADHD, allergies?...



- ***Krawietz v. Galveston ISD, 72 IDELR 205***
(5th Cir. 2018)

Student was in sp ed in earlier years due to learning and behavior problems, but then was homeschooled for a period

5 yrs later, student returned to school, but District did not place her back in sp ed although parent notified them of her past sp ed eligibility (District lost old records)

- ***Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)***

She was later placed in a disciplinary alternative program for 2 months due to sexual behavior with two other students in a restroom

Afterward, school placed her in §504 (due to diagnoses of ADHD, PTSD, OCD), as she was also failing most of her classes, but she completed her freshman year OK

The next year, she began to struggle again (completed less than half her credits)

- ***Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)***

She was also hospitalized for 10 days in response to two thefts (stole \$1500 from her mom in unauthorized online purchases)

In response to the school's request for a 504 meeting, parent filed a sp ed due process hearing request, alleging child-find and FAPE violations

School agreed to evaluate, and she qualified for sp ed based on the evaluation report



- ***Krawietz v. Galveston ISD*, 72 IDELR 205 (5th Cir. 2018)**

Hearing Officer (HO) found child-find violation, found student eligible, ordered IEP services, but refused to order residential placement

Case proceeded to federal courts for appeals

5th Circuit agreed that child-find was violated (“Ashley’s academic decline, hospitalization, and incidents of theft during the fall 2014 semester taken together were sufficient to cause GISD to suspect that her several disabilities created a need for special education services.”)



- ***Krawietz v. Galveston ISD*, 72 IDELR 205 (5th Cir. 2018)**

District's argument that the hospitalization due to thefts at home did not put it on notice of need to evaluate Ashley was rejected

Court noted that lower court and HO relied on a “combination of factors, including Ashley’s deteriorating academic performance.”

Four to six-month delay in evaluating (and only after due process was filed) was unreasonable under the circumstances, so District violated child-find



- ***District of Columbia Pub. Schs., 118 LRP 35382 (SEA DC 2018)***

Student with Autism was dismissed from sp ed after a reevaluation found he performed well on all academic areas

After dismissal, he was provided a §504 plan

Thereafter, student attempted to hang himself as a result of bullying at school

After suicide attempt, parent asked for a new initial sp ed evaluation, but school denied it, indicating student was doing well with 504 plan (B grades, one F in Science)



- ***District of Columbia Pub. Schs., 118 LRP 35382 (SEA DC 2018)***

HO noted that student was struggling with changes in routines, appropriate peer interactions, activities with peers, inappropriate responses to peers

HO stated that “whether Student was able to make academic progress with a Section 504 Plan has no bearing on Student’s special education eligibility.”


Failure to conduct an eval was violation of IDEA, impeded parent’s meaningful participation

- ***District of Columbia Pub. Schs., 118 LRP 35382 (SEA DC 2018)***

Questions—Against the backdrop of the suicide attempt, was the decision to deny a new evaluation a wise one? Contrast to *Lewisville ISD* response to suicide attempt

Is the HO correct that the student's academic performance "has no bearing" on the student's IDEA eligibility? Does that fact not bear on whether there is a need for sp ed?

Might the need for sp ed not be academic in nature? What would it be in this case?




- ***Yankton Sch. Dist. v. Schramm* 24 IDELR 704 (8th Cir. 1996)**

A case of special education in the physical domain of functioning...

High-schooler with cerebral palsy received adaptive PE, a variety of physically-related accommodations, and related services

When she completed her PE requirement, the school decided to dismiss her from sp ed and provide her services under §504

Parents took legal action




- ***Yankton Sch. Dist. v. Schramm* 24 IDELR 704 (8th Cir. 1996)**

Court held that her accommodations, assistance between classes, assistance getting on and off bus, assistance with stairs, and carrying her lunch tray constituted “special education services”

Question—Why couldn’t all those services be provided under a §504 plan? Do any of those services really require special education instructional assistance?


And, a need for related services is not enough for IDEA eligibility; the student must need special education services. See, e.g., *Letter to Clarke*, 48 IDELR 77 (OSEP 2007).



The Child-Find Obligation of IDEA: Legal Requirements, Caselaw Examples, and Helpful Practices

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1



IDEA’s Child-Find Requirement


Duty to find students within an LEA’s boundaries that may be disabled and in need of special education

20 USC §1412(a)(3); 34 CFR §300.111

Also called “identification,” which leads to offers of evaluation

Applies from ages 3 to 21

2



IDEA’s Child-Find Requirement

Duty to find students within an LEA’s boundaries that may be disabled and in need of special education

Applies even if students are passing their classes, homeless, wards of state, or in private schools (within LEA boundaries, see 34 C.F.R. §300.131(a))

Duty triggered by *residency*, not enrollment

Applies from ages 3 to 21

3

IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Applies to children that have complex medical conditions that reside in nursing homes or similar care facilities that are located within the district's boundaries (*Dear Colleague Letter, 67 IDELR 245 (OSERS 2016)*)

4

IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Applies to students served remotely or virtually, although that service model may make child-find more challenging (*Dear Colleague Letter, 68 IDELR 108 (OSERS/OSEP 2016)*)

5

IDEA's Child-Find Requirement

Duty to find students within an LEA's boundaries that may be disabled and in need of sp ed

Why child-find efforts for private school students? To afford parents the data they need to best make their decisions on where to place their children

6

IDEA’s Child-Find Requirement

Duty to find students within an LEA’s boundaries that may be disabled and in need of sp ed

A coordinated set of activities (notices, postings, websites, handbooks, pamphlets, and outreach efforts to homeless shelters, private schools, pediatricians, head start agencies)

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IDEA’s Child-Find Requirement

Duty to find students within an LEA’s boundaries that may be disabled and in need of sp ed

A proactive, ongoing, and affirmative duty of each school district

Child-find requires “knocking on doors,” sometimes literally, to find students that may be eligible under IDEA

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Special Wyoming Child-Find Issues

Schools without Pre-K have to make special efforts on child-find for young children

E.g, outreach to pediatricians, Head Start agencies, daycares, homeschool organizations, postings on social media, newspaper ads, website postings, pamphlets

While the regional CDCs perform the screenings and evaluations, districts must engage in their own efforts to actually find the students that may need referral

9

Special Wyoming Child-Find Issues

If there is a child-find claim on a 3-year-old in an IDEA due process hearing, the claim will be against the school district

Again, the child-find legal responsibility is on the individual school districts

10

Child-Find and Regular Interventions

Main Modern Child-Find Challenge

Using Rtl and reg ed intervention programs in ways that do not compromise LEAs' child-find duties under the IDEA

Meaning, ensuring that implementation of regular ed interventions for struggling students does not result in delays or denials of IDEA evaluations

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What is "Rtl"?

- Providing high-quality research-based interventions to regular ed students that are struggling with regular curriculum
- Then, assessing how they respond to those interventions to make educational decisions
- **Purpose:** to improve performance of struggling students and better identify students that may have SLDs and need sp ed

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34 C.F.R. §300.309—Basic SLD Identification (4-part process)

1. Failure to achieve
2. **Rtl analysis** or strength-and-weakness assessment-based analysis
3. Traditional exclusionary clauses
4. Appropriate instruction “filter”

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34 C.F.R. §300.309—Basic SLD Identification (4-part process)

Thus, in the second part of the SLD analysis, there can be a determination of whether a student failed to “respond” to interventions, which can indicate SLD

But, use of Rtl is discretionary, as schools can also use assessments to look for “patterns of strengths and weaknesses” indicative of SLD

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Rtl-Related Child-Find Complexities

- **New Questions:**
 - At what point in the RTI process should schools suspect SLD and refer?
 - How long should interventions be tried?
 - What if the child is moving thru RTI tiers with some improvement, but also deficits?
 - How do schools handle parent referrals?

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Rtl-Related Child-Find Complexities

What role do campus assistance teams play?

Ultimate question: How to make effective use of regular ed interventions while also timely complying with child-find?

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Rtl-Related Child-Find Complexities

Areas of complication:

- Timeliness of interventions
- Monitoring of progress in interventions
- Rate of progress in interventions
- Intervention periods and tiers
- Schools overly encouraging interventions
- Inflexible intervention/referral practices
- Use of Rtl for non-academic deficits

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• Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)

“It has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, **LEAs may be using RTI strategies to delay or deny a timely initial evaluation for children suspected of having a disability.**”

States and LEAs have an obligation to ensure that child-find and evaluations are not delayed or denied “because of implementation of an RTI strategy.”

18

• **Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)**

OSEP “supports” State and LEA implementation of RTI strategies, but to ensure early identification and timely provision of effective assistance.

“It would be inconsistent with the evaluation procedures [of the IDEA regulations] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework”

Note—Does this statement apply to parent referrals or any referral?...

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• **Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011)**

Although the regulations specifically address use of Rtl for SLD evaluations, “information obtained through RTI strategies may also be used as a component of evaluations for children suspected of having other disabilities, if appropriate.”

Note—But, given that the research basis for Rtl primarily focuses on SLD, probably safest to use Rtl in situations where student exhibit academic difficulties

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• **Letter to Ferrara, 60 IDELR 46 (OSEP 2012)**

“The implementation of an RTI process is not a reason to fail to respond to a parent’s request for an initial evaluation.”

Note—Thus, LEAs can’t wait until completion of Rtl tiers before responding to a parent request for an initial evaluation. What about with staff referrals?...

Note—See *Artichoker v. Todd Co. Sch. Dist.*, 60 IDELR 58 (D.S.D. 2016) for an example of a school responding to parent request for eval with Rtl services instead.

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• What About §504 Child-Find?—OCR ADHD Resource Guide, 68 IDELR 52 (OCR 2016)

Addresses a variety of §504 and IDEA issues related to students with ADHD

States that while early interventions can be “very effective and beneficial,” if there is suspicion of disability, it would be a violation of Section 504 to delay the evaluation in order to first implement interventions

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• What About §504 Child-Find?—OCR ADHD Resource Guide, 68 IDELR 52 (OCR 2016)

OCR states that districts tend to “run afoul” of their §504 child-find obligations when they:

1. “rigidly insist on first implementing interventions before conducting an evaluation”, or
2. “categorically require that data from an intervention strategy be collected and incorporated as a necessary element of an evaluation.”

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See OCR decisions on point: *Polk Co. (FL) Pub. Schs.*, 56 IDELR 179 (OCR 2010)(School required Rtl for struggling ADHD student); *Cherokee (TX) ISD*, 59 IDELR 18 (OCR 2012)(school provided Rtl after parent requested eval); *Indian River County (FL) Sch. Dist.*, 111 LRP 70055 (OCR 2011)(4-mos. Rtl for Tourette’s); *Bristol-Warren (RI) Regional Sch. Dist.*, 56 IDELR 303 (OCR 2010)(Rtl for student with anxiety and ADHD); *Harrison (CO) Sch. Dist. Two*, 57 IDELR 295 (OCR 2011)(long Rtl for ADHD student with multiple suspensions); *Forest Hills (OH) Local Sch. Dist.* 111 LRP 70117 (OCR 2011)(“diabetes Rtl” required prior to eval!).

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Problem Areas in Rtl/Child-Find

- **Overly rigid approaches to Rtl implementation at the local level**

Insistence on Rtl participation in most cases
 Viewing Rtl as a “prerequisite” to referral
 Failure to inform parents of options
 Failure to consider parental input
 Overly-lengthy intervention cycles
 Rigid adherence to tiered practices
 Academic Rtl for non-academic issues

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Problem Areas in Rtl/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—Hearing Officer Danna Young**

10-year-old is passing her classes, but parents worry about her academics, low reading scores

Teachers ask for referral, the request is rejected, District adds dyslexia services (unspecified)

Parents get independent eval, which finds ASD and LDs

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Problem Areas in Rtl/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—Hearing Officer Danna Young**

After review of IEE, District decides not to refer to sp ed, but rather initiate a §504 plan with accommodations

Parent was back and forth on sp ed vs. IDEA, but had an attorney

District evaluates student, finds LDs, but evaluation drags past timeline

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Problem Areas in Rtl/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—Hearing Officer Danna Young**

District conducted ASD evaluation piecemeal, after original eval was completed

IEP did not include specific services, and had one goal for ELA

HO faults the District for not initiating sped eval upon receiving “thorough” IEE

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Problem Areas in Rtl/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—Hearing Officer Danna Young**

HO noted child-find can apply to students that are passing, and here, the student was academically behind, despite passing

Then, HO noted delays in evals and weaknesses in IEP, finding a denial of FAPE, and ordering relief, including 50 hrs comp services in reading and spelling

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Problem Areas in Rtl/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—Hearing Officer Danna Young**

Lessons? Teacher referral plus worried parent plus IEE showing disability = District better evaluate

Schools should not be lulled into a false sense of security when a child is passing classes, but behind in reading scores

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Problem Areas in Rtl/Child-Find

- **White Hall Sch. Dist. (SEA ARK 2019)—Hearing Officer Danna Young**

Lessons? Why not dyslexia intervention while initial sp ed eval is pending

Is it a problem that a student might be evaluated and not qualify?... Not at all; child-find is triggered by suspicion of disability plus need for sp ed, **not** absolute certainty that student will qualify

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- **Avaras v. Clarkstown Cent. Sch. Dist., 73 IDELR 50 (S.D.N.Y. 2018)**

1st-grader went through 7 months of Rtl despite struggling in Tiers 1 and 2 in K

District decided to do Tier 3 for 9 months (total 16 months of Rtl), arguing that student was making some progress

Ultimately, school agreed to IDEA evaluation after 1st grade year was almost over, and student qualified SLD

Court found child-find violation

32

- **Avaras v. Clarkstown Cent. Sch. Dist., 73 IDELR 50 (S.D.N.Y. 2018)**

Court noted that child-find obligation extends to students that are advancing from grade to grade

District decided to continue Rtl for extended period only because student passed to 1st grade

Since Rtl ran in 8-wk periods, Court found that school should have evaluated after 8 wks of Rtl in 1st grade

After parent requested evaluation, student qualified LD, so he missed out on services (“Rtl services are not special education services”)

33

• **Avaras v. Clarkstown Cent. Sch. Dist., 73 IDELR 50 (S.D.N.Y. 2018)**

Note—Many times, schools are reluctant to evaluate younger students for sp ed, although the child-find requirement applies equally to ages 3-21.

But, if a court finds a failure to identify due to lingering too long in Rtl, it will order compensatory education from the time the school should have evaluated the student

Just because a student is passing, does not mean they are doing great with Rtl and don't need referral (underlying achievement scores could be really weak and not improving...)

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Suggested Rtl/Child-Find Protocol

1. Provide parents all intervention policies/process info
2. Meet with parents to discuss options (can be part of an Rtl or child study committee)
3. Make clear parents' right to request IDEA evaluation *at any time*
4. Try to reach consensus on course of action
5. Share progress monitoring data with parents
6. Follow-up on progress or lack thereof without delay
7. Have review meetings that include parents
8. Document steps taken and consensus decision-making

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Suggested Rtl/Child-Find Protocol

Goal of Protocol—Achieving a proper balance of Rtl implementation, respect for informed parental input, and the IDEA's child-find obligation

When in doubt, safest course of action is to evaluate...

How should we handle parent requests for referral?... Probably safest to agree to evaluate, even if school does not agree there is suspicion of disability or need for sp ed

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• Common, but NOT good justifications to decline referral

- Lack of participation in all Rtl tiers (not mandatory, can implement during IDEA eval)
- Potential presence of exclusionary factors (absences, educational disadvantage, language difference), as they must be addressed *in eval process, not at referral stage* (34 CFR 300.309(a)(3))
- Lack of access to appropriate instruction (again, addressed *in eval*—34 CFR 300.309(b))
- Child too young, too old (FAPE ages are 3-21)

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• Common, but NOT good justifications to decline referral

- Student is passing their classes (although there are indications of below grade-level performance, difficulty in class, informal accommodations, lots of work at home, anxiety related to academics, parents nervous about student's performance)

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Rtl/Child-Find Improvement Ideas

- Focus on **child-find compliance** in Rtl programs, rather than on stringent implementation of Rtl program
- While Rtl implementation is a matter of practice, child-find is a *legal* requirement
- Sp Ed staff must work with Rtl programs with an eye to observing child-find, not reducing or delaying referrals

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Rtl Improvement Ideas

- **Data analysis on Rtl program results**
 - What percentage of Rtl students respond well, cease interventions, and continue to perform well without additional interventions?
 - What percentage of students do not respond well and wind up getting referred for evaluation?
 - What percentage of non-responding students eventually qualify under IDEA as SLD?
 - How carefully is Rtl data used as part of SLD evaluations? Is it just a child-find “assistant”?

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- **Sp ed departments must have eyes on both the district’s Rtl and §504 programs**
 - They are a major source of IDEA child-find “targets”
 - And, they can be a source of child-find liability, if timely referral decisions are not made
 - Districts should avoid over-compartmentalization of sp ed, §504, and Rtl programs, as they must work in a coordinated fashion
 - Sp ed depts must be open to referrals from these programs

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Child-Find and Eligibility

- **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tx. 2020)**
 - 6th-grader with reading difficulties received Rtl Tier 2 interventions in 1st, 2nd, and 3rd grade.
 - Main issue appeared to be problems with reading comprehension
 - Student placed in §504 for “reading difficulty”

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Child-Find and Eligibility

- **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

§504 plan did not include services for reading (student may have been assessed for dyslexia and not qualified, although not clear from the decision)

In 4th grade, he failed to meet benchmark standards and failed the STAAR reading (bottom 2 percentile), although he was passing his classes

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- **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

He continued to struggle with reading in 5th grade, but was not referred to sp ed until the middle of the school year (and only after parents requested referral)

FIE determined he was eligible as LD in reading comprehension, and was provided 3.75 hrs/wk “co-teach” and 30 mins/wk dyslexia services (because an advocate demanded dyslexia services)

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- **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

Parents filed a sp ed due process hearing request

HO determined student was **not** dyslexic, and the IEP failed to address student’s reading comprehension issues

On appeal, Court found District referred the student to sp ed very late, and thus violated the child-find requirement of IDEA

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• **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

Court agreed the IEP services were insufficient, did not address the student's specific problems in reading comprehension

Court awarded compensatory services and about \$71,000 in attorneys' fees and costs (there would have been more comp services, but the parents delayed in filing the DP request and could only make claims back to 1 yr before the DP filing)

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• **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

Comments—Three years in Rtl Tier 2? And then, only a referral to §504, not sped? That seems an inordinately long time receiving the same Rtl services without success...

And, §504 committee qualifies student due to "reading difficulty," since he apparently did not qualify as dyslexic, and provides accommodations (student does not improve in reading comprehension)

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• **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

Why didn't the §504 committee refer the student to sped in 3rd grade, knowing he had received 3 yrs of Rtl without success, was not dyslexic, and he would only receive accommodations in his 504 plan?

Why didn't the §504 committee refer the student in 4th grade, knowing that he failed all benchmarks and STAAR reading at a really low percentile?

48

• **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

Perhaps the District was misled by the fact that the student was making passing grades, but inescapably, his reading issues were only getting worse...

Then, in sp ed, the IEP only contains some “co-teach” and minimal dyslexia services that weren’t even appropriate, as he was not dyslexic (notice that not every LD reading student is necessarily dyslexic)

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• **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

Thus, the child-find failure was compounded by an insufficient IEP

Why was this happening? School may not have known what to do with a student that did not neatly fit into the dyslexia program or the sp ed program offerings.

The lesson for §504 is the committee should have assertively moved to refer the student to sp ed much earlier (it may have)

50

• **D.C. v. Klein Ind. Sch. Dist., 76 IDELR 208 (S.D.Tex. 2020)**

The lesson for the District’s gen ed program is that a student cannot linger in an Rtl program, even for months, without making good progress, without referral

The lesson for sp ed is that sometimes, students don’t fit into neat categories of existing services, and may need *highly* individualized sp ed services, not just inclusion/co-teach

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• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

After years in private school, 5th-grader enrolled in District and immediately began struggling behaviorally, despite high IQ

Upon enrollment, parents submitted a psychiatrist's letter indicating he had ADHD and needed §504 accommodations

The first day he attended, teachers found he had drawn disturbing images of murder, anti-semitic imagery, and obscenities

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• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

The next day, student shot the finger at staff, refused directions, cussed at administrators, and threw objects at the Asst Principal

Parents now indicated student had ODD, Mood Disorder, Anxiety, and Depression

School contacted staff from prior private school to consult about student, but serious behaviors persisted

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• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

School offered a §504 evaluation, although the parent provided a new private evaluation and specifically asked about sped

Student was placed in §504 (October 2014) with a BIP, which had little impact on his behavior, while his grades dropped

In January 2015, student hit a staffmember with a jacket, assaulted his 5th grade teacher (kicked and hit with a closed fist), resulting in police charges

54

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

After a full semester of increasingly serious problems, the school agreed to refer the student to special education in a §504 meeting

Student qualified under IDEA as ED, and he was provided a BIP after a FBA, and placement in an “adaptive behavior program” on another campus

In that program, he was restrained 8 times due to aggression, and police were called 4 times

55

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

On May 15, 2015, police were called after student repeatedly hit teacher with his fist and he was restrained

Officer threatened to take him to jail (parents alleged this traumatized student)

The day after, school and parents agreed to shorten his day by 90 mins, and later, to a three-hour school day, without a prior IEPT meeting

56

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

Parents placed student in a private school, and later, after he was removed until he received “intervention,” he was placed in a residential school out-of-state

Parents filed for IDEA due process, where an HO found a child-find violation and a failure to provide a FAPE (due to shortened day, restraints, time outs, and police intervention)

57

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

On appeal to the 5th Circuit, the Panel found that there was a child-find violation.

“We in no way suggest that a school district necessarily commits a child-find violation if it pursues RTI or §504 accommodations before pursuing a special education evaluation. We instead recognize that determining whether a child find violation occurred is a fact-intensive inquiry and highlight that §504 accommodations are not a substitute for evaluation once a school district is ‘on notice of acts or behavior likely to indicate a disability.’”

58

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

In this case, the behaviors were highly serious and started immediately upon enrollment, and were unaffected by the §504 plan, which was an unreasonable intermediate step that delayed special education evaluation.

“Based on the severity of O.W.’s behavior, it was not reasonable to try intermediate measures to determine whether special education testing was appropriate...”

59

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

“We, of course, do not suggest that the School District’s §504 plan was unreasonable. It is only to say that, under the circumstances, it was not reasonable for the §504 plan to be a preliminary, rather than concurrent step in pursuing an evaluation”

Note—Thus, it would have been OK to go with §504, but only *while* special education testing was taking place, not before referral for testing

60

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

Court also found that use of time-out had to be in student’s IEP if used on a recurrent basis, and it was not on the student’s IEP

Finding of denial of FAPE was proper, in light of grades dropping, shortening of school day to 3 hrs/day

Restraints were proper under State law

61

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

Use of police was not inconsistent with IEP, as staff “took steps to avoid police interaction and O.W.’s behavior posed a substantial risk of serious injury”

Comments—It seems that some districts have a hard time acknowledging that, at times, the only proper course of action is an immediate sp ed referral, and not trying Rtl or §504 first. Is §504 really designed for students that exhibit highly serious and recurring behaviors due to psychological conditions that may in fact require specialized placement?...

62

• **Spring Branch Ind. Sch. Dist. v. O.W., 76 IDELR 234 (5th Cir. 2020)**

Comments—If you’re shortening a student’s school day due to behavior, you’re more than likely losing the case. More on the dangers of shortened school day in another case covered later...

63

• **H.D. v. Kennett Cons. Sch. Dist., 119 LRP 38755 (E.D.Pa. 2019)**

8th grader with anxiety and OCD had problems with homework and oral presentations

School provided §504 plan that allowed student to provide alternate work if he did not want to make a class presentation, extra time for homework, and some teacher assistance with homework

He was then found to have encouraged a fight in the cafeteria, for which he was arrested and given probation

64

• **H.D. v. Kennett Cons. Sch. Dist., 119 LRP 38755 (E.D.Pa. 2019)**

Within 10 weeks after the 504 plan was implemented, staff felt it was not fully meeting student's needs, and they offered the parents a sped evaluation

Instead, the parents placed the student in an out-of-state wilderness program, after which they placed him in a Utah residential facility

Parents sued for failure to provide FAPE under §504 and child-find failure under IDEA

65

• **H.D. v. Kennett Cons. Sch. Dist., 119 LRP 38755 (E.D.Pa. 2019)**

Court applied the more lenient FAPE standard used in federal courts, requiring only that the school "reasonably accommodate the needs of the handicapped child to as to ensure meaningful participation in educational activities and meaningful access to educational benefits."

Court found that the §504 plan mods reasonably addressed the student's anxiety-related problems and improved his attendance (anxiety appeared to manifest more at home)

66

• **H.D. v. Kennett Cons. Sch. Dist., 119 LRP 38755 (E.D.Pa. 2019)**

It rejected the parents' arguments that the §504 evaluation regulations incorporated the IDEA evaluation requirements

"IDEA, facially, mandates a more sweeping, thorough, and precise evaluation than §504 does"

Court found that, at its time, the §504 plan was appropriate ("District's duty under §504 was to mitigate the impact of H.D.'s disability, not to erase it")

67

• **H.D. v. Kennett Cons. Sch. Dist., 119 LRP 38755 (E.D.Pa. 2019)**

Note—Crucially, the District was wise to offer a sped evaluation at the first signs that the §504 plan might not be meeting the student's needs

But, Court found that at the time it was written, the §504 plan reasonably addressed the student's problems with anxiety over homework and class presentations, which the parents themselves cited as the main issues

68

• **H.D. v. Kennett Cons. Sch. Dist., 119 LRP 38755 (E.D.Pa. 2019)**

Takeaway—The child-find question is a bifurcated one: should a child that is suspected of having a disability and needing services be referred to §504 or IDEA?

Key data point: What does the student appear to need? If the needs could be met with accommodations and light services (e.g., behavior interventions, counseling), the §504 may be appropriate. If the student appears to need specialized instruction, then sped referral may be warranted.

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• **Navigating §504 and IDEA Child-Find**

Students that are struggling despite implementation of good §504 plans that have been properly revised are potential IDEA child-find candidates

Lines of communication must be established and maintained with sp ed depts regarding these students

Issue becomes crucial if the district's IDEA eligibility numbers are low

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• **Navigating §504 and IDEA Child-Find**

Think of child-find as a “radar” that should constantly be operational, looking for potential §504 and IDEA students that are suspected of having disabilities and need for services

How well is your “radar” operating? And how well is the §504 radar cooperating with the sp ed radar?...

Is it getting to kids on health plans, those showing signs of reading disabilities, behavior problems, indications of ADHD, allergies?...

71

• **Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)**

Student was in sp ed in earlier years due to learning and behavior problems, but then was homeschooled for a period

5 yrs later, student returned to school, but District did not place her back in sp ed although parent notified them of her past sp ed eligibility (District lost old records)

72

• Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)

She was later placed in a disciplinary alternative program for 2 months due to sexual behavior with two other students in a restroom

Afterward, school placed her in §504 (due to diagnoses of ADHD, PTSD, OCD), as she was also failing most of her classes, but she completed her freshman year OK

The next year, she began to struggle again (completed less than half her credits)

73

• Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)

She was also hospitalized for 10 days in response to two thefts (stole \$1500 from her mom in unauthorized online purchases)

In response to the school's request for a 504 meeting, parent filed a sp ed due process hearing request, alleging child-find and FAPE violations

School agreed to evaluate, and she qualified for sp ed based on the evaluation report

74

• Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)

Hearing Officer (HO) found child-find violation, found student eligible, ordered IEP services, but refused to order residential placement

Case proceeded to federal courts for appeals

5th Circuit agreed that child-find was violated ("Ashley's academic decline, hospitalization, and incidents of theft during the fall 2014 semester taken together were sufficient to cause GISD to suspect that her several disabilities created a need for special education services.")

75

• ***Krawietz v. Galveston ISD, 72 IDELR 205 (5th Cir. 2018)***

District’s argument that the hospitalization due to thefts at home did not put it on notice of need to evaluate Ashley was rejected

Court noted that lower court and HO relied on a “combination of factors, including Ashley’s deteriorating academic performance.”

Four to six-month delay in evaluating (and only after due process was filed) was unreasonable under the circumstances, so District violated child-find

76

• ***District of Columbia Pub. Schs., 118 LRP 35382 (SEA DC 2018)***

Student with Autism was dismissed from sp ed after a reevaluation found he performed well on all academic areas

After dismissal, he was provided a §504 plan

Thereafter, student attempted to hang himself as a result of bullying at school

After suicide attempt, parent asked for a new initial sp ed evaluation, but school denied it, indicating student was doing well with 504 plan (B grades, one F in Science)

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• ***District of Columbia Pub. Schs., 118 LRP 35382 (SEA DC 2018)***

HO noted that student was struggling with changes in routines, appropriate peer interactions, activities with peers, inappropriate responses to peers

HO stated that “whether Student was able to make academic progress with a Section 504 Plan has no bearing on Student’s special education eligibility.”

Failure to conduct an eval was violation of IDEA, impeded parent’s meaningful participation

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• **District of Columbia Pub. Schs., 118 LRP 35382 (SEA DC 2018)**

Questions—Against the backdrop of the suicide attempt, was the decision to deny a new evaluation a wise one? Contrast to *Lewisville ISD* response to suicide attempt

Is the HO correct that the student’s academic performance “has no bearing” on the student’s IDEA eligibility? Does that fact not bear on whether there is a need for sp ed?

Might the need for sp ed not be academic in nature? What would it be in this case?

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• **Yankton Sch. Dist. v. Schramm 24 IDELR 704 (8th Cir. 1996)**

A case of special education in the physical domain of functioning...

High-schooler with cerebral palsy received adaptive PE, a variety of physically-related accommodations, and related services

When she completed her PE requirement, the school decided to dismiss her from sp ed and provide her services under §504

Parents took legal action

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• **Yankton Sch. Dist. v. Schramm 24 IDELR 704 (8th Cir. 1996)**

Court held that her accommodations, assistance between classes, assistance getting on and off bus, assistance with stairs, and carrying her lunch tray constituted “special education services”

Question—Why couldn’t all those services be provided under a §504 plan? Do any of those services really require special education instructional assistance?

And, a need for related services is not enough for IDEA eligibility; the student must need special education services. See, e.g., *Letter to Clarke*, 48 IDELR 77 (OSEP 2007).

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