# SPECIAL EDUCATION ELIGIBILITY: TO BE OR NOT TO BE

# PAULA MADDOX ROALSON

WALSH, ANDERSON, BROWN, GALLEGOS and GREEN, P.C.

ATTORNEYS AT LAW

#### www.WalshAnderson.com

505 E. Huntland Drive	100 N.E. Loop 410,	909 Hidden Ridge
Suite 600	Suite 900	Suite 410
Austin, TX 78752	San Antonio, TX 78216	Irving, TX 75038
(512) 454-6864	(210) 979-6633	(214) 574-8800
6521 N. 10 <sup>th</sup> Street	500 Marquette Ave., N.W.	10375 Richmond Ave.
Suite C	Suite 1360	Suite 750
McAllen, TX 78504	Albuquerque, NM 87102	Houston, Texas 77042-4196
(956) 971-9317	(505) 243-6864	(713) 789-6864

## **CHILD FIND OBLIGATIONS**

# A. Federal Regulations

## 34 C.F.R. §300.111(a)(i)

The State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

# 34 C.F.R. §300.111(d)

Nothing...requires that children be classified by their disability so long as each child who has a disability (listed in the regulations) and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

#### 34 C.F.R. §300.111(c)(1) and (2)

Child find also must include children who are suspected of being a child with a disability...and in need of special education, even though they are advancing from grade to grade; and highly mobile children, including migrant children.

B. Interpretations by the Office of Special Education Programs

Letter to Eig, 52 IDELR 136 (OSEP 2009)

OSEP here advises that a district cannot refuse to evaluate a student who resides in the district on the basis of the child's placement by the parents at a private school outside of the district's boundaries. The letter makes it clear that if student lives in District A and attends a private school in District B, both districts have a child find responsibility. District A has the duty to make FAPE available; District B has the duty to provide proportionate share services to privately placed, eligible students. Thus a parent may obtain two evaluations. Key Quote:

While the Department generally discourages parents from requesting evaluations from two LEAs, if a parent chooses to request evaluations from the LEA responsible for providing the child with a program of FAPE and a different LEA that is responsible for considering the child for the provision of equitable services, both LEAs are required to conduct an evaluation.

#### C. Case Law

Regional School District No. 9 Board of Education v. Mr. and Mrs. M., 53 IDELR 8 (D.C.Conn. 2009)

The court affirmed a hearing officer's decision that the district had failed in its child find obligation. The parent informed the school that the child had been placed in a psychiatric hospital. The district had also been informed that the child had a prior diagnosis of depression, and was taking anti-depression medications. This was enough, according to the hearing officer and the court, to trigger the child find duty. Three days after the school was informed of the psychiatric hospitalization, the parent placed the child in a residential program in Utah. The Connecticut school argued that it had no further duty once the child went to Utah, but the court rejected that argument. Key Quotes:

Thus, M.M.'s placement in Utah does not divest District 9 of its IDEA obligations to a student who remained officially registered at [the Connecticut school] and a resident of Connecticut.

# <u>Anello v. Indian River School District</u>, 53 IDELR 253 (3<sup>rd</sup> Cir. 2009) (Unpublished)

The court held that the district did not violate child find because the student was making adequate progress under a 504 plan. The parents requested an evaluation for IDEA eligibility on February 3, 2004, and the district conducted an evaluation. But there was no duty on the part of the district to conduct an evaluation prior to that time. The student's grades "were improving in all subjects, including math, and the School District could not know she would later fail both the third grade and the [statewide test]."

# D.K. v. Abington School District, 54 IDELR 119 (E.D.Pa. 2010)

The court affirmed an administrative decision in favor of the school district in a child find dispute involving a young child who was eventually determined eligible due to ADHD. The child was retained in kindergarten and continued to experience some difficulties in first and second grade. The district provided Title I reading support and behavioral plans for the student. During the first grade year the parents requested an evaluation. The district conducted the evaluation and determined the student was not eligible. The evaluation indicated the student had low-average to average cognitive ability and age appropriate concentration and attention levels. During second grade, the school provided 180 minutes of reading support and 30 minutes of math support per week. Grades improved. During the summer after second grade the parents obtained an ADHD diagnosis and shared it with the school. The district did another evaluation and this time declared the student eligible as OHI. Key Quotes:

A determination of whether the District failed to identify a student eligible for special education services in a timely fashion requires a finding that the District knew, or should have known, that the child was disabled or in need of special education.

Without signs of a disability at the relevant times, the Court agrees that prior to receiving a diagnosis of ADHD and conducting its second evaluation, the District had insufficient reason to believe that D.K. was a student with a mental impairment that substantially limited one or more of his major life activities. The Court agrees with the Hearing Officer's logic that one must take into account the fact that children develop cognitively and socially at different rates.

# L.R. v. Steelton-Highspire School District, 54 IDELR 155 (M.D.Pa. 2010)

The court held that the district violated the McKinney-Vento Act by refusing to continue to serve a homeless student. L.R. was a 13-year old student in the Steelton-Highspire School District in Pennsylvania when a fire destroyed the

home where he lived with his grandmother. The student and his grandmother moved in, temporarily, with relatives in the Harrisburg School District, but the boy continued in Steelton-Highspire for the rest of that school year. Moreover, Steelton-Highspire District provided transportation, even though the student resided beyond district boundaries. However, Steelton-Highspire refused to accept the student for enrollment when the next school year began, citing his continued residence in Harrisburg. However, Harrisburg also refused enrollment. Harrisburg relented seven months later, but for those seven months, the student was out of school. The parents sued Steelton-Highspire, citing the McKinney-Vento Act. The court ruled in favor of the parents, and made several key points.

Who is "homeless"?

First of all, L.R. persuaded the court that he was "homeless" even though he slept with a roof over his head every night. The definition of "homeless" under the law goes far beyond a dictionary definition of "homeless." The basic definition in the law addresses individuals who "lack a fixed, regular, and adequate nighttime residence," but it goes on to specify that this includes people who "are sharing the housing of other persons due to loss of housing, economic hardships, or a similar reason." L.R. was sharing a bedroom with his grandmother in a house leased by and resided in by his aunt and her family, all due to the loss of their own home in a fire. That counts as "homeless."

How long can someone be "homeless"?

the Act makes it clear that there is no maximum duration of homelessness. Instead, an LEA must accommodate a homeless child for the entire time that they are homeless.

Preference for the "school of origin"

Third, McKinney-Vento expresses a preference for the "school of origin," which means the school attended at the time the student became homeless. The law calls for school attendance issues to be based on the best interests of the student, but it specifies that this means "to the extent feasible, keep[ing] a homeless child or youth in the school of origin, except when doing so is contrary to the wishes of the child's or youth's parent or guardian."

Enroll first; Ask questions later

Both the text of the Act and the DOE's implementing regulations make it clear that in the event of a dispute over whether enrollment is proper, the LEA must immediately enroll the child in the school in which the parent or guardian seeks enrollment.

#### **Procedures**

Fifth, McKinney-Vento requires procedural compliance by the school district, similar to what is required under IDEA. In particular, if the school refuses enrollment of a homeless student the school is required to provide "a written explanation of the school's decision regarding school selection or enrollment, including the rights of the parent, guardian or youth to appeal the decision."

Comment: This student was IDEA eligible, but that did not factor into the decision. This case is about homelessness, not special education, but it is important for special educators to keep in mind.

## SCHOOL DISTRICT RIGHT TO EVALUATE

A. Fifth Circuit: *Andress v. Cleveland Indep. Sch. Dist.*, 22 IDELR 1134, 64 F.3d 176 (5th Cir. 1995) (holding that if parents want their child to receive special education under the IDEA, they must allow the school itself to conduct a reevaluation of the child).

Shelby S. v. Conroe Indep. Sch. Dist., 45 IDELR 269, 454 F.3d 450 (5th Cir. 2006) (holding that reevaluation was warranted for the school district to be able to fashion an IEP that would allow the district to perform its IDEA-mandated duties, and if the parent did not want to submit to the reevaluation, she was free to decline special education services under the IDEA).

See also, *M.L.*, as next friend of A.L. v. El Paso Independent School District, 52 IDELR 159; 610 F.Supp.2d 582 (W.D. Tex. 2009) (district court granted EPISD's request to override the parent's lack of consent for a reevaluation) ("Of course, Plaintiff may continue to refuse consent for a reevaluation. [Citing Shelby S.] But then EPISD 'shall not be considered to be in violation of the requirement to make available a [FAPE]' for A.L. See 20 U.S.C. § 1414(a)(1)(D)(ii)(III)(aa).")

- B. The Second, Seventh, Ninth and Eleventh Circuits have all ruled consistently with the Fifth Circuit.
- C. Fourth Circuit: *Hudson by and through Tyree v. Wilson*, 559 IDELR 139, 828 F.2d 1059 (4<sup>th</sup> Cir. 1987) (holding that incomplete testing limits the opportunity of the court to find that the child in fact did not receive a FAPE).

## **SCOPE OF THE EVALUATION**

A. Conduct of evaluation

34 C.F.R. § 300.304(b)(1) describes the function of an evaluation as follows:

In conducting the evaluation, the public agency must... [u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 300.8; and
- (ii) The content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities).
- B. The scope of an evaluation goes beyond determining eligibility

34 C.F.R. § 300.304(c)(7) requires that, when conducting an evaluation, the public agency uses "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child...."

34 C.F.R. § 300.304(c)(6) requires that, when conducting an evaluation, the public agency must ensure that "[i]n evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to address all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

- C. The scope of an initial evaluation (if appropriate) and any reevaluation is determined by a review of existing evaluation data. See 34 C.F.R. § 300.305(a).
  - 1. What constitutes an initial evaluation and a reevaluation?

According to the U.S. Department of Education, "An initial evaluation of a child is the first complete assessment of a child to determine if the child has a disability under the Act, and the nature and extent of special education and related services required. Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services under the Act, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation. In the example provided by the commenter, the second evaluation would be considered a reevaluation." 71 Fed. Reg. 46640 (August 14, 2006); see also, *OSEP Letter to Sarzynski* (September 5, 2007).

2. Is a review of existing evaluation data required prior to every evaluation of a child?

A review of existing evaluation data is part of the evaluation process. The regulations make it clear that the review of existing evaluation data must

take place "as part of an initial evaluation (if appropriate)". 34 C.F.R. § 300.305(a).

The regulations also make clear that a review of existing evaluation data must take place "as part of any reevaluation." 34 C.F.R. § 300.305(a).

3. Who must participate in the review of existing evaluation data process?

The regulation states the review of existing evaluation data must be conducted by "the IEP Team and other qualified professionals, as appropriate". 34 C.F.R. § 300.305(a).

"The phrase, 'qualified professionals, as appropriate' is used to provide flexibility for public agencies to include other professionals who may not be a part of the child's IEP Team in the group that determines if additional data are needed to make an eligibility determination and determine the child's educational needs. We believe that public agencies should have flexibility in determining how to define 'qualified professionals' and we do not believe a definition should be included in the regulations." 71 Fed. Reg. 46644 (August 14, 2006).

4. Does it have to take place in an IEP Team meeting?

It doesn't have to take place in a meeting. The regulation states: "The group described in paragraph (a) of this section may conduct its review without a meeting." 34 C.F.R. § 300.305(b).

5. What happens if the IEP Team determines that no additional evaluation data are needed?

The regulations set forth the "requirements if additional data are not needed" as follows:

- (1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of
  - (i) That determination and the reasons for the determination; and
  - (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.
- (2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents. 34 C.F.R. § 300.305(d).

"Please note that under this regulation, the parent must always be given the opportunity to request further assessment even if the public agency determines that no additional evaluation data are needed. If the public agency informs the parent that no additional data are needed to determine whether the child is a child with a disability and the child's educational needs, but the parent requests that additional assessment be conducted, the public agency would be required to obtain parental consent prior to conducting that assessment. The purpose of the additional assessment would be to determine whether the child has a disability and the nature and extent of the child's educational needs." 34 CFR §§300.300(a)(1)(i) and 300.15. OSEP Letter to Copenhaver (October 19, 2007).

"[A] reevaluation cannot be conditioned on the parent providing a reason for requesting a reevaluation." 71 Fed. Reg. 46640 (August 14, 2006).

6. Can an initial evaluation be completed through a review of existing evaluation data?

"Based on these [IDEA] evaluation requirements, we believe that only in limited circumstances could a public agency conduct an initial evaluation only through review of existing data on the child, and that, in most instances, review of existing evaluation data on the child generally would be insufficient for a team to determine whether a child qualifies as a child with a disability and the nature and extent of the child's educational needs." *OSEP Letter to Copenhaver* (October 19, 2007).

7. If no additional evaluation data are needed, what is the timeline for the eligibility determination?

"The review of existing data is a part of the eligibility determination process that occurs prior to the initiation of any evaluation timeline that would apply if additional evaluation data were needed. Therefore, we would expect that the eligibility determination would occur promptly if no further evaluation data were needed." *OSEP Letter to Copenhaver* (October 19, 2007).

8. If no additional evaluation data are needed, then what constitutes our evaluation?

"If the parents do not request an assessment, then the review of existing data may constitute the reevaluation." *OSEP Redacted Letter* (February 6, 2007).

9. If additional data are needed, what are the next steps?

"The public agency must administer such assessments and other evaluation measures as may be needed to produce the data identified under paragraph (a) of this section." 34 C.F.R. § 300.305(c).

## D. Evaluation procedures checklist

- ✓ Do not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. (34 C.F.R. § 300.304(b)(2))
- ✓ Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (34 C.F.R. § 300.304(b)(3))
- ✓ Select and administer assessments and other evaluation materials so as to not be racially or culturally discriminatory. (34 C.F.R. § 300.304(c)(1)(i))
- ✓ Provide and administer tests in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally, unless it is clearly not feasible to do so. (34 C.F.R. § 300.304(c)(1)(ii))
- ✓ Use assessments for the purposes for which the assessments or measures are valid and reliable. (34 C.F.R. § 300.304(c)(1)(iii))
- ✓ Make sure your assessments and other measures are administered by trained and knowledgeable personnel. (34 C.F.R. § 300.304(c)(1)(iv))
- ✓ Administer your assessments in accordance with the instructions provided by the producer of the assessments. (34 C.F.R. § 300.304(c)(1)(v))
- ✓ Include assessments and other evaluation materials tailored to assess specific areas of educational need and note merely those that are designed to provide a single general intelligence quotient. (34 C.F.R. § 300.304(c)(2))
- ✓ Select and administer assessments so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure). (34 C.F.R. § 300.304(c)(3))

- ✓ Make sure that the child is assessed in all areas related to the suspected disability, including if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (34 C.F.R. § 300.304(c)(4))
- ✓ When a child transfers from one district to another in the same school year, coordinate with the other school district, as necessary and as expeditiously as possible to ensure prompt completion of full evaluations. (34 C.F.R. § 300.304(c)(5))
- ✓ Comply with the additional procedures for determining a specific learning disability. (34 C.F.R. §§ 300.307 through 300.311)

# E. Group of qualified professionals and evaluation report

"Upon completion of the administration of assessments and other evaluation measures—

- (1) A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and
- (2) The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent." 34 C.F.R. § 300.306(a).

See additional group members for the determination of a specific learning disability. 34 C.F.R. § 300.308.

# F. Analysis of Determinant Factor

"A child must not be determined to be a child with a disability under this part —

- (1) If the determinant factor for that determination is
  - (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
  - (ii) Lack of appropriate instruction in math; or
  - (iii) Limited English proficiency; and
- (2) If the child does not otherwise meet the eligibility criteria under § 300.8(a)." 34 C.F.R. § 300.306(b).

#### G. Procedures for Determining Eligibility

"In interpreting evaluation data for the purpose of determining if a child is a child with a disability under § 300.8, and the educational needs of the child, each public agency must—

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered." 34 C.F.R. § 300.306(c).

# H. DeMerchant v. Springfield Sch. Dist., 48 IDELR 181 (D. Vt. 2007).

After the district conducted its own evaluation and concluded that the child no longer qualified for special education services under the IDEA, the parents requested an independent educational evaluation at public expense. Rather than pay for the IEE, the district requested a due process hearing to show that its evaluation was appropriate. The parents also requested a due process hearing alleging that the district failed to properly consider information supplied by the parents, failed to properly consider their request for an IEE, and failed to provide prior written notice before concluding that the child no longer qualified for special education services. The school district prevailed at the due process hearing and the parents appealed.

## **Key Quotes:**

The hearing officer "concluded that 'the District's three year evaluation of the student in 2004 met all the requirements of the regulations regarding planning, notice, scope, sufficiency, and documentation..."

"Each of the reports submitted by the evaluators appears to have been both 'comprehensive and individual."

## **DOES THE LABEL MATTER?**

A. OSEP Letter to Anonymous, 51 IDELR 251 (June 3, 2008)

"The Department's longstanding policy is that special education and related services are based on the identified needs of the child and not on the disability category in which the child is classified."

B. 34 C.F.R. § 300.304(c)(4)

"Each public agency must ensure that ... the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."

C. The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to

the disability category in which the child has been classified." 34 C.F.R. § 300.304(c)(6).

D. *N.B. and C.B. v. Hellgate ISD*, 50 IDELR 241, 541 F.3d 1202 (9<sup>th</sup> Cir. 2008)

In January, 2003, a New Jersey doctor noted that "an autistic component appears to be complicating [C.B.'s] performance." The child was almost three. The family moved to Montana in June. In August, the family shared records with the Montana school district, including the doctor's report. The school adopted the NJ IEP. In September, an IEP Team meeting was held and the school called for further evaluation, meanwhile implementing a "diagnostic IEP." In November, the Team met again. The parents suggested that the child might be autistic, and in response, the school referred them to the Missoula Child Development Center (CDC) where free autism testing could be conducted. That testing was done and discussed at an IEP Team meeting in March, 2004. The CDC evaluation indicated that the child "exhibited behavior consistent with autism spectrum disorder." The IEP was revised accordingly. The Team met again in May and declined to offer ESY. The parents disagreed and did not enroll the student in the district the following fall.

The school district prevailed at the due process hearing and the district court, but the 9<sup>th</sup> Circuit reversed. The court held that the District failed to assess the student in all areas of suspected disability, specifically autism, and as a result denied the student a free appropriate public education ("FAPE"). The court agreed with the district that the child did not qualify for ESY, but found that the failure to evaluate for autism was enough of a procedural error to deny FAPE for the 2003-04 school year.

## **Key Quotes**:

"...without evaluative information that C.B. has autism spectrum disorder, it was not possible for the IEP team to develop a plan reasonably calculated to provide C.B. with a meaningful educational benefit throughout the 2003-04 school year."

"Hellgate did not fulfill its statutory obligations by simply referring C.B.'s parents to the CDC. Such an action does not 'ensure that the child is assessed,' as required by 20 U.S.C. 1414C(b)(3)(C)."

E. *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 103 LRP 33278, 267 F.3d 877 (9th Cir. 2001).

When Amanda was two years old, a child psychologist recommended that she be placed in the school district's early childhood program for a determination of her special education eligibility. The district subsequently conducted a psychological evaluation in March 1995, which indicated "mixed" results on the Autism Behavior. The report containing this information was not provided to the parents.

The district's speech pathologist also evaluated Amanda in March 1995, and found her to qualify as "severely autistic" under the Childhood Autism Rating Scale. However, no documentation existed in the case record to establish that this information was shared with the parents.

In April 1995, Amanda was deemed eligible for special education services as "developmentally delayed" by an eligibility team because of her language, cognitive, self-help and social/emotional difficulties. Amanda's mother requested copies of the child's assessment reports and was given a two-page summary of the district psychologist's recommendations, which did not mention the reports indicating possible autism.

At the May 1995 initial IEP Team meeting, the IEP Team addressed Amanda's "delays in language, cognitive, social skills, and self-help." In fall 1995, Amanda was placed in an early childhood education class taught by a teacher who had "a master's degree in early childhood special education but no special training or experience with autistic children." In October, at the request of Amanda's teacher, the IEP Team reconvened to review and revise some of the child's goals in light of her lack of progress. The IEP Team made changes to Amanda's IEP.

In October 1995, Amanda and her family moved to California. In December 1995, Amanda's uncle (a doctor) referred her for an evaluation due to characteristics suggesting autism, resulting in an affirmative diagnosis of autism confirmed in February through a second opinion.

At an April 1996 IEP Team meeting, Amanda's parents were for the first time given copies of the Clark County school district's 1995 reports indicating the district's detection of possible autism more than a year earlier.

The parents requested a due process hearing against the Nevada school district. The hearing officer decided in favor of the parents. The state review officer, district court and First Circuit found in favor of the parents. The First Circuit held that the "egregious" procedural violation of failing to give the parents copies of Amanda's initial evaluation reports resulted in a denial of FAPE.

#### **Key Quotes:**

"This is a situation where the District had information in its records which, if disclosed, would have changed the educational approach used for Amanda....This is a particularly troubling violation, where, as here, the parents had no other source of information available to them. No one will ever know the extent to which this failure to act upon early detection of the possibility of autism has seriously impaired Amanda's ability to fully develop the skills to receive education and to fully participate as a member of the community."

- "....Autism is a developmental disorder; those affected by autism exhibit significant deficiencies in communication skills, social interaction and motor control. Early intervention can lead to positive outcomes, particularly when children are placed in highly structured, specialized, and individualized programs."
- "...[The district's] procedural violations, which prevented Amanda's parents from learning critical medical information about their child, rendered the accomplishment of the IDEA's goals—and the achievement of FAPE—impossible."
- F. Weissburg v. Lancaster Sch. Dist., 53 IDELR 240, 591 F.3d 1255 (9th Cir. 2010)

An evaluation of Edward in 2005 concluded that he met eligibility criteria as a student with mental retardation. The evaluation by the school district further indicated that "he did not display autistic behavior." For two years the parents voiced their disagreement with the district's evaluation. In contrast, a private psychologist concluded that Edward was autistic and not mentally retarded. A due process hearing was held, and although the hearing officer found that the district's evaluation was appropriate, the hearing officer further found that the conclusion was erroneous. The hearing officer concluded that Edward met eligibility criteria as a student with autism and mental retardation. Nevertheless, the hearing officer found that Edward had been afforded a FAPE. Subsequently, the parents sought their attorney's fees in district court. The district court ruled that the parents were not entitled to their attorneys' fees since they had not prevailed. The Ninth Circuit reversed.

#### Key Quote:

"We hold that a change in eligibility category materially alters the legal relationship between the parties because it entitles Edward to placement in a classroom with a teacher qualified to teach students with the primary disabilities of mental retardation and autism. Although Edward did, in fact, receive placement in the proper classroom, the school district refused to recognize his additional primary disability of autism, and thus his legal right to such placement, until his eligibility category was changed. Accordingly, we hold that the Weissburgs qualify as prevailing parties under the IDEA and are thereby eligible for attorneys' fees at the discretion of the court."

## CONDITION, DISABILITY AND EDUCATIONAL NEED

#### A. Conditions

There are 13 enumerated disability conditions under the IDEA. To be eligible for special education services, a child must have one of these enumerated disability conditions.

## B. Disability

To be disabled as a result of one of one of the disability conditions, the condition must adversely affect educational performance. See 34 C.F.R. § 300.8(c) (definitions of disability terms).

Although the specific learning disability definition does not use the phrase "adversely affect educational performance," an adverse effect on educational performance is inherently part a specific learning disability, as reflected in the criteria. See 34 C.F.R. § 300.309(a).

#### C. Educational need

To be eligible for services under the IDEA, it is not enough to have a disability (i.e., a condition that adversely affects educational performance). By reason of the child's disability, the child must need special education and related services, as set forth below:

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deafblindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a)(1)(emphasis added).

"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(a)(1).

"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." 34 C.F.R. § 300.39(b)(e).

# D. Related Services and eligibility

If a child has a disability, and by reason thereof, only needs a related service, the child is not eligible for services under the IDEA, unless the state has classified the service as special education rather than a related service. See 34 C.F.R. § 300.8(a)(2).

# "ADVERSELY AFFECTS EDUCATIONAL PERFORMANCE"

#### A. First Circuit

*Mr. I. and Mrs. I. ex. rel. L.I. v. Maine Sch. Admin. Sch. Dist. No. 55*, 47 IDELR 121, 480 F.3d 1 (1<sup>st</sup> Cir. 2007).

L.I. was a bright student who in fourth grade began to experience sadness, anxiety, and difficulty with peer relationships. By fifth grade, L.I.'s parents obtained psychological counseling for L.I. and she started taking an anti-depressant. In the fifth grade, her grades dropped from "high honors" to "honors." A few weeks into sixth grade, L.I. began "slacking off" in her academic work, missing school, and had continued trouble relating with peers. Her mother also noticed cuts or scratches on L.I.'s arms. L.I.'s teacher speculated that "L.I. might have inflicted those wounds on herself during her 'lengthy bathroom breaks' from class." During this time, "[a]ccording to the teacher, L.I. was also having continued trouble relating with her peers due to a 'serious lack of awareness' of their social and emotional states, which bordered on 'hostility.' The teacher added that she could not 'reach' L.I., who had refused to complete assignments and shown a 'passive resistance to meeting learning goals.' Yet the teacher considered L.I. 'a very bright young girl with strong language and math skills ... capable of powerful insights in her reading and writing. ..."

Not long afterward, L.I. attempted suicide and her parents took her to a new counselor who diagnosed her with Asperger's Syndrome and referred her to a neuropsychologist for testing. The neuropsychologist diagnosed L.I. with Asperger's Syndrome as well as an adjustment disorder with depressed mood. A subsequent speech evaluation indicated "significant social understanding deficits which impact her overall emotional and social well-being." L.I.'s parents advised the school that L.I. would not soon return to classes and that they were exploring a private program for their daughter.

Subsequently, the school evaluated and the school's testing also suggested that L.I. had Asperger's Syndrome, as well as adjustment disorder with depressed mood.

L.I. was eventually identified by the district as a "qualified individual with a disability" under the Rehabilitation Act but not as a "child with a disability" under the IDEA.

The parents also sought a due process hearing. At the hearing, the hearing officer agreed with the district that, while L.I. did have Asperger's and a "depressive disorder," she was not entitled to IDEA benefits because those disabilities did not adversely affect her educational performance. When the parents brought an action in district court, the magistrate judge concluded that L.I. did not meet IDEA eligibility criteria because her condition did not adversely affect her educational performance. The district court, however, rejected the magistrate judge's report and recommendation, instead concluding that L.I.'s "condition did adversely affect her educational performance as Maine defines that term and that the events [that transpired at the public school] cannot be isolated from [L.I.'s] underlying condition." On appeal, the First Circuit affirmed the lower court's conclusion that L.I. was eligible for special education services under IDEA.

# Key Quotes regarding the "adversely affects" standard:

"Each state thus remains free to calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the statute. [Citations omitted.]"

"Maine has adopted its own definition of 'educational performance' for IDEA purposes: The term 'educational performance' includes academic areas (reading, math, communication, etc.), non-academic areas (daily life activities, mobility, etc.), extracurricular activities, progress in meeting goals established for the general curriculum, and performance on State-wide and local assessments.' [Citation omitted]."

"Despite this expansive notion of educational performance, and in the absence of any regulatory guidance as to the term 'adversely affects', the district asks us to hold that a child meets the first criterion of IDEA eligibility in Maine 'only if the student's condition imposes a significant negative impact on the child's educational performance ... limited to those areas of performance actually being measured and assessed by the local unit, in accordance with law.' We decline to do so."

"In light of Maine's broad notion of 'educational performance' as the standard of IDEA eligibility, we see no basis for restricting that standard to 'areas of performance actually being measured and assessed by the local unit.' Indeed, 'there is nothing in IDEA or its legislative history that supports the conclusion that ... 'educational performance' is limited only to performance that is graded.' [Reference omitted]."

"The district also argues that the district court misconstrued the 'adversely affects' component of the test to include disabilities with 'any adverse effect on educational performance, however slight. ...' *Id.* at 160. The correct formulation, the district urges, requires 'some significant impact on educational performance.' In rejecting this proposal, the district court reasoned that the phrase 'adversely affects,' as it appears in the relevant regulations, has no qualifier such as 'substantial,' 'significant,' or 'marked,' and declined to infer such a limitation 'from Maine's regulatory silence.' *Id.* We agree with this interpretation of the 'adversely affects' standard."

"Though the district marshals a number of arguments in support of its contrary position, they all sound a common theme: that an unlimited definition of 'adversely affects' will qualify every child with one of the listed disabilities -- no matter how minor -- for IDEA benefits. This contention, however, overlooks the structure of the IDEA's eligibility standard, which requires not only that a child have one of the listed conditions, § 1401 (3) (A) (i), but also that, 'by reason thereof,' the child 'needs special education and related services,' id. § 1401 (3) (A) (ii). So a finding that a child meets the first criterion because his or her disability adversely affects educational performance -- to whatever degree -- does not itself entitle the child to special education and related services under the IDEA. [References omitted]. The child must also need special education and related services by reason of the disability."

"In fact, an adverse effect on educational performance, standing alone, does not even satisfy the first prong of the eligibility test. The child's condition must also possess the additional characteristics required by the regulatory definitions of each of the disabilities enumerated in § 1401 (3) (A) (i)."

# B. Wisconsin district court adopts the First Circuit's standard

Marshall Joint School Dist. No. 2 v. C.D. ex rel. Brian D., 592 F.Supp.2d 1059, (W.D.Wis. 2009).

C.D. suffered from "Ehlers-Danlos Syndrome hypermobile type, which is a genetic, generalized connective tissue disorder that causes C.D. to experience joint hypermobility, poor upper body strength, poor postural and trunk stability, chronic and intermittent pain and fatigue, hypotonic muscles and gastrointestinal problems." From kindergarten through most of C.D.'s second grade year, "C.D. received adaptive physical education services, physical and occupational therapy, assistive technology, supplemental aids and services and program modifications at school" based on an eligibility classification of other health impaired. Following a reevaluation, the team concluded that "C.D. had a chronic health problem that resulted in limited strength and vitality but that his educational performance was not adversely affected as a result." The parents challenged this decision, and the hearing officer concluded that C.D. continued to qualify for special education services. The district court affirmed.

## Key Quote:

"The Court of Appeals for the First Circuit interpreted adverse effect to be any negative impact, however slight, reasoning that the term appears in the regulations without a qualifier such as significant or marked. [Citations omitted.] Although the school district spends several pages of its supporting brief arguing why this court should not adopt a similar interpretation, I do not find its arguments persuasive."

#### C. Second Circuit—when there are state criteria

J.D. v. Pawlet Sch. Dist., 33 IDELR 34, 224 F.3d 60 (2d Cir. 2000).

"J.D., a minor of high school age at all times relevant to this action, is an academically gifted child who also has emotional and behavioral problems."

"Partly because of his academic progress, he skipped the sixth grade and was placed in Poultney High School ("PHS") for the seventh grade, where he was allowed to take ninth grade English. While in the seventh grade, J.D. took an IQ test on which he scored in the top two percent of his age group. In the eighth grade, J.D. took the Comprehensive Test of Basic Skills, a norm-based examination on which he received grade equivalency scores for reading, language, and mathematics that were predominantly in the tenth, eleventh, and twelfth grade levels. Even his lowest score, in spelling, placed him at the mideighth grade level. In the ninth grade, he took classes at or above his grade level in a variety of subjects and achieved grades ranging from B to A+."

Out of concern that the district was not meeting J.D.'s emotional and behavioral needs, J.D.'s mother requested an evaluation for special education services. His intellectual and academic testing confirmed his superior functioning. With regard to J.D.'s emotional behavioral functioning, "Dr. Meisenhelder also observed that J.D. experienced 'frustration, boredom, alienation, apathy, and hopelessness' because of an absence of intellectual peers at PHS, and that these feelings persisted despite a 'somewhat differentiated curriculum at school,' leading to passive resistance as well as aggressive behavior at school."

The evaluation team was able to agree that J.D. met criteria for an "emotional behavioral disability;" however, the school concluded J.D. was not eligible because his condition did not adversely affect his educational performance. The parent disagreed and requested a due process hearing. The hearing officer, district court and Second Circuit all affirmed the school district's conclusion that J.D. was not eligible for special education services under the IDEA. The Second Circuit relied on the Vermont highly specific definition of "adverse effect on educational performance."

## **Key Quotes:**

"Based on the overwhelming evidence in the record, the district court did not err in concluding that J.D.'s basic skills, and hence his educational performance, were not adversely affected by his disability within the meaning of the Vermont Rule."

"J.D., on the other hand, emphasizes his emotional condition, including his difficulty with interpersonal relationships and negative feelings. However, while these are signs of an emotional disability, under the statutory and administrative schemes, they are not measures of an adverse effect on basic skills by which educational performance must be assessed. For this reason, this case is distinguishable from Barnard Sch. Dist. v. R.M., 1983-84 EHLR Dec. 555:263 (D. Vt. Nov. 3, 1983), which J.D. cites. Although the student in that case performed well on certain standardized intelligence tests, the evidence also showed that, unlike J.D., his 'school performance ha[d] . . . been dismal' and that 'he ha[d] obtained failing grades a number of times . . . and his overall academic record [was] extremely poor.' *Id.* at 264."

"[H]ere, we must apply Vermont's regulatory definition, which directs us to eight basic skills. Because J.D. has not established an adverse effect on any of these skills, we affirm the district court's holding that he is not eligible for special education under the IDEA."

#### D. Second Circuit—in the absence of state criteria—two cases

C.B. on behalf of Z.G v. Dept. of Educ. of the City of N.Y., 52 IDELR 121 (2d Cir. 2009) (unpublished decision).

The parents challenged the school district's determination that their child, who suffered from bi-polar disorder and ADHD, did not qualify for services under the IDEA, and further sought reimbursement for their private school placement.

The hearing officer found the student to qualify under the IDEA based on an eligibility classification as other health impaired (OHI). The state review officer reversed, and the district court upheld the decision of the state review officer. In an unpublished decision, the Second Circuit affirmed the decision of the district court that the child was not eligible for special education services.

#### **Key Quotes:**

"Neither party contests that ADHD and bipolar disorder could qualify as disabling conditions. The question is whether Z.G.'s experience of those conditions adversely impacted her educational performance. Z.G.'s grades and test results demonstrate that she continuously performed well both in public school before she was diagnosed, and at the Dalton school thereafter. The DOE's psychoeducational assessment and a psychological evaluation requested by

plaintiff concur in finding that Z.G. tested above grade-level and do not opine that Z.G.'s educational performance has suffered. While Z.G.'s treating psychiatrist and teacher at Dalton testified to their observations of Z.G.'s difficulties with bipolar disorder and ADHD, there was a continuity of Z.G.'s successful performance both before and after her conditions were diagnosed. The evidence on record is insufficient to show that Z.G. has suffered an adverse impact on her educational performance. Plaintiff's other arguments are without merit."

Mr. and Mrs. N.C. v. Bedford Central Sch. Dist., 51 IDELR 149 (2d Cir. 2008) (unpublished decision).

As the Second Circuit pointed out, "M.C. did not fail any of his classes at Fox Lane High School .... From ninth to tenth grade, M.C.'s grade-point average ("GPA") declined only nine points."

# Key Quotes regarding whether M.C. suffers from an emotional disturbance:

"With respect to M.C.'s possible display of 'a generally pervasive mood of unhappiness or depression,' we agree with the district court's conclusion that the evidence was insufficient to demonstrate the presence of this factor. [Citation omitted.] Though there were diagnoses both for and against finding M.C. depressed, the therapist who diagnosed major depression, single episode, only met with M.C. three times. In contrast ... the therapists who had the most familiarity with M.C. -- William Reulbach and Scott Gillet -- were the ones who found that he did not suffer from depression. [Footnote omitted.]"

"Regarding the inappropriate behavior characteristic, we also agree with the district court's conclusion that M.C.'s inappropriate behavior falls short of qualifying him as emotionally disturbed. [Citation omitted.] Dr. Reulbach saw M.C.'s drug use as the root of his problems in school. As the district court points out, this conclusion is 'more consistent with social maladjustment than with emotional disturbance.' N.C. ex rel. M.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 545 (S.D.N.Y. 2007). Plaintiffs have not produced enough evidence of an 'accompanying emotional disturbance beyond the bad conduct.' *Id.* Therefore, we conclude that M.C. cannot qualify as emotionally disturbed based on the inappropriate behavior factor."

# Key Quotes regarding the "adversely affects" standard:

"Even if M.C. did satisfy one or more of the five emotional disturbance characteristics, he still would not qualify as emotionally disturbed because there is insufficient evidence that M.C.'s educational performance was adversely affected by any such condition."

Regarding the drop in grades: "And we cannot conclude on the basis of the record here that this decline was attributable to an emotional disturbance as opposed to M.C.'s acknowledged drug use."

## E. New York district court applies the Second Circuit's standard

A.J. by C.L.J. and C.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist., 53 IDELR 327 (E.D. N.Y. 2010).

As a preschooler, A.J. was determined eligible to receive preschool services as a student with a disability due to significant delays in fine motor and social emotional functioning. At the end of his preschool years, he was dismissed from services due to his progress. Once no longer eligible, his teacher reported that he "was 'fine' academically, that that his behavior was disruptive, compulsive and all consuming." Following a parent referral for special education evaluation, the district evaluated A.J. and determined that he did not qualify for special education due to the "steady progress" he was making academically.

Despite private evaluations diagnosing A.J. as having Asperger's Disorder and ADHD, as well as evidence of behavioral difficulties, the hearing officer upheld the school district's determination that A.J. did not qualify for special education services. The teacher testified that although A.J. had behavioral difficulties, his behaviors were not unique, and could be adequately dealt with in the classroom. The school psychologist observed that A.J.'s behaviors did not interfere with the teacher's ability to maintain control of the classroom. The hearing officer placed a great deal of weight on the teacher's testimony, stating: "She perhaps occupies the best vantage point from which to make that judgment." The state review officer upheld the decision of the hearing officer.

On appeal, the district court articulated the 3-part eligibility test as follows:

Thus, in determining IDEA eligibility, the Court must examine: (1) whether A.J.'s disability falls within at least one of the delineated classifications; (2) whether the disability has an adverse effect on educational performance; and (3) whether, as a result, A.J. needs "special education and related services."

Although the Court found that "A.J. has autism," the Court concluded that A.J.'s autism did not have an adverse effect on educational performance.

#### **Key Quotes:**

Citing the two unpublished Second Circuit decisions above, the court stated: "'educational performance' must be assessed by reference to academic performance which appears to be the principal, if not only, guiding factor."

"Here, Plaintiffs ask this Court to find that A.J.'s 'educational performance' was affected by his Asperger's because despite his academic progress, A.J.'s disorder caused him to be impulsive, to require frequent redirection, and to exhibit inappropriate social behaviors and peer interactions. While it may be that A.J.'s emotional problems are hindering his learning progress, Plaintiffs have not presented any evidence that supports that conclusion. Absent any concrete gauge demonstrating that A.J.'s academic performance has suffered, all the Court is left with is the implication that A.J. is not reaching his full potential, a standard that finds no support in the statute."

"Absent a statutory directive to the contrary, the Court agrees with Plaintiffs that the term 'adversely affects' should be given its ordinary meaning and that no qualifier such as "severe" or "significant" should be inferred. ... Nonetheless, even when the correct legal standard is applied, the result is the same. The record reveals that despite A.J.'s Asperger's, A.J. was performing at average to above average levels in the classroom and was progressing academically. Therefore, even applying the term's ordinary meaning, the Court finds by a preponderance of the evidence that A.J.'s condition was not affecting his educational performance in an adverse or unfavorable way."

#### F. Fifth Circuit

Alvin ISD v. A.D., 48 IDELR 240, 503 F.3d 378 (5th Cir. 2007).

See factual summary below.

Key Quotes regarding the "adversely affects" standard:

"A.D. also argues that the district court applied the wrong legal standard when determining 'need' under 20 U.S.C. § 1401(3)(A). Specifically, A.D. argues that the district court should have looked to whether or not his ADHD 'adversely affects his educational performance' rather than whether his ADHD adversely impacts his ability to 'benefit from regular education.'"

"A.D.'s argument is flawed for two reasons. First, the 'adversely affects a child's educational performance' standard is a subpart of the definition of 'other health impairment.' [Footnote omitted.] 34 C.F.R. § 300.8(c)(9). Thus, establishing an adverse effect on educational performance demonstrates that A.D. has an 'other health impairment.' As described above, however, determining that a child has an 'other health impairment' only fulfills the first prong of the 'child with a disability' analysis under 20 U.S.C. § 1401(3)(A). A.D. must still fulfill the second prong by demonstrating that, by reason of his ADHD, he needs special education services. Therefore, the fact that A.D.'s ADHD adversely affects his educational performance does not necessarily mean that he is eligible for special education services under the IDEA."

G. Office of Special Education Programs (OSEP)

OSEP Letter to Clark, 48 IDELR 77 (March 8, 2007).

"It remains the Department's position that the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance. Whether a speech and language impairment adversely affects a child's educational performance must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas. Section 614(b)(2)(A) of IDEA and the final regulations at 34 CFR § 300.304(b) state that in conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. Therefore, IDEA and the regulations clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance. Furthermore, 34 CFR § 300.101(c) states that each State must ensure that a free appropriate public education (FAPE) is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."

H. District court looks to nature of private school services to determine whether there was an adverse effect on educational performance

N.G. v. District of Columbia, 50 IDELR 7, 556 F. Supp. 2d 11 (D. D.C. 2008)

The court concluded that the student was eligible for services despite her strong performance in two private boarding schools where she was not identified as a student with a disability.

#### **Key Quotes:**

"The evidence considered by the MDT and the Hearing Officer shows only that N.G. does well in a highly structured environment, with extremely small classes, a high level of direction and supervision, access to crisis counseling, ongoing psychological services, and medication therapy. The Court makes this observation not to minimize N.G.'s great progress, but to support its conclusion that without such supports, which [the public school district] admittedly would not provide, N.G.'s disabilities would certainly adversely impact her educational performance."

"That N.G. can perform well in precisely the school environment recommended by her doctors does not mean that she is not disabled or that her disabilities do not adversely impact her educational performance. To the contrary, it means that N.G.'s parents have successfully stepped in where DCPS failed and comprised an appropriate educational program for their daughter."

# "EDUCATIONAL NEED"

# A. First Circuit

*Mr. and Mrs. I v. Maine Sch. Admin. Sch. Dist. No. 55*, 47 IDELR 121, 480 F.3d 1 (1<sup>st</sup> Cir. 2007).

See factual summary above.

Key Quotes regarding the "educational need" standard:

"The district contends that 'whether a child needs special education for IDEA eligibility should depend on whether that child requires special education to benefit in those areas of educational performance that are adversely affected,' but does not argue that LI does not pass that test. Instead, the district argues ... that she does not need special education 'to benefit from school' or 'to do well in school."

"But whether a child requires special education 'to do well in school,' or even 'to benefit from school,' presents a different question from whether the child requires special education 'to benefit in those areas of educational performance that are adversely affected by her disability.' The former inquiry considers the effect of special education on the child's overall achievement in school, while the latter focuses on the effect of special education on the components of that achievement hampered by the child's disability. Indeed, a child may 'do well in school' without special education, accumulating a high grade point average, but may nevertheless perform below acceptable levels in other areas, such as behavior. The questions of whether such a child 'needs special education' under a proper interpretation of § 1401 (3)(A)(ii)—and how to articulate that interpretation in the first instance—have generated a cacophony of different answers."

"We do not attempt to compose the correct standard of 'need' here. We simply note the significant variance between the standard the district urges us to adopt and the standard it argues has been satisfied. [T]he district does not explain how [a finding that LI does not require special education 'to do well in school'] would support the conclusion that LI does not 'need special education' under the IDEA and, in fact, argues that the proper inquiry incorporates a substantially different standard, i.e., whether LI 'requires special education to benefit in those areas of educational performance that are adversely affected.' Conversely, the district does not explain how the evidence received at the due process hearing falls short of that standard. The district has therefore failed to show that the district court's treatment of the 'need' issue as settled had any effect on its ultimate conclusion that LI qualified for IDEA benefits."

#### B. Fifth Circuit

Alvin ISD v. A.D., 48 IDELR 240, 503 F.3d 378 (5th Cir. 2007).

A.D. attended school in Alvin since he was three. He was identified with a speech impairment and ADHD until the third grade, when he was dismissed due to a lack of need for special education services. He did well during his elementary school years.

A.D. started to exhibit behavior problems in the 7<sup>th</sup> grade. He was disciplined for a variety of disrespectful and disruptive behaviors. He was sent to in-school suspension (ISS) several times, and was assigned to Saturday school and detention. However, he passed all of his classes and all portions of the statewide assessment.

A.D. was identified as "at risk" in the 8<sup>th</sup> grade and was monitored by the Student Success Team (SST). Around this period, various stressors emerged in A.D.'s life, including the death of his baby brother, a strained relationship with his stepfather, and his mother's pregnancy. A.D. began abusing alcohol during this time. The SST developed an Academic Behavior Contract with A.D. which required him to take his medication every day, maintain appropriate verbal behavior, follow the dress code and complete assignments on time. A.D. took his medication almost every day and missed only three days of school. However, his behavior problems continued, ultimately leading to ten days in ISS and a recommendation for expulsion to a disciplinary alternative educational placement due to alleged theft from the school's concession stand. "Even with these issues, however, A.D. passed the eighth grade with one A, three Bs, two Cs, and one D and passed the [statewide assessment] test, receiving an evaluation of 'commended' on the reading portion."

After the concession stand incident, the parent asked for an evaluation for special education services. The evaluations were summarized by the court as follows: "In the written report, A.D.'s cognitive abilities were found to be in the average range. Dr. Peters, the evaluating psychologist, concluded that A.D.'s symptoms of ADHD did not prevent him from making age-appropriate academic and social progress. Ms. McDaniel, the educational diagnostician, concluded that A.D.'s academic performance was "high average" in basic reading skills and "average" in all remaining areas. Approximately one month later, AISD received the information requested from A.D.'s treating physicians, Dr. Kazmi and Dr. Nguyen, who recommended special education services for A.D. AISD also received a report from Dr. Rasheed, a new, privately obtained psychiatrist, who recommended special education services."

Based on these evaluations, the ARD committee concluded that A.D. was not eligible for special education services. The hearing officer ruled that A.D. was eligible based on OHI. The school district appealed that decision to federal court,

and the district court overturned the hearing officer's decision, concluding that A.D. was, in fact, not eligible. The parent appealed to the Fifth Circuit.

## Key Quotes regarding the "educational need" standard:

"AISD argues that the district court properly determined that the testimony of A.D.'s teachers, who observed his educational progress first-hand, is more reliable than much of the testimony from A.D.'s physicians, who based their opinions on faulty information culled from isolated visits, select documents provided by A.D.'s mother, and statements from A.D.'s mother about what she believed was happening in school. Finally, AISD argues that much of A.D's behavioral problems are derived from non-ADHD related occurrences, such as alcohol abuse and the tragic death of A.D's brother. Thus, AISD asserts, any educational need is not by reason of A.D's ADHD, as required by the statute. We agree with the district's argument and find that the district court's factual findings were not clearly erroneous."

#### C. Ninth Circuit

Hood v. Encinitas Union School District, 47 IDELR 213, 486 F.3d 1099 (9<sup>th</sup> Cir. 2007).

The court held that the student was not eligible due to a specific learning disability or an other health impairment, because there was no need for specially designed instruction. As to a learning disability, the court held that the student failed to show that her disability could not be "corrected through regular or categorical services within the regular instructional program." California had a rule that stated that students were not eligible for special education if their learning problems were "correctable" through the provision of other services. The case was about what "correctable" means. The parents argued that "correctable" means that the services provided would cause the discrepancy between achievement and potential to narrow—i.e., that the learning disability would be lessened or cured. The court said that the parents' brief "offers no case law in support" of that standard. Instead, the court ruled that the proper standard was the Rowley standard of educational benefit. Since the student was receiving an educational benefit from the services provided in the regular classroom, any learning disability that she had was "correctable." Likewise, her ADD condition did not require special education.

#### D. Hawaii district court

Ashli and Gordon C. v. State of Hawaii DOE, 47 IDELR 65 (D. Hawaii 2007).

The court held that the student was not eligible despite having ADHD and receiving "differentiated instruction."

## **Key Quotes:**

Regarding the "adversely affects" standard: "If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services."

Importantly, the court ruled that "differentiated instruction" is not "specially designed instruction": "[T]here is nothing in either the IDEA or in the state or federal implementing regulations to indicate that a student would qualify as a 'student with a disability' when the school voluntarily modifies the regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level."

The court approved the analysis of the IHO:

The Hearing Officer found that Sidney received "differentiated instruction" in the classroom such as additional time highlighting and taking tests, being moved closer to the teacher during tests, and having the teacher read the test directions to him, but that "differentiated instruction such as this is available to all children in [Sidney's] classroom and is not an accommodation or different method of teaching, as special education or Section 504 modifications or accommodations would be."

## THE INTERPLAY BETWEEN RTI AND SPECIAL EDUCATION ELIGIBILITY

A. When do we need to refer a Tier 1 or 2 Student to Special Education?

As soon as you know or suspect that the student has a disability, and due to the disability, requires special education and related services.

IDEA defines a student with a disability as:

A child evaluated in accordance with [IDEA] as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, . . . an orthopedic impairment, autism, traumatic brain injury, another heath impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, *by reason thereof*, needs special education and related services.

20 U.S.C. §1401(3).

A student may have a disability condition, such as a hearing impairment or vision impairment, and not require specially designed instruction, thus negating the need for special education. For example, a student with a hearing impairment who hears within normal limits with a hearing aid and is functioning well academically would not need special education. The same student may, however, struggle academically, for a reason other than the student's impairment. For example, the student may struggle in math due to lack of appropriate instruction in math. Such a student would be benefit from the RtI process, but would not need to be referred to Special Education unless RtI is unsuccessful.

The provision of RtI does not relieve the District of its Child Find obligations. The District is required to have policies and procedures in place that ensure that all children with disabilities who need specialized instruction are "identified, located and evaluated." 34 C.F.R. § 300.111(a). RtI is not a substitute for a Full, Individual Evaluation (FIE) under IDEA. If a parent requests an evaluation for special education or makes a referral to special education, immediately provide the parent with a copy of the Procedural Safeguards. You must also then conduct the evaluation or provide the parent with Prior Written Notice of the district's refusal to complete an evaluation. Even if the parent subsequently agrees that an FIE or referral to special education is pre-mature, it is best to provide the parent with Prior Written Notice that an evaluation will not be done.

# B. Case in point:

Jackson v. Northwest Local School Dist., 110 LRP 49983 (S.D. OH 2010)

The District had reason to suspect a student was a student with a disability because the student was no longer responding to interventions and had behavioral issues that were severe enough for the student intervention team to recommend that the parent take the student to an outside mental health agency. The student was diagnosed with ADHD in 1<sup>st</sup> grade and was provided with interventions, including school counseling, 1:1 instruction in the classroom, pull-out small group instruction, and modifications. The student responded well to the interventions in 1<sup>st</sup> and 2<sup>nd</sup> grade, but in 3<sup>rd</sup> grade, the student had increased academic and behavioral difficulties. The Court found that, because the interventions were no longer resulting in adequate progress and the team had determined counseling may be needed, the district should have referred the student to special education. Not only was this a Child Find violation, but the student intervention team's knowledge was sufficient to entitle the student to protections in disciplinary matters; the district had reason to know the student had a disability and was therefore required to conduct a manifestation determination before expelling the student.

# C. If A Parent Requests an Evaluation, Should You Wait Until You Have RtI Data?

No. An effective RtI process *may* provide appropriate interventions that allow for adequate progress and thus support a decision of the district not to complete an FIE for special education consideration, but a parent can request an FIE at any time. 34 C.F.R. § 300.301(b). If a referral for Section 504 or special education eligibility consideration is made at any time during the RtI process, the District should proceed with its normal Section 504 or special education referral process, while continuing any RtI interventions. This requires a two-track process in which the RtI Team continues to document, assess, graph, monitor and review the students' response to general education interventions, and the Section 504 committee or an ARD committee considers the referral.

Since the RTI data may provide valuable information as part of an initial evaluation for a specific learning disability, even after an evaluation is requested, it may be appropriate to gather RTI data concurrently with completing formal assessment, but the timeline for completing an initial evaluation and considering eligibility is not extended by the RTI process.

#### D. Case Law:

## D.A. v. Houston Indep. Sch. Dist., 110 LRP 23150 (S.D. TX 2009)

Although general education support services are required prior to referral of a student to special education (19 TAC §89.1011), it wasn't appropriate for a district to delay a requested evaluation until interventions were provided. D.A. had been considered at risk since pre-K. In 1<sup>st</sup> grade, the Intervention Assistance Team ("IAT") determined that the student should not be referred for assessment because the general education teacher had not "sufficiently documented his problems." They gave the teacher an ABC form to document the student's behavior. Two months later, the IAT team again decided not to evaluate the

student because the teacher "had not provided sufficient documentation, on the proper forms" and requested the teacher complete the proper forms.

## Key Quotes:

As of October, 2007, all of D.A.'s teachers, from pre-K to first grade, had expressed concern about his developmental delays and behavior problems. His mother had expressed her concern to the Crespo administration on numerous occasions, and his speech therapist had both called and written to the school to recommend that he be evaluated. The IAT, however, failed to consider this evidence in October, either because it had not

## **Practice Tip:**

One way to address the lack of adequate RtI documentation is to provide interventions and gather data related to the interventions as part of the FIE. Due to the time limit for completing an FIE, this would need to be done over a 4-6 week period.

collected accurate information about his academic progress, such as his failing first grade report card, or because it refused to allow [the teacher] to present her observations because they were not documented on proper forms. . . . [T]he lack of communication within HISD and between HISD and L.A., led to an unnecessary delay in D.A.'s special education referral.

The Court also found that the District should have given the parent Prior Written Notice of its refusal to assess the Student.

Student v. Austin ISD, 110 LRP 49317 (SEA TX 2010).

The diagnostician in the recent *Austin ISD* case told the parent, "I can't look at your kiddo until we try some interventions . . . do a lot of interventions." Although the Hearing Officer concluded that the district had met its child find duty, she specifically held that because the parent had requested an assessment, "the school district had a duty to evaluate the student that overrode the district's use of the local district RTI process."

## Letter to Copenhaver, 108 LRP 16368 (OSEP 2007)

Parent consent is not required prior to beginning RtI as part of an FIE. The review of RtI data would be part of a Review of Existing Evaluation Data for which no consent is required. The sixty day timeline does not begin to run until the district determines that additional evaluation data is needed and obtains parent consent for the additional evaluation. However, the RtI process must not "operate to impede the child's right to the timely provision of special education and related services." RtI data would be sufficient to determine whether a child is a child with a disability only in "limited circumstances" because RtI does not meet the requirements of an FIE. [Note: If after reviewing RtI data, the ARD committee determines there is not an educational need for special education and related services, no FIE would be required. In that situation, the district must give the parent notice that no additional evaluation data is needed, and the parent can request an FIE.]

## Letter to Combs, 109 LRP 15035 (OSEP 2008)

RtI cannot be used as the single measure to determine eligibility. Even if the District has a policy of using RtI as part of the eligibility determination, the District must expedite the completion of an initial evaluation when the student has been subjected to a disciplinary change of placement.

The information in this handout was created by Walsh, Anderson, Brown, Gallegos & Green, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.