

CASES AND COMMENTARY ON CHILD FIND

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INTRODUCTION

“Child find” refers to the ongoing duty of public school districts to identify, locate, and evaluate all children suspected of having disabilities residing within the jurisdiction that either have or are suspected of having disabilities and need special education as a result of those disabilities. 34 CFR §300.111.

§ 300.111 Child find.

(a) *General.*

(1) The State must have in effect policies and procedures to ensure that—

- (i) 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; and
- (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.

(b) *Use of term developmental delay.* The following provisions apply with respect to implementing the child find requirements of this section:

(1) A State that adopts a definition of *developmental delay* under § 300.8(b) determines whether the term applies to children aged three through nine, or to a subset of that age range (e.g., ages three through five).

(2) A State may not require an LEA to adopt and use the term *developmental delay* for any children within its jurisdiction.

(3) If an LEA uses the term *developmental delay* for children described in § 300.8(b), the LEA must conform to both the State's definition of that term and to the age range that has been adopted by the State.

(4) If a State does not adopt the term *developmental delay*, an LEA may not independently use that term as a basis for establishing a child's eligibility under this part.

(c) *Other children in child find.* Child find also must include—

(1) Children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade; and

(2) Highly mobile children, including migrant children.

(d) *Construction.* Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 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.

CHILD FIND REQUIREMENTS, GENERALLY

Enrollment Not Required

A public school district has an affirmative obligation to engage in child find efforts, even when the students at issue are not enrolled in the public school system. See Robertson County School System v. King, 24 IDELR 1036 (6th Cir. 1996)(unpublished). In that case, the court stated that “it is simply not true that a public school system has no responsibility to evaluate students not enrolled in the system. The school system has an affirmative obligation to seek out and evaluate all potentially eligible children who live (or whose parents live) within the jurisdiction, regardless of whether such children are enrolled in private institutions within or without the jurisdiction.”

Private School Students

Public school districts also have child find responsibilities toward students enrolled in private schools.

§ 300.131 Child find for parentally-placed private school children with disabilities.

(a) *General.* Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§ 300.111 and 300.201.

- (b) *Child find design.* The child find process must be designed to ensure—
- (1) The equitable participation of parentally-placed private school children; and
 - (2) An accurate count of those children.
- (c) *Activities.* In carrying out the requirements of this section, the LEA, or, if applicable, the SEA, must undertake activities similar to the activities undertaken for the agency's public school children.
- (d) *Cost.* The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under § 300.133.
- (e) *Completion period.* The child find process must be completed in a time period comparable to that for students attending public schools in the LEA consistent with § 300.301.
- (f) *Out-of-State children.* Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

RECENT CASES AND COMMENTARY

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.

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.

Anello v. Indian River School District, 53 IDELR 253 (3rd 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.

D.A. v. Houston ISD, 54 IDELR 168 (S.D. Tex. 2009)

The court held that the district failed in its child find duties, but did not order any relief due to mootness and a failure by the parents to present evidence to support the claim for compensatory relief. The request to order Houston ISD to conduct an FIE was moot due to the student's move to a new district which was conducting the evaluation. As for child find, the court held that the district had sufficient information to order an FIE as of October, 2007. Teachers from pre-K, kindergarten and first grade had all observed significant problems; the student was failing all academic courses; a private speech therapist stated that he was "in desperate need of intervention"; and the first grade teacher provided a "notebook full of documentation." Moreover, the mother had been seeking an FIE for over a year. The suit also sought relief against the HISD principal and school counselor, but the court noted that individuals are not subject to suit under IDEA, 504 or the ADA. The court also denied relief on the 504 claim against the district, noting that district may have been negligent, but its conduct was not a gross departure from accepted standards among education professionals. Therefore, it did not amount to discrimination "solely on the basis" of disability.

D.L. v. District of Columbia, 55 IDELR 6 (D.C. D.C. 2010)

In a class action case, the court held that the district failed to fulfill its child find duty for three to five year olds in the years leading up to 2007, the last year in which data was available. This holding was based on statistical data alone. The court noted that the nationwide, 5.94 % of 3-5 year olds qualified for special education. Given its demographics, the District of Columbia should be serving at least 6% of these students. Between 1992 and 2007, the district served only 2-3% of these children. Based on many agreed facts along with annual findings by OSEP that the District had failed to fulfill its child find duties, the court held that the district violated IDEA and Section 504. The 504 ruling was based on the fact that the district was aware of its failings and failed to rectify them.

Comment: The opinion includes a definition of "child find" taken from the OSEP website: "a definition of the target population, a widespread public awareness campaign, a referral process that fosters the timely identification of children, screening and evaluation of children who may be eligible for services, an accurate eligibility determination, tracking systems to ensure that all children who are referred are screened, evaluated, and receiving services, and an interagency coordination effort between state and local agencies."

A.P. v. Woodstock Board of Education, 55 IDELR 61; 370 F.App'x. 202 (2nd Cir. 2010)

The court affirmed a decision in favor of the school district, noting that the district court had independently and properly reviewed the hearing officer's decision. The hearing lasted 12 days and produced over 200 exhibits. The hearing officer issued a 20-page, single-spaced decision

with 53 findings of fact and 26 conclusions of law. The district court's decision, which is at 50 IDELR 275, goes into much more detail than the Circuit Court's. What follows is a summary of the district court decision. The district court held that the district did not violate its child find duty. The student made progress in regular education with interventions designed by the Child Study Team. Eventually, the school determined that the student was eligible for special education, but the parent complained that this came too late. The parents argued that the school's routine use of the CST as a "pre-referral" process was a "per se violation of the IDEA." The court rejected that argument. The court noted state laws that require the use of regular education interventions prior to a referral for special education testing. The second argument asserted that the school used the CST improperly as a "roadblock," intentionally designed to prevent referrals. But the court held that these assertions were not borne out by the record. The law states that parents can make a referral at any time. The record showed that these parents knew this, or should have known it. They never did make a referral even though they knew how to do so. Third, the parents argued that if, in fact, it is permissible for schools to use this CST process, then the CST should be required to follow all of the rules and procedures that apply to IEP Team meetings. Parents should be notified and included in all meetings with an opportunity to participate in every decision. The court rejected that argument as well. The court concluded that the procedural safeguards parents enjoy under the IDEA are triggered by a referral for special education testing—not by pre-referral activities such as a meeting of the CST.

Comment: The term "response to intervention" does not appear anywhere in the court's decision. But educators who read this one will understand instantly what was going on. In alignment with RTI theory, the school used regular education staff and services to provide the extra help the student needed. The school provided one year of informal intervention by the teacher, and a second year of formal action by the CST. The court ruled in favor of the school district on all grounds. But this case illustrates the inherent tension between Child Find and RTI. The campus based support team is charged with balancing this tension and making decisions about kids on an individualized basis.

Taylor v. Altoona Area School District, 55 IDELR 65 (W.D. Pa. 2010)

The court held that the district did not violate its child find duty. The student had severe asthma and a Service Plan to address it, but was never considered for or tested for special education. The court concluded that this did not violate the child find duty. The student's academic performance did not indicate that there was any need for specially designed instruction.

E.J. v. San Carlos Elementary School District, 56 IDELR 159 (N.D. Cal. 2011)

The court held that the district did not violate its child find duty. The student was diagnosed with PDD with Asperger's features while in 5th grade. The school responded by convening a Student Study Team which created a plan for the student. In the 7th grade, based on information that the student had been diagnosed with OCD and anxiety disorder, the SST met again. The student's plan was tweaked and modified during 5th, 6th and 7th grades and the student's school performance was good. During 8th grade, the parent referred the child for an evaluation and the school determined she was eligible for special education services.

Comment: This is a good illustration of the fact that a diagnosis does not make a student IDEA eligible, but it does call for a thoughtful response from the school district.

D.G. v. Flour Bluff ISD, 56 IDELR 255 (S.D. Tex. 2011)

The court held that the district failed to fulfill its child find duties, and ordered one year of compensatory educational services and attorneys' fees, thus overturning the IHO's decision. Much of this was based on the student's lengthy assignment to the district's alternative education program for disciplinary reasons, along with the fact that the district was aware of an ADHD diagnosis.

Moorestown Township Board of Education v. S.D., 57 IDELR 158 (D.C. N.J. 2011)

The court framed this issue: "may a school district deny a request for evaluations and an IEP by a privately enrolled student whom the district knows is disabled and domiciled in the district, on the ground that the student has not re-enrolled in the public school?" The answer is no. Key Quote:

Thus, the statutory language makes clear that where parents request reevaluations of their child for purposes of having an offer of an FAPE made for him, and the child is domiciled in the district, the school district must comply.

Comment: The court accused the district of creating "unnecessary procedural hurdles [that] frustrate IDEA's broad, remedial purpose. They become even more indefensible when they put children and their parents in "Zugzwang. Clearly, Congress intended collaboration, not gamesmanship." Fortunately the court provided a helpful footnote to let us know that "zugzwang" is "the unenviable position in chess where a player is obligated to move but cannot do so without disadvantage."

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

The court held that the district identified the student as having a learning disability in a timely fashion. The student received RTI services in kindergarten and first grade. In December of first grade year, the school tested the student and determined that he had a learning disability but did not need special education services. RTI continued. Early in the third grade year, the student was tested again and determined to be eligible. The parents claimed he should have been identified earlier but the court did not agree.

Comment: This decision rests on fact findings and does not break new legal ground. However it is an interesting illustration of a common scenario in the RTI era. The district prevailed because of its documentation of student progress. When the student began to struggle, the district tested him again and determined he was eligible.

J.S. v. Scarsdale Union Free School District, 58 IDELR 16 (S.D. N.Y., 2011)

The court held that the district still had a child find obligation to the student even though the parents, who resided in the district, had placed the student in an out-of-state residential facility.

Jamie S. v. Milwaukee Public Schools, 58 IDELR 91; 668 F.3d 481 (7th Cir. 2012)

The Circuit Court held that the class action lawsuit against MPS over child find violations should never have been certified as a class action, thus overturning the district court. The state department of instruction had settled the suit with the plaintiffs by imposing strict requirements on the MPS. MPS continued to litigate and got a favorable decision from the 7th Circuit. The Court held that the putative class of students harmed by systemic child find violations was too indefinite and lacked the “commonality” required of a class. Based on the de-certification of the class, the Court also overturned all of the district court’s decisions that went against the district as well as the settlement with the state and the strict requirements imposed on the MPS.

Comment: This suit was filed in 2001. Now, 11 years later, the district has obtained a major victory, but at great cost. The court’s analysis of what it takes to make a “class action” suit will be cited in any future such effort, and will make it difficult for plaintiffs to bring class actions under IDEA. Much of the analysis emphasizes the individual decision making that is the key component of IDEA, thus making class actions suspect.