ELIGIBILITY UNDER IDEA

NYS IDEA IMPARTIAL HEARING OFFICER TRAINING – WEBINAR 2
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Children's status as a child with a disability entitles them to free, appropriate public education under the IDEA, 20 U.S.C. §§ 1400-1482. This paper will discuss some of the issues that impartial hearing officers (IHOs) confront in determining whether a child qualifies as a child with a disability under the IDEA. The following topics are included within the general subject of IDEA eligibility:

- Child-Find Requirements
- Definitions of Disabling Conditions, Including Emotional Disturbance and Specific Learning Disabilities
- Adverse Effect on Educational Performance
- Need for Special Education
- Relation of IDEA Eligibility to Eligibility Under Section 504
- Statute of Limitations Issues

Evaluation for disability is a topic closely related to eligibility, but it is so large in scope that this paper will not discuss it except in passing.

The essential eligibility definition under the IDEA is:

> Child with a disability
> (A) In general
> The term "child with a disability" means a child--
> (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
> (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3). Also potentially included is a child aged three through nine who is:

> (i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and
>
> (ii) who, by reason thereof, needs special education and related services.

Id. § 1401(3)(B).

The New York Education Law provides the following definition:

> A "child with a disability" or "student with a disability" means a person under the age of twenty-one who is entitled to attend public schools pursuant to section 3202 of this chapter and who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education. Such term does not include a child whose educational needs are due primarily to unfamiliarity with the English language, environmental, cultural or economic factors. Lack of [appropriate] instruction in reading[, including in the essential components of reading instruction as defined in subsection three of section 1208 of the Elementary and Secondary Education Act of 1965,] or [lack of appropriate instruction in] mathematics or limited English proficiency shall not be the determinant factor in identifying a student as a student with a disability.

N.Y. Educ. Law § 4401 (language in brackets is effective until June 30, 2018). State regulations also define "student with a disability." N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1(zz). New York regulations further define a "preschool student with a disability," *Id*. § 200.1(mm).

Eligibility with regard to age has generated significant litigation in some states. The federal law covers children between ages 3 and 21, inclusive, although states may exclude children under 5 and over 18 in some circumstances, and the IDEA Part C program covers children from 0 to 3. *See* 20 U.S.C. § 1412(a)(1).

Child-Find Requirements

A number of issues relating to eligibility and its determination have garnered attention, and among the more prominent is the child-find obligation. States and school districts must identify, locate, and evaluate all children with disabilities from birth, even if they do not provide the children educational services. 20 U.S.C. § 1412(a)(3), 34 C.F.R. § 300.111. This obligation is triggered when the school district has a reason to suspect a need for evaluation. *Board of Educ. of Wappingers Cent. Sch. Dist. v. M.N.*, No. 16-CV-09448(TPG), 2017 WL 4641219, 71 IDELR 9 (S.D.N.Y. Oct. 13, 2017), *appeal filed*, No. 17-3707 (2d Cir. Nov. 14, 2017). In the *M.N.* case, the parents of a student diagnosed with ADHD, reactive disorder and mood disorder notified the school district of an

emergency situation in December 2014 that entailed the student's hurting herself and expressing suicidal thoughts, to the point where she was asked to leave her boarding school. The court held that the district violated its child-find obligation because based on the information, it had reason to suspect a need for evaluation of the child as of December 2014 but failed to refer the student to the committee on special education or take any action until the parents ultimately requested a referral in March of 2015.

When a district requires a parent to request an evaluation of a child before making its own referral for evaluation, it violates the child-find duty. *Dean v. School Dist. of City of Niagara Falls*, 615 F. Supp. 2d 63, 71, 53 IDELR 59 (W.D.N.Y. 2009) ("Defendants required Plaintiff to request an evaluation of J.D.J. under IDEA before conducting one and before classifying J.D.J. as disabled under IDEA, in contravention of the 'child-find' provision in the IDEA which requires Defendants to identify, locate and evaluate students suspected of being a 'child with a disability' under the IDEA."); *see Board of Ed. Of the Syracuse City Sch. Dist.*, No. 01-082, 37 IDELR 232 (NY SRO 2002) (stating: "Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child. The child find duty is triggered when the district has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability"; further noting that frequent absences were more than mere truancy but continued after therapy and other assistance, and stating: "There were several warning signs of an emotional impairment, including her sudden decline in academic performance, her absenteeism, her disciplinary violations, her turbulent family background and the cautionary notes in the neuropsychologist's report. She was found to have major depressive disorder and then dysthymia, both of which are characterized by a pervasive mood of depression, and oppositional-defiant disorder . . . . I conclude that respondent had sufficient information to warrant a referral to its CSE by the fall of 1999. It failed to do so, and it cannot rely upon its failure to refer the student to the CSE to avoid responsibility under the IDEA for an award of tuition reimbursement") (internal quotation marks omitted).

There will be situations in which a school district that does not refer a child for evaluation is innocent of violating the child-find requirement. *W.A. v. Hendrick Hudson Central School District*, 219 F. Supp. 3d 421, 69 IDELR 4 (S.D.N.Y. 2016), involved a teenager with a migraine condition that forced him to miss school frequently. The court upheld an SRO determination that the district did not violate the child-find obligation by failing to identify and evaluate the student before the parents requested a referral for special education. The court said the district did not have enough reason to believe that student's disability required special education. It cited the student's good grades and test scores when the student received accommodations under a Section 504 plan. *See also R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp. 3d 262, 67 IDELR 214 (S.D.N.Y. Mar. 30, 2016) (in case of child with Tourette's Syndrome and other disabilities, holding that school district did not violate child-find requirement when it did not refer child for special education when child was receiving Section 504 plan accommodations and performing at average levels, satisfying state proficiency standards).

Among the leading cases in which courts have found child-find violations and ordered extensive remedies is *Compton Unified School District v. Addison*, 598 F.3d

1181, 54 IDELR 71 (9th Cir. 2010), in which the court affirmed an award of compensatory education and attorneys' fees for a high school student who scored below the first percentile on standardized tests in ninth grade, whose work in tenth grade was described by teachers as gibberish, and who played with dolls and colored with crayons in class and urinated on herself. Nevertheless, she was not evaluated until her mother requested an evaluation in the fall semester of eleventh grade. The court rejected an argument that at best can be described as creative, in which the district said that a claim under IDEA should not exist for the inaction of failure to obey the child-find requirement. *Boose v. District of Columbia*, 786 F.3d 1054, 65 IDELR 191 (D.C. Cir. 2015), another well-known case, overturned the dismissal of a claim for compensatory education beyond the minimum appropriate education standard required under the IDEA to make up for a claimed three-month delay in the identification of a child, in violation of the child-find duty.

Declines in student performance may trigger the obligation to evaluate. *S.D. Portland Pub. Schs.*, No. 2:13–cv–00152–JDL, 2014 WL 4681036, 64 IDELR 74 (D. Me. 2014) (regression in reading). A court has held that a mother's playing a tape recording of a child's speech to a district speech-language pathologist was enough to trigger the obligation to evaluate the child for a disability in speech. C.C. Jr. v. Beaumont Indep. Sch. Dist., No. 1:13-cv-685, 65 IDELR 109 (E.D. Tex. Mar. 23, 2015). The parent's general knowledge of the availability of services does not by itself bar tuition reimbursement for private schooling when the school district is derelict in its child-find duties. *Doe v. Metropolitan Nashville Pub. Schs.*, 133 F.3d 384, 27 IDELR 219 (6th Cir. 1998)

A question that sometimes arises is whether, when a child is being assisted through a response-to-intervention (RTI) program, a formal identification and evaluation of the child may be delayed awaiting progress through that program. In *Greenwich Board of Education v. G.M.*, No. 3:13-CV-00235, 2016 WL 3512120, 68 IDELR 8 (D. Conn. June 22, 2016), *appeal withdrawn*, No. 16-2548 (2d Cir. Oct. 11, 2016), the court ruled that the school board failed to offer a first grade student appropriate education by not providing her a comprehensive evaluation when she experienced difficulties with reading. The school board relied on the fact that the student was making progress under RTI, but the court held that the IDEA requires evaluation of all children suspected of having a disability, and said that the parents offered adequate evidence that there was at least enough grounds to raise a suspicion that child was failing to make sufficient progress under RTI, including a report by an expert who determined that despite months of intervention child was well below the expected reading level for her age.

Definitions of Disabling Conditions

The IDEA regulations provide extensive definitions of the disabling conditions listed in the statute, 34 C.F.R. § 300.8(c), as do the New York education regulations, N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1(zz). Two disability categories that appear prominently in the case law are emotional disturbance and specific learning disabilities.

Emotional Disturbance

The federal regulations provide:

> (i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
> (C) Inappropriate types of behavior or feelings under normal circumstances.
> (D) A general pervasive mood of unhappiness or depression.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
>
> (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

34 C.F.R. § 300.8(c)(4). The New York provision is identical. N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1(zz)(4).

The meaning of the term "socially maladjusted" is obscure, but it appears to have been a 1970s-era euphemism for "juvenile delinquent;" thus the meaning of the (ii) provision was a way to spell out that not every juvenile delinquent is necessarily emotionally disturbed and eligible for services under IDEA. *See* Mark C. Weber, "The IDEA Eligibility Mess," 57 *Buff. L. Rev.* 83, 110-11 (2009) (collecting and analyzing sources).

A well-known Second Circuit case finding the definition satisfied is *Muller v. Committee on Special Education*, 145 F.3d 95, 28 IDELR 188 (2d Cir. 1998), in which the court ruled that the child had an inability to learn that was not explained solely by intellectual, sensory, or health factors, and that her academic performance improved when her emotional problems were addressed clinically. She had a pervasive mood of unhappiness or depression for a long time and to a marked degree, as well as inappropriate behavior or feelings under normal circumstances. In *Eschenasy v. New York City Department of Education*, 604 F. Supp. 2d 639, 52 IDELR 66 (S.D.N.Y. 2009), the student manifested behaviors suggesting that she was socially maladjusted, but her self-injurious behaviors qualified as inappropriate behavior under normal circumstances. There was also evidence that she had a pervasive mood of unhappiness or depression, and her behavior impeded her ability to learn. The fact that she was socially maladjusted did not matter when she met the criteria for emotional disturbance, and she should have been found eligible. In *New Paltz Central School District v. St.*

Pierre, 307 F. Supp. 2d 394, 40 IDELR 211 (N.D.N.Y. 2004) the court affirmed IHO and SRO rulings that a high-school student was eligible on basis of emotional disturbance when he had done well academically until his parents' divorce, but then his grades declined, and he began acting out and using drugs. The court found that he displayed several of the characteristics required by the regulation on emotional disturbance.

A recent out-of-jurisdiction decision is *A.A. v. District of Columbia*, No. 16-248, 70 IDELR 21 (D.D.C. Apr. 20, 2017), which involved a child with a troubled early childhood and who was diagnosed with ADHD, PTSD, and disinhibited social engagement disorder and who had made suicide attempts. The court said that the child met the criteria for emotional disturbance and that the impairment adversely affected her educational performance despite her good grades. On 20 school days, she was removed from first grade to a kindergarten class due to her behavior, and she displayed inappropriate behavior in connection with attachment disorder and extreme anxiety, and experienced hallucinations.

The most prominent case on emotional disturbance that finds a child ineligible is *Springer v. Fairfax County School Board*, 134 F.3d 69, 27 IDELR 367 (4th Cir. 1998). In *Springer*, a child who had done well previously developed behavior problems in eighth grade and engaged in criminal activity as well as school discipline infractions. He failed three courses in the school year due to absenteeism, failure to complete assignments, and failure to appear for exams. The court declared that the student was socially maladjusted, and described social maladjustment as a carve-out from the emotional disturbance definition. The court went on to say that the finding of social maladjustment did not end the inquiry, and determined that the student did not meet the criteria in the regulation defining emotional disturbance. Various other cases find children not eligible under the emotional disturbance classification, some of them noting the students were socially maladjusted but did not meet the criteria for emotional disturbance. *See, e.g.*, *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F. Supp. 2d 516, 56 IDELR 252 (E.D.N.Y. 2011) (discussing habitual marijuana use); *W.G. and M.G. ex rel. K.G. v. New York City Dep't of Educ.*, 801 F. Supp. 2d 142, 56 IDELR 260 (S.D.N.Y. 2011) (noting substance abuse and scant evidence of depression).

R.B. v. Napa Valley Unified School District, 496 F.3d 932, 48 IDELR 60 (9th Cir. 2007), considered a child who had been exposed to drugs in utero and was a victim of molestation at age two. She had a significant history of violent and inappropriate behavior, but at least for a time the misconduct yielded to a behavior management plan, and the child achieved good grades. The court found that despite various psychiatric diagnoses, the child did not meet the criteria in the emotional disturbance regulation, and specifically that the behavior did not adversely affect the student's educational performance. Hence she was not eligible under the IDEA. *See also* Letter to Coe, 32 IDELR 204 (OSEP 1999) ("[T]he definitions of conditions or categories that are used for purposes of establishing an individual's eligibility for mental health services, as found in the DSM-IV, are not synonymous with criteria used for determining whether a child is a 'child with a disability' for purposes of establishing eligibility for services under the regulations to IDEA '97.").

Specific Learning Disability

A recent case from the courts of appeals discussing an impairment within the category of specific learning disability is *Doe v. Cape Elizabeth School District*, 832 F.3d 69, 68 IDELR 61 (1st Cir.2016). The court vacated a district court decision that had found the student not eligible for special education on basis of overall academic achievement and above-average reading test results, but without regard to the reading fluency deficit identified in some of the testing. Reading is a combination of rate and accuracy of decoding. The court said that grades and standardized test results are relevant to a student's need for special education but it concluded that the eligibility inquiry for a student alleged to have a reading fluency deficit had to draw on measures directly relevant to reading fluency. Thus the adequacy of achievement had to be in the area of reading fluency, not the student's academic record as whole. The court stated:

> [W]hen the risk is high that a child's overall academic performance could mask her learning disability because of innate or ancillary factors specific to that child, and the regulations included that disability category to mitigate such masking, . . . generalized academic measures—even when proven to be a fair indicator of the child's learning disability—must have high probative value to outweigh specific disability measures in identifying an SLD.

Id. at 81 (citation omitted). The court remanded for consideration of all the factors relevant to the condition and its effect on the student's academic performance and need for special education.

Adverse Effect on Educational Performance

Most of definitions of the disability conditions that are found in the federal regulations, including that for emotional disturbance, require an adverse effect on educational performance. See 34 C.F.R. § 300.5. Some others, such as that for specific learning disability, may imply the term. One fairly recent New York case found a child not eligible under IDEA on the ground that the child's disabling conditions did not adversely affect her educational performance. *Maus v. Wappingers Central School District*, 688 F. Supp. 2d 282, 54 IDELR 10 (S.D.N.Y. 2010), found that a child with an intellectual capacity in 91st percentile and with strong academic skills but also with diagnoses of a high functioning autism disorder, anxiety disorder, and some cognitive deficits was not eligible under IDEA. The court noted that "the federal and New York implementing regulations do not define 'adverse effect on educational performance,'" *id*. at 296, but said that "proof of an adverse impact on academic performance is a prerequisite for eligibility for special education services under IDEA and New York's implementing regulations," *id*. at 297. The court relied on cases such as *A.J. v. Board of Education*, 679 F. Supp. 2d 299, 53 IDELR 327 (E.D.N.Y. 2010), which found a child with Asperger Syndrome and other conditions not eligible because of lack of an adverse effect on academic progress.

A decision from the Second Circuit, *J.D. v. Pawlet School District*, 224 F.3d 60, 33 IDELR 34 (2d Cir. 2000), affirmed a determination that a child who had an emotional condition was not eligible for special education because under Vermont law, which the court found to be applicable, an adverse effect is defined as performance significantly below age or grade norms in one or more basic skill areas, such as oral expression, listening comprehension, written expression, basic reading skills, mathematics calculation, and the like. The child, who performed well academically despite his condition, was found ineligible. The Seventh Circuit said in a Wisconsin case that it would express no opinion on the correct definition of adversely affects educational performance but nevertheless ruled that a child's ADHD and joint disease did not affect it when the child did well in his classes with the resources provided him and at most needed adaptations in gym. Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 54 IDELR 307 (7th Cir. 2010); *see also E.M. v. Pajaro Valley Unified Sch. Dist.*, 758 F.3d 1162, 1177, 63 IDELR 211 (9th Cir. 2014) ("Because Plaintiffs have failed to show that PVUSD unreasonably failed to diagnose limited alertness, we need not consider whether there was evidence that E.M. met the other criteria for eligibility under the OHI category. Nonetheless, we note that our review of the record reveals nothing to suggest that E.M. suffered from chronic or acute health problems. Furthermore, even assuming that E.M. had limited alertness, there is scant evidence that this, rather than other causes, such as his failure to complete his homework, adversely affected his educational performance.").

In a contrast to the courts in those cases, the court in *Corchado v. Board of Education, Rochester City School District*, 86 F. Supp. 2d 168, 32 IDELR 116 (W.D.N.Y. 2000), determined that a 10-year-old child with a seizure disorder, ADHD, and speech difficulties, but who had superior intellectual functioning and an educational performance in the average range, should have been found eligible. The court noted that there was unrebutted evidence about the child's seizures and said, "The district did not present any evidence, either in the form of an expert's report or direct testimony from a medical professional, that [the child's] seizures would not adversely affect his ability to concentrate, focus and learn." *Id.* at 174. The court also found the standards satisfied with regard to the speech difficulties, again despite grade level academic performance. The court stressed that the requisite adverse effect is to be considered in relation to the specific child, stating, "The fact that a child, despite a disability, receives some educational benefit from regular classroom instruction should not disqualify the child from eligibility for special education benefits if the disabilities are demonstrated to "adversely affect *the child's* educational performance." 34 C.F.R. 300.7 (emphasis added)." *Id.* at 176.

A well-known case distinguishing *J.D. v. Pawlet* as based on the specifics of the Vermont regulation not found in other states is *Mr. I. v. Maine School Administrative District.*, 480 F.3d 1, 47 IDELR 121 (1st Cir. 2007). The court affirmed a decision that the school district improperly found a student with Asperger Syndrome and depressive disorder not eligible on the ground of the lack of an adverse effect on educational performance. The court pointed out that neither federal nor Maine law required the adverse effect to be significant, and further noted that Maine's definition of education included things such as communication and career preparation, which the student's

conditions adversely affected. *See also A.A. v. District of Columbia*, No. 16-248, 70 IDELR 21 (D.D.C. Apr. 20, 2017) (reversing finding that child was not eligible; noting that student received good grades but that anxiety and inability to regulate her emotions resulted in many removals from school, causing child to fall behind in classroom instruction, adversely affecting her educational performance).

Need for Special Education

The second half of the IDEA definition of a child with a disability is that the child needs special education. In a variety of cases, courts have ruled that a child is eligible under IDEA, affirming that by reason of the child's disabling condition, the child needs special education and related services. Two recent cases are *M.M. v. New York City Department of Education*, 26 F. Supp. 3d 249, 63 IDELR 156 (S.D.N.Y. 2014), and *A.W. v. Board of Education of the Wallkill Central School District*, No. 1:14–CV–1583, 2016 WL 4742297, 68 IDELR 164 (N.D.N.Y. Sept. 12, 2016), *appeal withdrawn*, No. 16-3464 (2d Cir. Nov. 23, 2016). In *M.M.*, the SRO ruled that the child was not eligible under the IDEA, stressing that she consistently received good grades, even when her anxiety and depression surged. The court reversed. It said that students with good grades in general education may still be disabled for purposes of IDEA. It found significant the fact that the student was frequently absent from school, requiring home instruction. The court declared that "Few things could be more indicative of an emotional problem that "adversely affected" a student's education than one that prevented her from attending school." 26 F. Supp. 3d at 256. The court also stressed the student's inability to carry a full course load and a decline in grades before she began at a therapeutic school.

A.W. involved a child diagnosed with dyslexia and ADHD. The court ruled that the school district improperly deemed the child ineligible for special education during the 2011-12 school year, though it later found him to be eligible. The district defended its earlier determination of ineligibility by stressing that the child tested in average range on various standardized tests. The court noted that the district had significant information about the functional impairments of the child, and his difficulties in preparation, focus, and attention, but did not consider the effects of his disabilities on his academics.

Yankton School District v. Schramm, 93 F.3d 1369, 24 IDELR 704 (8th Cir. 1996), is a prominent case from outside New York in which the court relied on the need for special education services in ruling that a child continued to be eligible under the IDEA. The child had an orthopedic impairment, but the district said it did not adversely affect her educational performance and did not cause her to need special education once she had already satisfied her physical education requirement. As the court noted, however, she continued to have slowness and fatigue when writing and lack of dexterity in her right hand, and she was still in need of transition services that IDEA provides, even if some of the services and accommodations she needed were also required under Section 504. *See also L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 117 LRP 6572 (9th Cir. 2017) (discussed below); Memorandum to State Directors. of Special Educ., 65 IDELR 181 (OSEP 2015) (noting that high cognition does not bar eligibility and districts

may not use cut-off scores as sole basis for determining eligibility of students with high cognition who may qualify on the basis of learning disabilities).

A number of cases rule that children are not eligible for special education because, although they have disabling conditions within the IDEA definitions, they do not, by reason thereof, need special education. A well-known case, *Alvin Independent School District v. A.D.*, 503 F.3d 378, 48 IDELR 240 (5th Cir. 2007), concerned a child with ADHD who was terminated from special education after third grade and did well during elementary school, but exhibited behavior problems in middle school. He eventually became involved in theft of property and a robbery, though he had satisfactory grades and passed a state achievement test. The court found that the student's academic success and social acceptance meant he did not need special education. *See also Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 47 IDELR 213 (9th Cir. 2007) (finding insufficient support for conclusion that child needed special education when accommodations were provided under Section 504 plan); *D.L. v. Clear Creek Indep. Sch. Dist.*, No. H-15-1373, 2016 WL 4704919, 116 LRP 38829 (S.D. Tex. Aug. 16, 2016) (magistrate judge report and recommendation) (holding that need for special education was not shown), *adopted sub nom. Devon L. v. Clear Creek Indep. Sch. Dist.*, 2016 WL 4702446, 68 IDELR 166 (S.D. Tex. Sept. 7, 2016), *aff'd sub nom. D.L. v. Clear Creek Indep. Sch. Dist.*, 695 F. App'x 733, 70 IDELR 32 (5th Cir. June 2, 2017) (deferring to district on issue of student's need for special education and stating that district did not rely exclusively on student's academic performance), *petition for cert. filed*, No. 17-760 (U.S. Nov. 24, 2017); *M.P. v. Aransas Pass Indep. Sch. Dist.*, No. 2:15-CV-23, 2016 WL 632032, 67 IDELR 58 (S.D. Tex. Feb. 17, 2016) (holding that child with mood disorder and other conditions was not eligible under IDEA, reasoning that evidence did not provide sufficient connection between child's disability and need for special education services, despite student's behavior difficulties leading to alternative education placement and despite academic decline).

The Meaning of Special Education

Whether a child needs special education may hinge on what is meant by special education. In *L.J. v. Pittsburg Unified School District*, 850 F.3d 996, 117 LRP 6572 (9th Cir. 2017) (2017), a child with diagnoses of bipolar disorder, oppositional defiant disorder, and ADHD displayed suicidal behavior. The parties agree that the child met the IDEA's standards for specific learning disability, other-health impairment, and serious emotional disturbance, but the district maintained that the child did not need special education because he was performing academically at an average or above average level. The court held that the child should have been found eligible for special education because he was in need of special education, stressing that his successful academic performance occurred when he was provided services, including specially designed mental health services, assistance from a one-on-one aide, and the school district behavior specialist's clinical interventions, and those are not services offered to general education students. Even though these services were furnished in the general education classroom, they were effectively special education, so the district could not maintain that he had no need for special education and could succeed academically

without it. *See generally* cases discussed below under "Relation of Eligibility Under Section 504 to IDEA Eligibility."

The "Preschool, Elementary School, or Secondary School Education" Provision

The IDEA defines free, appropriate public education to include appropriate "preschool, elementary school, or secondary school education." Some controversies have arisen over whether a student has completed secondary education such that the student is no longer IDEA eligible. In *T.M. v. Kingston City School District*, 891 F. Supp. 2d 289, 59 IDELR 254 (N.D.N.Y. 2012), the court ruled that when a child with pervasive developmental disability who was classified as having autism had completed the state requirements for a Regents diploma, he was no longer entitled to free, appropriate public education under the IDEA, even though he was never formally awarded a diploma from his school district. The court relied on New York law dictating who is eligible to attend public school and setting out the significance of earning a Regents diploma.

Relation of Eligibility Under Section 504 to IDEA Eligibility

Federal regulations provide that all children who are eligible under the IDEA qualify as individuals with disabilities under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. 34 C.F.R. § 300.104.3(*l*). This, of course, does not mean that every child who is covered under Section 504 is necessarily eligible under the IDEA. Many of the cases discussed above concern children who were receiving accommodations under Section 504 plans and whether they additionally qualified for services under the IDEA. As indicated in *L.J. v. Pittsburg Unified School District*, 850 F.3d 996, 117 LRP 6572 (9th Cir. 2017), accommodations not designated as IDEA services may nevertheless amount to special education with regard to whether a child is in need of special education and thus meets that section of the IDEA eligibility definition. In other instances, results under accommodations provided pursuant to Section 504 have contributed to courts' conclusions that children did not meet IDEA eligibility standards either by reason of not needing special education or otherwise. *See, e.g., Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 47 IDELR 213 (9th Cir. 2007) (noting lack of need for special education when child was receiving accommodations under Section 504 plan); *R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp. 3d 262, 67 IDELR 214 (S.D.N.Y. 2016) (in case of child with Tourette's Syndrome and other conditions, holding that school district did not violate child find requirement when it did not refer child who was receiving accommodations under Section 504 plan and performing academically at average levels). *But see, e.g., Mr. I. v. Maine Sch. Admin. Dist.*, 480 F.3d 1, 47 IDELR 121 (1st Cir. 2007) (discussed above; finding child eligible when she was receiving accommodations under Section 504).

Statutes of Limitations Issues

The leading case interpreting the IDEA statute of limitations for due process hearing requests is *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601, 66 IDELR 91 (3d Cir. Sept. 22, 2015), which holds that 20 U.S.C. § 1415(b)(6)(B) and §

1415(f)(3)(C) establish a two-year limitations period from the date the parent knew or should have known of the IDEA violation for filing a due process complaint, but the provisions do not limit the period that may be considered in fashioning a compensatory remedy for all claims that are timely filed. As the court stated, "[O]nce a violation is reasonably discovered by the parent, any claim for that violation, however far back it dates, must be filed within two years of the 'knew or should have known' date. If it is not, all but the most recent two years before the filing of the complaint will be time-barred; but if it is timely filed, then, upon a finding of liability, the entire period of the violation should be remedied. In other words, § 1415(f)(3)(C), like its synopsis in § 1415(b)(6)(B), reflects a traditional statute of limitations." *Id*. at 620-21,

In a case applying *G.L.*, a court held that an IDEA claim accrued when a mother was apprised of a district's evaluations at an IEP meeting and the evaluations demonstrated that the student had fallen far below peers and had a serious disparity between cognitive abilities and achievement. *Damarcus S. v. District of Columbia*, 190 F. Supp. 3d 35 (D.D.C. May 23, 2016). The court said the rule was that the action accrued when the "alleged violations should have been immediately apparent even to a layperson like Damarcus's mother" (emphasis in original). *Id*. at 47.

Even before *G.L.*, courts ruled that a failure to evaluate a child may enable a child's parents to assert claims from much earlier. See, e.g. *K.H. v. New York City Dep't of Educ.*, No. 12–CV–1680, 2014 WL 3866430, 63 IDELR 295 (E.D.N.Y. Aug. 6, 2014) (permitting claims for conduct going back to 1990s when child did not obtain an evaluation until 2010 and filed the due process complaint promptly after receiving the evaluation, stating: "I conclude that this claim did not accrue until 2010, when plaintiff obtained the evaluation from Dr. Newman that diagnosed him with specific learning disabilities. Until that point, plaintiff could not have been aware of his claim challenging the adequacy of the DOE's prior evaluations. Nor could plaintiff have been aware of his related claim that the DOE, acting on inadequate evaluations, placed him in settings that were inappropriate for his particular needs, including classes for emotionally disturbed and intellectually disabled children. This claim covers all of plaintiff's years in the DOE schools and goes to the heart of whether the DOE provided him a free appropriate public education during those years. Since this claim did not accrue until 2010, it falls within the IDEA's statute of limitations and precludes dismissal of plaintiff's claims regarding any of the school years from 1994–95 onward."); *see also Somoza v. New York City Dep't of Educ.*, 538 F.3d 106, 50 IDELR 182 (2d Cir. 2008) (finding that accrual did not occur until the child underwent rapid progress after services voluntarily provided by district were furnished). *But see D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 59 IDELR 271 (3d Cir. 2012) (applying limitations defense to claims for actions by school district more than two years before due process complaint filed, relying on absence of misrepresentation or other factors specified in IDEA), *limited* by *G.L.* 802 F.3d at 611.

Additional Reference: Mark C. Weber, "Eligibility for Special Education," *Special Education Law and Litigation Treatise* ch. 2 (LRP Pubs. 4th ed. 2017).

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