What Does the Law Say?

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ELIGIBILITY

Have there been any notable developments since your *TEC* update of the case law on specific learning disability (SLD) eligibility (Zirkel, 2010)?

Only one, but the trend remains basically the same. The one notable development is that in *M.B. v. South Orange-Maplewood Board of Education* (2010), the federal district court in New Jersey reversed the hearing officer's decision, which had been that the child was no longer eligible based on her lack of a severe discrepancy between ability and achievement in any of the eight enumerated areas of specific learning disability. The court concluded that the fatal problem was reliance on a formula-driven computerized assessment for severe discrepancy in the face of what the judge regarded as overwhelming countervailing evidence that the child met this criterion for both reading and math. By lacking the usual deference to hearing officer's assessment of the evidence and putting the burden of proof on the district, this judicial decision is rather narrow. Although this particular case was a reversal in favor of eligibility, the overall trend remains basically the same as the past several decades: Hearing/review officers and courts tend to decide SLD cases in favor of district determinations of ineligibility based primarily on severe discrepancy and secondarily on the need for special education (Zirkel, 2006; Zirkel, 2010).

Well, how about more recent developments concerning response to intervention (RTI) since your other *TEC* update (Zirkel & Thomas, 2010)?

For state laws, the only notable development is that Wisconsin recently finalized its regulations, joining the 14 other states that we reported as requiring RTI for SLD eligibility for all or at least specified grades or subject areas. More specifically, Wisconsin replaces severe discrepancy with RTI as of December 1, 2013. Moreover, although permitting districts to continue to use severe discrepancy until that date, the regulation allows them to opt for RTI during this transitional period and in addition requires any district that uses RTI for determining SLD eligibility for one child to switch to that approach for the entire school (Wis. Admin. Code § PI 11.36(6)). For case law on RTI, the developments have been negligible thus far, being limited to a few decisions at the administrative level that have not been specific to SLD eligibility (e.g., *Citrus County School District*, 2009; *Delaware College Preparatory Academy*, 2009).

Is an academically high-performing child with Asperger's syndrome eligible under the Individuals With Disabilities Education Act (IDEA)?

Although more information is needed about the individual child than this broad description, a key legal consideration will be whether the jurisdiction views "educational performance" and, thus, the need for special education as limited to academics or more broadly based on other factors, such as social adeptness. Probably due to the relative recency of the Asperger diagnosis, only a few courts have addressed this consideration. The Second Circuit has adopted the narrower approach (e.g., *A.J. v. Board of Education*, 2010), disagreeing with the earlier and broader position of the First Circuit (*Mr. I. v. Maine School Administrative District No. 55*, 2007).

Does moving a child into Tiers 2 or 3 of an RTI process or providing a child with a Section 504 plan trigger an IDEA "child find" claim for which the parent prevails?

Not necessarily at all. In both cases, the ultimate question for the adjudicator is whether the district had reason to suspect that the child may have a disability, which under the IDEA (§ 1401[3][A]) means a) meeting the criteria of one or more of the recognized classifications and, by reason thereof, b) needing special education. Although it is clear that RTI may not be used to delay an evaluation upon reasonable suspicion of these two prongs, it is equally clear that serving a child in Tier 2 or 3 does not, in itself, equate to this requisite suspicion. Indeed, no such case has yet surfaced in the published case law to date. Similarly, such services do not automatically meet the recently broadened eligibility standards of Section 504 (e.g., Zirkel, 2009). For example, in *Anello v. Indian River School District* (2009), the Third Circuit

rejected the child-find claim the parents filed on behalf of their third grader, who was on a 504 plan. Although the parent prevailed in *N.G. v. District of Columbia* (2008), the case was clearly distinguishable; the parent's expert had recommended accommodations via a 504 plan, but the district had not followed through. The court properly concluded that the District's defense was absurd, explaining that excusing the child-find obligation "merely because parents or therapists had suggested additional, alternative ways to accommodate the child . . . is clearly not what Congress intended . . ., particularly when the District did not even act on the suggested accommodations in the first place" (p. 29).

Upon evaluating a child who has a 504 plan for eligibility under IDEA, is the second prong (i.e., the need for special education) properly determined with or without the child's 504 accommodations?

IDEA regulations do not address this question, and the few courts that have done so determined the child's need for special education with the 504 plan and without considering it as, in effect, a mitigating effect. For example, in *Hood v. Encinitas School District* (2007), the Ninth Circuit concluded that a fifth-grade student whom the parents claimed had an SLD or other health impairment did not need special education because she was performing at or above grade level with a 504 plan. Similarly, in *Loch v. Edwardsville School District No. 7* (2009/2010), the lack of preponderant evidence of the need for special education defeated the IDEA eligibility claim of a high school student who had a 504 plan based on diabetes and social anxiety. Perhaps parents have not pressed the argument that even though a 504 plan is typically within general education, the accommodations—covered under the rubric of free appropriate public education (FAPE) in the 504 regulations—overlap with special education. In any event, the courts have not specifically addressed it.

FAPE

In a FAPE case, if the child failed to attain proficiency on the No Child Left Behind Act of 2001 (NCLB)-mandated statewide assessments, does this evidence weigh heavily in the adjudication of the parent's claim that the child's program was not appropriate?

Although the courts have not clearly settled this issue, the predominant view in the limited number of cases thus far is no, this evidence is not particularly weighty. More specifically, two federal courts decided FAPE cases in the defendant districts' favor even though the evidence was that the child, whose program was at issue, had not scored proficiently in the NCLB testing (*El Paso Independent School District v. Richard R.*, 2008; *Leighty v. Laurel School District*, 2006). Parents can argue that such testing is a clear indicator of the child's success or lack of success in accessing the general curriculum, and districts can counter that such testing is valid for assessing the district and school in terms of adequate yearly progress, not the individual child in terms of FAPE. However, the courts have not fully addressed such arguments.

Does an individualized education program's (IEP) failure to name the particular proposed placement constitute a denial of FAPE?

The answer largely depends on the jurisdiction, and most circuits have not resolved this issue. In the Second Circuit, which consists of Connecticut, New York, and Vermont, the answer is "no," reasoning that the IDEA's IEP requirement to specify "location" refers to the type of appropriate environment, not the specific school site (*T.Y. v. New York City Department of Education*, 2009/2010). In contrast, the Fourth Circuit, which consists of the Carolinas, Maryland, Virginia, and West Virginia, earlier answered the question with what appeared to be a clear-cut "yes" (*A.K. v. Alexandria City School Board*, 2007/2008). However, its subsequent decisions allowed for factual exceptions that effectively modified its answer to more like "it depends" (*K.J. v. Fairfax County School Board*, 2010; *Shaw v. Weast*, 2010).

In its latest IDEA ruling, the Supreme Court ruled that a child's lack of previous enrollment in special education is not a categorical bar to tuition reimbursement (*Forest Grove School District v. T.A.*, 2009). Upon remand to the district court, did the parent obtain the requested reimbursement?

No. Assessing the equities in the case, which is part of the multistep analysis for tuition reimbursement, the court concluded that the parent's failure to provide timely notice with regard to the transitional unilateral placement and the parent's purpose for the ultimate unilateral placement was "not because of any disability recognized by the IDEA but because of his drug abuse and behavioral problems" (*Forest Grove v. T.A.*, 2009, p. 1067).

Did the Ninth Circuit affirm or reverse the federal district court's decision in *J.L. v. Mercer Island School District* (2006), which was the outlier for the otherwise rather uniform judicial trend that interpreted the various amendments to the IDEA as not raising the *Board of Education v. Rowley* (1982) substantive standard for FAPE?

The federal district court's interpretation indeed had been the outlier for this otherwise uniform trend (Zirkel, 2009). However, upon appeal, the Ninth Circuit reversed the lower court's ruling (*J.L. v. Mercer Island Sch. Dist.*, 2010), thus making consistent the line of authority that the 1997 and 2007 amended versions of IDEA did not change the substantive standard of appropriateness that dates back to *Rowley* (1982; Zirkel, 2008).

Does a district's failure to make arrangements for an IEP meeting to fit the parent's schedule constitute a denial of FAPE?

It depends on the circumstances and the court. The 2004 IDEA amendments (20 U.S.C. § 1415[f][3][E][ii]) emphasized the importance of parental involvement by singling out one procedural violation as what may be an automatic denial of FAPE: specifically, where the district "significantly

impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child." In some of the subsequent cases concerning the scheduling arrangements for IEP meetings, depending on the specific facts, courts have found a denial of FAPE (e.g., *Drobnicki v. Poway Unified School District*, 2010; *J.N. v. District of Columbia*, 2010), whereas in others they have not (e.g., *C.H. v. Henlopen School District*, 2010). The key qualifiers in the statutory language appear to be *significantly* and *opportunity*, but the message seems relatively clear that the district should put a priority on facilitating the parent's participation in the FAPE-related processes, which center on IEP meetings.

TERMINOLOGY

Is "mental retardation" still the legally correct term in the context of IDEA?

No. On October 5, 2010, the President signed legislation popularly known as "Rosa's law" that changes the reference from "mental retardation" in IDEA and other federal legislation, such as Section 504, to "intellectual disability" (see "President Signs Rosa's Law!," 2010). State laws are encouraged, but not required, to do the same.

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