CHILD-FIND AND RESPONSE TO INTERVENTION (RTI)

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Though pure "RtI model challenges" have not yet made it to the reported court case level, there have been plenty of child-find violation cases and agency decisions/letters that implicate the use of an "RtI model" and remind us that the law's child-find obligation is alive and well. Based upon this guidance, it is vital to remember that the IDEA's child-find duty to refer, evaluate and identify is triggered by a **"reason to suspect"** or **"reason to believe"** that a child 1) is a child with a disability and 2) is in need of special education services. It does not take **actual knowledge** of a disability and need for services to trigger the IDEA's or Section 504's child-find provisions. As a result, existing and emerging child-find cases must be observed in an "RtI world," particularly those that identify "referral triggers" that school personnel must keep in mind in general and, more specifically, as they move to full implementation of the RtI model for identification. There is clearly a growing tension emerging between RtI and the law's child-find requirement that must be balanced in this "new age" of RtI.

A. The Law's Child-Find Requirements (Location, Evaluation, Identification)

1. The IDEA

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

More relevant to the issue of the interplay between RtI and child-find is the IDEA's regulatory provision related to "other children in child-find." The regulations note that "[c]hild-find also must include—

> (1) Children who are *suspected of being a child with a disability…and in need of special education*, even though they are advancing from grade to grade; and
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> (2) Highly mobile children, including migrant children.

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

2. Section 504

Although RtI is really an IDEA identification issue, the Office for Civil Rights has investigated child-find complaints brought by parents under the auspices of Section 504. Section 504's regulations similarly contain the following language regarding the duty to evaluate:

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

34 C.F.R. § 104.35(a).

This "suspicion" language in both the IDEA and 504 regulatory language is what makes the child-find obligation affirmative in nature. Thus, school personnel cannot just ignore certain factors (or "referral red flags") that could be deemed sufficient to trigger the child-find duty to identify, locate and evaluate.

B. Agency Guidance on the Child-Find Duty in an RtI World

In January of 2011, the U.S. Department of Education's OSEP issued a memorandum that many interpreted to be a position of "back peddling" on the RtI movement. However, when read carefully, this memorandum merely emphasized that OSEP was concerned about situations where it seemed that school personnel were denying parental requests for evaluation on the basis that the student had not completed the RtI process.

> *Memo to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RtI strategy. The use of RtI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provisions of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RtI framework. Unless the district believes that there is no reason to suspect that the child is disabled and in need of special education services, an evaluation must be conducted within the applicable timeline. Should the district refuse to conduct an evaluation because no reason to suspect exists, prior written notice of the refusal must be provided to the parents.
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> *See also*:
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> *Letter to Ferrara*, 112 LRP 52101 (OSEP 2012). While districts cannot use RTI as a reason for failing to evaluate a student, a Texas regulation advising districts to consider RTI before referring a student is not inconsistent with the IDEA's child-find requirement.

> While it is inconsistent with the IDEA for an LEA to wait until the completion of RTI activities before responding to a parent's request for an initial evaluation by either refusing to conduct it (because it does not suspect that the student has a disability) and providing written notice of the refusal or conducting it in accordance with IDEA's timelines, the Texas regulation does not prohibit a district or a child's parent from referring a child prior to completion of RTI. Rather, it merely states that RTI "should be considered" before referral. If a parent believes that RTI is being used to delay or deny an evaluation, the parent may seek redress through a due process complaint.

OSEP has also opined on whether school personnel can require a student to participate in the RtI process prior to conducting an evaluation of a student placed in a private school setting where RtI data may not exist.

> *Letter to Zirkel*, 56 IDELR 140 (OSEP 2011). If a private school located within a district's jurisdiction does not use RtI, the district is neither required to implement it with the private school student, nor entitled to deny or delay a referral for an evaluation because the private school did not use RtI. In addition and regardless of whether the private school has used RtI, unless the district believes that there is no reason to suspect that the child is eligible, it must respond to a referral from the private school or parent by conducting an evaluation within 60 days or according to the state-imposed deadline. "If an RtI process is not used in a private school, the group making the eligibility determination for a private school child may need to rely on other information, such as any assessment data collected by the private school that would permit a determination of how well a child responds to appropriate instruction, or identify what additional data are needed to determine whether the child has a disability."

The same goes for referrals of students in programs operated by an outside agency, such as Head Start. A school district cannot require the outside agency to implement RtI before making a referral for an initial evaluation.

> *Letter to Brekken*, 56 IDELR 80 (OSEP 2010). School districts cannot require outside agencies, such as Head Start, to implement RtI before referring a child for an initial evaluation. Once a district receives a child-find referral, it must initiate the evaluation process in accordance with the IDEA. The IDEA neither requires nor encourages districts to monitor a child's progress under RtI prior to referring the child for an evaluation, or as part of an eligibility determination. Rather, it requires states to allow districts to use RtI in the process of determining whether a student has an SLD.

And OCR is on the same band wagon, finding it to be a violation of 504's evaluation requirements where RtI completion is a prerequisite to conducting an evaluation. For example:

> *Polk Co. (FL) Sch. Dist.*, 56 IDELR 179 (OCR 2010). Where district's policies indicated that completing the RtI process was a prerequisite to qualifying for special education services and the district told the parent that the student first had to complete general education interventions before an evaluation could be conducted, district violated Section 504's evaluation requirements. By September of 2009, the district had sufficient

evidence, based upon parent input, the student's academic performance and medical documentation that the student might need special education and related services because of his ADHD, but waited until March 2010 to conduct an evaluation.

C. Court Guidance on the Child-Find Duty in an RtI World

As indicated previously, there have been no cases where a head-on challenge has been made to the use of an RtI model for identifying students with disabilities. However, there has been class action litigation challenging what appears to be an "RtI-like" model in Wisconsin, but just this year, all of the developments were made null and void by the 7th Circuit Court of Appeals:

> *Jamie S. v. Milwaukee Pub. Schs.*, 58 IDELR 91, 668 F.3d 481 (7th Cir. 2012). The district court erred when certifying a child-find claim as a class action, and its decision in that regard is vacated, in addition to the decision that the school district had committed systemic child-find violations. The district court's order approving a settlement agreement between the class of students and the State Department of Education is also vacated, as well as an order requiring the district to take extensive remedial action. The class, which was defined as IDEA-eligible students "who are, have been or will be denied or delayed entry or participation" in special education, leaves no way to determine which students were members of the class. "In short, a class of unidentified but potentially IDEA-eligible disabled students is inherently too indefinite to be certified" as a class. Further, the unique nature of each child's circumstances makes a class-wide resolution of the child-find claims inappropriate. [Note: On August 20, 2012, in *Jamie S. v. Milwaukee Bd. of Sch. Directors*, 59 IDELR 194 (E.D. Wis. 2012), the district court dismissed the individual cases on the basis of failure to exhaust administrative remedies. The court also vacated its previous award of $459,123 in attorney's fees against the district, noting that the parents were no longer prevailing parties. It declined to decide, however, whether the Wisconsin ED could recover $475,000 in attorney's fees and costs that it agreed to pay as part of its settlement with the parents, since the ED was not a party to the district's appeal].
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> Previous history: *Jamie S. v. Milwaukee Pub. Schs.*, 48 IDELR 219, 519 F.Supp.2d 870 (E.D. Wis. 2007). District failed to refer children with suspected disabilities in a timely fashion and improperly extended the initial evaluation process. In addition, the State DOE violated its legal responsibility to properly supervise, monitor and sanction the LEA's non-compliance. While the district may have assumed that it had sufficient interventions in place to deal with issues such as poor grades, frequent absences, maladaptive behavior, and suicidal ideation, that did not excuse its failure to refer countless students for special education evaluations. Further, the district had a practice of not referring students due to concerns that such referrals would stigmatize them and the district often went to great lengths to attempt alternative interventions in order to avoid having to recommend students for a special education referral. "as can be seen in the case of [the named students], the extreme hesitancy of educators to pull the special education referral trigger, even if done in good faith, did a disservice to the educational and other needs of the child…."

[Subsequent History Note: The State DOE settled the case with the class plaintiffs, requiring the LEA to take extensive action and to be monitored by an outside authority. The LEA objected to the settlement, but the district court found it to be fair. 50 IDELR 127 (E.D. Wis. 2008). The court then went on to order additional remedies against the school district. 52 IDELR 257 (E.D. Wis. 2009) [where district has made only minimal efforts to remedy its systemic child-find violations, additional interventions are necessary, including the appointment of a special education professional to monitor the district's review of each student's compensatory education needs. The independent monitor will establish guidelines for deciding which individuals qualify as class members, evaluating each class member's eligibility for compensatory services and determining the amount, type and duration of the services. In addition, a "hybrid IEP team" will apply those guidelines in assessing each student's right to compensatory education. The hybrid IEP team will include at least four permanent members, selected from district personnel, and "rotating" members who are knowledgeable about each student's unique needs. In addition, the district must notify potential class members of the remedial scheme and students whose evaluations were delayed during the relevant time period are to receive individualized notice of the class action, and for all other potential class members, the district can provide a general notice on its web site]].

D. Sample Recent Child-Find Cases that Set our Referral Triggers

Anaheim Union High Sch. Dist. v. J.E., 113 LRP 22112 (C.D. Cal. 2013). District had notice of student's likely status as a child with a disability when the Section 504 Team met to discuss the student's panic attacks, inability to complete work, failing grades, inability to remain in class and hospitalization for attempted suicide. Thus, the district had an obligation to conduct a manifestation determination before placing him in an alternative school for disciplinary purposes. A school district is deemed to have knowledge of a student's disability before the misconduct occurred where a teacher or other staff member "expresses concern about a pattern of behavior" to the special education director or other district supervisor. This does not require teachers to suggest a special education evaluation. Rather, the high school AP's attendance at the 504 meeting triggered the knowledge that the student was likely covered by IDEA. Thus, the hearing officer's decision requiring a manifestation determination is upheld.

Lauren G. v. West Chester Area Sch. Dist., 60 IDELR 4 (E.D. Pa. 2012). Clearly, the school district had reason to believe that the student had a disability and erred in finding the student ineligible for a Section 504 plan and, therefore, is responsible for partial reimbursement for the student's therapeutic residential placement. The denial of FAPE stemmed from the child study team's selective review of evaluation data. Although the team looked at academic records, student meetings and feedback from teachers, it did not consider information about his mental and emotional difficulties. Specifically, the district ignored the student's psychiatric diagnoses, her inpatient and outpatient psychiatric hospitalization, and the fact that she was cutting classes to see the guidance or crisis counselor once or twice per week. In addition, the district informed the parents that it found the student ineligible for a 504 Plan just one day after the guidance counselor requested additional information about the student. Because the student's depression and

OCD substantially limited his learning, the district's failure to find him eligible for a 504 Plan amounted to a denial of FAPE.

Long v. District of Columbia, 56 IDELR 122 (D. D.C. 2011). Where district did not evaluate student for three years and violated its child-find duty, case is remanded to the hearing officer to determine appropriate compensatory education. In this case, the district's child-find duty was triggered when a private psychologist diagnosed a learning disability in 2006. Contrary to the district's assertions and the hearing officer's findings, there was evidence that the district was aware of the evaluation in 2006 but did not conduct an evaluation until 2009. For instance, an IEP team member apologized for the district's delay in following through on the referral process that was "initiated in 2006" when the charter school, for which the district was the LEA, referred the student for the evaluation in 2006. In addition, the district's assertion that the student suffered no harm is rejected, where the IEP team determined that the student was eligible for services when it finally completed the evaluation in 2009. The district's argument that it was not on notice of the suspected SLD until the parent presented a copy of the 2006 evaluation at the 2009 IEP meeting is also rejected, as the district's child-find obligations are triggered "as soon as a child is identified as a potential candidate for services."

E.J. v. San Carlos Elem. Sch. Dist., 56 IDELR 159 (N.D. Cal. 2011). District did not fail to timely identify the student as eligible under IDEA. Rather, the district properly and timely responded to parental concerns by convening a student study team meeting when it learned that a private neuropsychologist had diagnosed the student with Asperger syndrome. In addition, the team made modifications to the student's educational program, including extended time for test taking, the use of relaxation techniques and the use of a sign if the student needed to take a break. Not only did the student complete the 5th grade with A's and B's, she performed well in the 6th grade as well. During the 7th grade, the student study team met twice, after she was diagnosed with anxiety and OCD and adopted additional modifications to instruction. In eighth grade, the district promptly referred her for a special education evaluation in response to her parents' request. Prior to that, the student's teachers had no reason to believe she needed special education services and the evidence supports the conclusion that her parents did not request referral prior to the team meeting in November 2008. Thus, the due process decision in favor of the district is affirmed.

Lazerson v. Capistrano Unif. Sch. Dist., 56 IDELR 213 (C.D. Cal. 2011). Where a student became suicidal, her father requested an IEP, and two days later the district asked the parents to bring the student in for an evaluation, the district did not deny FAPE to the student. The district took affirmative steps to arrange an evaluation, but the parents refused and placed the student in a residential facility with only a day's notice followed by months of non-communication from the parents. At the same time, the district continued its efforts to arrange an evaluation after the student was placed in the residential program, but the parents expressed no interest. Though the parents were acting in response to a mental health emergency, districts are not responsible for providing emergency mental health services.

Oxnard (CA) Elem. Sch. Dist., 56 IDELR 274 (OCR 2011). School district discriminated against a first-grader diagnosed with ADHD, a seizure disorder and a mood disorder by delaying his IDEA evaluation and failing to evaluate for Section 504 services. The district violated 504 by referring the student to its student support team before conducting an evaluation, even when there was reason to suspect a need for special education services. Where the district placed the child on a half-day schedule and later excluded him from summer school due to his disruptive behavior, coupled with the knowledge of the medical diagnoses, there was enough there to have suspected a need for special education services.

Compton Unified Sch. Dist. v. Addison, 54 IDELR 71, 598 F.3d 1181 (9th Cir. 2010), *cert. denied*, (2012). Where failing 10th grade student was referred by the school to a mental health counselor (who ultimately recommended an evaluation), her teachers indicated that her work was "gibberish and incomprehensible," she played with dolls in class and urinated on herself, district cannot avoid a child-find claim based upon an argument that it did not take any affirmative action in response to high schooler's academic and emotional difficulties because the parent did not request an evaluation. Where the district argued that the IDEA's written notice requirement applies only to proposals or refusals to initiate a change in a student's identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces "absurd" results and the IDEA's provision addressing the right to file a due process complaint is separate from the written notice requirement. "Section 1415(b)(6)(A) states that a party may present a complaint 'with respect to any matter relating to the identification, evaluation, or educational placement of the child,'" and the IDEA's written notice requirement does not limit the scope of the due process complaint provision. By alleging that the district failed to take any action with regard to the student's disabilities, the parent pleaded a viable IDEA claim. (Note: The dissent in this case noted that determining that a "refusal" to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child-find claim without a request and a "refusal" on the part of the district).

Anello v. Indian River Sch. Dist., 53 IDELR 253 (3d Cir. 2009). District did not violate the IDEA in failing to evaluate a transfer student for LD until the middle of her third grade year, because the district had no reason to suspect a disability before the parents requested an evaluation. The parents' claim that the student's struggles under her 504 plan should have alerted the district to the need for an IDEA evaluation is rejected. Rather, the student was successful under her 504 Plan, as the student's grades had been improving in all subjects. Although the student ultimately failed third grade and a statewide standardized assessment, the district could not have predicted the student's failure.

Richard S. v. Wissahickon Sch. Dist., 52 IDELR 245 (3d Cir. 2009). District court's ruling that the district did not fail to timely identify student as disabled prior to the eighth grade is affirmed. The district court properly found that the school district did not focus solely upon the ability/achievement analysis to determine that there was no evidence of

LD at the relevant time. In addition, the district court considered the testimony of the student's teachers that the student was not one who had problems with attention, impulsivity, or hyperactivity during the relevant period. Indeed, the district court pointed to extensive evidence that, in the seventh and eighth grades, the student was perceived by professional educators to be an average student who was making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences and failure to complete homework.

Jackson v. Northwest Local Sch. Dist., 55 IDELR 104, 2010 WL 3452333 (S.D. Ohio 2010). The failure to conduct an MD review prior to suspending and ultimately expelling a third-grade student with ADHD for threatening behavior violated the IDEA's procedural safeguards. Clearly, the district should have known that the student had a disability at the time it expelled her because it had provided her with RTI services for approximately two years but she had made few gains. In addition, there were behavioral concerns expressed by her teacher and others that resulted in a referral by her RtI team to an outside mental health agency for an evaluation, but the district did not initiate its own evaluation at that time.

D.K. v. Abington Sch. Dist., 54 IDELR 119 (E.D. Pa. 2010). To establish a child-find violation, a parent must first show the district knew, or should have known, that the child was a student with a disability. Before the district learned of his ADHD diagnosis, it had insufficient reason to suspect a disability. Rather, the student did not stand out from his classmates and his inattentiveness could be explained by his young age. Although the school psychologist acknowledged after the fact that the student may have had some behavior consistent with ADHD, there was also evidence that the student's difficulties were less pronounced when he was first evaluated and found ineligible and were typical of a 5 or 6-year-old.

Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 53 IDELR 8 (D. Conn. 2009). Where district violated its child-find obligation, it must reimburse the parents for the student's therapeutic placements. Although the student's hospitalization did not in itself qualify her as a child with an emotional disturbance, "[t]he standard for triggering the child-find duty is suspicion of a disability rather than factual knowledge of a qualifying disability." The parent completed a health assessment form just one week before the student's hospitalization, when she enrolled the student in her local high school. The form stated that the student had been diagnosed with depression the previous year and was taking an antidepressant. Those statements, combined with the student's subsequent hospitalization, should have raised a suspicion that the student suffered from an emotional disturbance over a long period of time. Based upon private evaluations, the student is eligible for IDEA services and her parents are entitled to reimbursement.

N.G. v. District of Columbia, 50 IDELR 7 (D. D.C. 2008). Where student exhibited at least two of the five characteristics of SED (pervasive depression and inappropriate types of behaviors), her academic performance was adversely affected as a result, and DCPS knew it, the school district should have evaluated her, particularly after being informed of

her ADHD diagnosis. In addition, she failed four of her seven classes when she had previously been an A/B student.

Wilson County (NC) Pub. Schs., 51 IDELR 137 (OCR 2008). District could not avoid liability for its child-find violation merely by pointing out that the 7th-grader's parents never requested a special education assessment. The student's poor grades, inappropriate behaviors and ADHD tendencies should have given the district reason to suspect the existence of a disability. Along with poor academic performance, the student was suspended from the school bus on several occasions for offenses that included throwing objects, moving from seat to seat, and hitting fellow classmates. In addition, the student failed math and social studies and will repeat 7th grade. Furthermore, an evaluation conducted in 2005 showed that the student tested in the "at-risk to clinically significant" range for ADHD. All of these factors should have put the district on notice of potential disability.

E. A Summary of Referral Triggers

So, what does it take for there to be a "reason to suspect" or "reason to believe" that a student is disabled and needs special education? Based upon existing case law, I have developed a running checklist of referral triggers that courts/agencies have found, in combination, sufficient to constitute a "reason to suspect a disability" that would trigger the IDEA's or 504's child-find duty. When using this checklist, it is very important to remember that not one of these triggers alone would typically be sufficient to trigger the child-find duty. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered. Look out for indicators in these areas and **"when there's debate, evaluate (and re-evaluate too)!"**

1. Academic Concerns in School

- Failing or noticeably declining grades
- Poor or noticeably declining progress on standardized assessments
- Student negatively "stands out" from his/her same-age peers
- Student has been in the Problem Solving/RtI process and progress monitoring data indicate little progress or positive response to interventions
- Student is on a 504 Plan and accommodations have provided little benefit

2. Behavioral Concerns in School

- Numerous or increasing disciplinary referrals for violations of the code of conduct
- Signs of depression, withdrawal, inattention
- Truancy problems, increased absences or skipping class
- Student negatively "stands out" from his/her same-age peers

3. Outside Information Provided

- Information that the child has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- Information that the child has received a DSM-IV diagnosis (ADHD, ODD, OCD, etc.)
- Information that child is taking medication
- Information that child is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or services

4. Information from School Personnel

- Teacher/other service provider suggests a need for an evaluation or suggests counseling, other services, etc.

5. Parent Request for an Evaluation

- Parent requests an evaluation and other listed items are present