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Eligibility Determinations: Why is this so Difficult?!

MO-CASE Fall Conference
September 2017
Heidi Atkins Lieberman

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Sub-topics for session today

I. Eligibility's Two-Part Test/Three-Part Test

- Adverse Educational Impact
- Use of Professional Judgment
- Exclusionary Criteria
- Special education services v related services

II. Specific Categories embedded

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Two part/Three Part

Three (for most IDEA disabilities) things must be true for a student to be eligible for services under the IDEA:

- Meets criteria for one of IDEA's disabilities;
- The disability adversely affects the student's educational performance (but not specifically for LD, deaf/blindness, and multiple disabilities); and
- Because of the disability, the student needs special education.

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IDEA Eligibility Categories

The Individuals with Disabilities Education Act defines "child with a disability" as children with one of the listed categories of disabilities (SLD, CD, Autism, TBI, etc.):

"who, by reason thereof, needs special education and related services."

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Eligibility determination is tied to the Referral and Evaluation!

Why did you decide to do a special education evaluation?

The same information that led you to suspect a disability will be relevant to determining whether the student meets the definition for the disability category and if there is an adverse impact on educational performance.

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Eligibility Evaluation

Review of Existing Data
Additional Testing/Assessment as needed
Eligibility Staffing/Evaluation Team meeting

7

Eligibility

“child with a disability”:

- Properly evaluated.
- Has an IDEA disability.
- Because of the disability, requires special education and related services.

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Proper Evaluation?

- Information/data from a variety of sources must be considered by the evaluation team.
- Academic Progress is not the only factor to be considered by the team.

9

Applying Criteria after Evaluation Completed

- Members of the eligibility team need to know what the criteria are.
- Read the criteria.
- Explain the criteria.
- Use the criteria.

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Eligibility Criteria

Evaluation team must consciously consider the eligibility criteria (of state regulations) for the category before concluding the student meets the criteria.

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Criteria language

Example:

TBI definition indicates it does NOT apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

TBI definition requires that it be caused by an **EXTERNAL** physical force.

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Criteria

- Consider any exclusions. Some are part of the criteria.
- Consider all factors that may explain a student's achievement or behavior, e.g.,
 - More than 22 point difference between cognitive score and achievement score, but student has missed a significant amount of school.
 - Student with full scale cognitive score of 75 who is "inattentive" and has difficulty staying on task.

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Criteria

- **"Consideration of the overall purpose of the IDEA is also helpful to understanding the eligibility regulations.** The purpose of the IDEA is to ensure that the school program provides services sufficient to enable that child to derive some benefit from the educational program. *Rowley*, 458 U.S. at 199-200. A school may ensure that a student benefits from the educational program by modifying the regular classroom setting such as by providing differentiated instruction." (emphasis added)
Ashli v. State of Hawaii (D. Hawaii 2005).

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IDEA Criteria for Eligibility

Federal regulations implementing IDEA contains a definition of "child with a disability" and

- Each category of disability is listed and defined
- Each definition includes "adversely affects a child's educational performance" with a couple of exceptions.

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Autism Category

"Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, **that adversely affects a child's educational performance.**"

34 CFR 300.8 (c)(1)(i)

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Traumatic Brain Injury Example

"an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, **that adversely affects a child's educational performance.....**"

34 CFR 300.8 (c)(1)(i)

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Adverse Educational Impact

- No definition of "adversely affecting" or "adverse educational impact" within the IDEA Regulations – federal, or in Missouri's state regulations.
- U.S. Department of Education, Office of Special Education Programs (OSEP) declined to define.

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Lauren G. v West Chester Area School District

- U.S. District Court (PA) 2012
- Student should have been found eligible
- Student should have been referred under Child Find much sooner
- Several psychiatric diagnoses
- Multiple inpatient and outpatient hospitalizations

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A.J. v Board of Ed. Of East Islip Union Free School District

- U.S. District Court (NY) 2010
- Student with Asperger's Syndrome
- Performed well in school
- Ineligible

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Ashli C. v State of Hawaii

- U.S. District Court, Hawaii (2007)
- Minimal adverse effect
- Ineligible
- Ordinary meaning of "adverse" was key to court's analysis

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"adversely affects"

- "To determine the phrase's ordinary meaning, the Court looks to the dictionary definition of 'adverse'. . . . Merriam Webster's Collegiate Dictionary defined "adverse" as: 1) acting against or in a contrary direction; 2) opposed to one's interests or causing harm; or 3) opposite in position. In this context, 'causing harm' or harmful is the most applicable ordinary meaning of 'adverse'. Where a student such as Sidney is able to learn and function at an average level in the regular classroom and experiences only a slight impact on his educational performance, it cannot be said that the student is harmed." *Ashli v. State of Hawaii* (D. Hawaii 2005).

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Mr. I. v Maine School Administrative District No. 55

- 1st Circuit Court of Appeals (2007)
- State attempted to define "educational performance"
- Educational performance can't be limited to only those areas being measured and assessed by the school district
- Adversely doesn't mean "significant" impact

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"adversely affects"

Court:

"I interpret the phrase as reflecting Congress's and Maine's intent that any adverse effect on educational performance, however slight, meets this prong of the definition." *Mr. I v. Maine School Administrative Dist. 55*, 416 F. Supp. 2d 147 (D. Me. 2006).

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“adversely affects”

- “States wishing to put meat on the bones of the ‘adversely affects’ standard are free to do so-provided, of course, they do not transgress the ‘floor’ of substantive protection set by the IDEA. On its own, however, the federal regulation does not contain the ‘significant impact’ requirement the district desires, and we cannot put it there. The district court correctly ruled that any negative impact, regardless of degree, qualifies as an ‘adverse effect’ under the relevant federal and state regulations.” *Mr. I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007).

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“adversely affects”

- Indiana statute: “Adversely affects educational performance” means that a student's disability has a consistent and significant negative impact on: ...”

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“adversely affects a child’s educational performance”

- Key questions:
 - To what extent?
 - For how long?
 - What is “educational performance”?

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“educational performance”

- Missouri has no definition.

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“educational performance”

- “Maine has chosen to define ‘educational performance’ broadly. Under Maine’s regulations, even the term ‘academic area’ includes communication skills, *i.e.*, skills that may be implicated by Asperger’s Syndrome. But in addition to academic areas, Maine explicitly includes ‘non-academic areas (daily life activities, mobility, etc.), extracurricular activities, [and] progress in meeting goals established for the general curriculum.’” *Mr. I v. Maine School Administrative Dist. 55*, 416 F.Supp. 2d 147 (D. Me. 2006).

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“educational performance” - Maine

- **Educational Performance.** Educational performance means performance in those academic and functional areas (as defined in Section II(15) Functional Performance) including, but not limited to, those areas that are being assessed through the local SAU’s own curriculum.
- **Functional Performance.** Functional performance means how the child demonstrates his/her skills and behaviors in cognition, communication, motor, adaptive, social/emotional and sensory areas.

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“educational performance”

- “The import of these cases is that a child’s ‘difficulties with [his or her] disorder,’ which presumably include emotional and behavioral troubles, are not the proper measure of ‘educational performance.’ Rather, ‘educational performance’ **must be assessed by reference to academic performance which appears to be the principal, if not only, guiding factor.** See *N.C. ex rel. M.C.*, (finding that even if student displayed characteristics of an emotionally disturbed child, his educational performance was not adversely affected where he did not fail any classes at school and his grade point average dropped only nine points); *C.B. ex rel. Z.G.*, 322 (finding that despite students’ difficulties with bipolar disorder and ADHD, his educational performance was not adversely affected where child performed well academically).” *A.J. v. Bd. of Educ., East Islip Union Free Sch. Dist.*, 679 F. Supp. 2d 299 (E.D.N.Y. 2010). (emphasis added)

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“adversely affects a child’s educational performance”

- The “IDEA is not a panacea for all of life’s ills.” *Maricus W. v. Lanett City Bd. of Educ.*, 141 F. Supp. 2d 1064 (M.D. Ala. 2001).

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“educational performance”

- Not defined by statute, federal regulation, or Missouri regulation.
- In the absence of state definition, courts often do not attempt to define it.

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“educational performance”

- “The phrase ‘adversely affects a child’s educational performance’ is not defined in either the Federal or Wisconsin Regulations. And we express no opinion on how that term should be defined. Our review is limited to whether the ALJ applied the correct legal standard in rejecting the team’s finding.” *Marshall Joint School Dist. No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632, 637 - 638 (7th Cir. 2010).

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“educational performance” - Indiana

- (1) the student’s:
 - (A) academic achievement; or
 - (B) functional performance; or
- (2) both the student’s academic achievement and functional performance.
- Sec. 42. “Functional performance” means a measure of skills, behaviors, and knowledge necessary to achieve self-sufficiency in areas that support those defined by academic achievement.
- Cont.

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“educational performance” - Indiana

- This may include the following:
- (1) Physical skills, such as sensory responses, fine and gross motor skills.
 - (2) Personal care skills, such as the following:
 - (A) Eating.
 - (B) Dressing.
 - (C) Maintaining hygiene.
 - (3) Social emotional adjustment, such as the following: - 10 -
 - (A) Interpersonal skills.
 - (B) Intrapersonal regulation.
 - (C) Habits of learning.

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Cont'd

- (4) Independent living skills, such as the following:
 - (A) Maintaining a household.
 - (B) Managing health needs.
 - (C) Using tools.
 - (D) Shopping.
 - (E) Budgeting.
 - (F) Practicing safety.
 - (G) Accessing transportation.
 - (H) Recreation.
 - (I) Accessing community resources.
 - (J) Employment.

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“adversely affects”

- Idaho rule: “An adverse effect is a harmful or unfavorable influence.”

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“adversely affects”

- “Precedent directs the Court to apply the Rowley educational benefit standard in special education eligibility cases.”
- “Indeed, a finding that any weakness in any academic or nonacademic area constitutes an adverse effect on educational performance would turn the IDEA’s floor into a ceiling over the heads of all but the most gifted children.”
- *D.A. v. Meridian Joint School District No. 2*, 2014 WL 43639 (D. Idaho 2014).

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“adversely affects”

If the FAPE obligation does not require maximization of a student’s capabilities, does it make sense to say there is an adverse effect on educational performance if a student is achieving slightly below capabilities because of a disability?

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“educational performance” - Arkansas

- Adverse affect on educational performance means the effect on the child that an impairment identified in 34 CFR 300. 8(c)(1) – (13) and §6.08 of these regulations must have in order to establish eligibility for special education and related services under Part B of the IDEA. In the consideration of the effect of the child’s disability on his or her overall educational performance, **criteria must include not only curriculum/ developmental areas, but also affective, behavioral, and physical characteristics or professional judgment of a multidisciplinary team.**

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“educational performance”

- “The Court agrees with the DOE that whether a student’s disability ‘adversely affects’ his ‘educational performance’ refers to the student’s ability to perform in a regular classroom designed for non-handicapped students. If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services.” *Ashli v. State of Hawaii* (D. Hawaii 2005).

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“educational performance”

- IEP content:
“a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum (i.e., the same curriculum as for nondisabled children)”

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“educational performance”

- “The question is whether Z.G.'s experience of those conditions adversely impacted her educational performance. Z.G.'s grades and test results demonstrate that she continuously performed well both in public school before she was diagnosed, and at the Dalton school thereafter. The DOE's psychoeducational assessment and a psychological evaluation requested by plaintiff concur in finding that Z.G. tested above grade-level and do not opine that Z.G.'s educational performance has suffered. While Z.G.'s treating psychiatrist and teacher at Dalton testified to their observations of Z.G.'s difficulties with bipolar disorder and ADHD, there was a continuity of Z.G.'s successful performance both before and after her conditions were diagnosed. The evidence on record is insufficient to show that Z.G. has suffered an adverse impact on her educational performance.” *C.B. v. Dep't of Educ. of City of New York*, 2009 WL 928093, 2 (2nd Cir. 2009).

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“educational performance”

Autism:
“(1) Disturbances of speech, language-cognitive, and nonverbal communication: The child displays abnormalities that extend beyond speech to many aspects of the communication process. Communicative language may be absent or, if present, language may lack communicative intent. Characteristics may involve both deviance and delay. There is a deficit in the capacity to use language for social communication, both receptively and expressively.

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- (2) Disturbance of the capacity to relate appropriately to people, events, or objects: The child displays abnormalities in relating to people, objects, and events. There is a deficit in the capacity to form relationships with people. The capacity to use objects in an age appropriate or functional manner may be absent, arrested, or delayed. The child may seek consistency in environmental events to the point of exhibiting rigidity in routines.”

Note that adverse effect on educational performance is an additional requirement.

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“educational performance”

Emotional Disturbance:
“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; and,
E. a tendency to develop physical symptoms or fears associated with personal or social problems.”

Note that adverse effect on educational performance is an additional requirement.

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- “This is an incorrect formulation of the test. It is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does*.” *Marshall Joint School Dist. No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632, 637 -638 (7th Cir. 2010).

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“educational performance”

- “Where . . . the record indicates that a student’s behavioral problems, if unattended, might significantly curtail his ability to learn, the fact that he is learning is significant evidence that his behavioral problems have, at least in part, been attended to.” *CIN v. Minneapolis Pub. Sch.*, 323 F.3d 630 (8th Cir. 2003).

Question: The court found that FAPE was provided. Does the opinion suggest that educational performance is, fundamentally, about learning/academics?

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“educational performance”

- Honor roll student, no behavioral issues, but socially inept (no friends, ...).
- Is there impact on “educational performance”?

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“adversely affects”

- Student has a medical diagnosis of depression and meets emotional disturbance criteria based on inappropriate behaviors under normal circumstances.
- Grades are mixed As and Bs, when previously they were all As.
- Is there an adverse effect on educational performance?

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Professional Judgment

Historically used to identify a child as eligible for special education without the necessary evaluation results (e.g. the child does not meet the eligibility criteria identified under the category of disability.)

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Professional Judgment

In other words:

Evaluation teams over-rode the existing data and any new assessment information obtained usually with the intention that it be “in the best interests of the child.”

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Professional Judgment

In the best interest of the child? Or discriminatory?

- Are you basing the decision on some stereotypes or ingrained prejudices?
- Making assumptions you shouldn’t be making?

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Professional Judgment

Are you using this as a short-cut?
Do you really have all the evaluation information you need?
Is there incomplete data?
Was the evaluation thorough enough?

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Professional Judgment

- No definition of term in Missouri.
- No definition of term in IDEA.
- No definition of term in federal or state regulations implementing IDEA.
- State decision whether to allow for use of professional judgment.

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Professional Judgment in Missouri

- Missouri, through DESE, has made changes over the years to the use of Professional Judgment;
- Currently, this use is limited in eligibility determinations under the categories of: SLD, Language Disorder, Sound System Disorder, TBI, and YCDD.

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Professional Judgment

Eligibility for SLD in Missouri permitted if child does not meet severe discrepancy if “based on “professional judgment and review of formal and informal assessments the evaluation team concludes that a severe discrepancy exists.”

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“In such cases, sufficient data must be presented in the evaluation report to document the existence of a specific learning disability.”

DATA VERSES GUT FEELING!

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Proper Use of Professional Judgment

- Team using its professional expertise and experience to review an array of data/information from a variety of sources;
- “It is based on the professionals’ explicit training, direct experience with those with whom the professionals are working, and specific knowledge of the person and the person’s environment.” (New Mexico State Educational Department Technical Assistance)

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Iowa State's Definition

“Professional Judgment: the reasoned application of clear guidelines to the specific data and circumstances related to each unique individual. Professional judgment adheres to high standards based on research and informed practice that are established by professional organizations or agencies. (Adapted from Katz, 1994).”

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Washington State

“.....Professional Judgment refers to the situation where the evaluation group, attempting to establish the existence of a Specific Learning Disability (SLD), is faced with the situation where the criterion score of the LD regression table **is not congruent with other data collected by the team.**”

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Washington, cont'd

Eligibility determinations in Washington based on professional judgment must:

- “Include a **description of all data used** to make the determination through the use of Professional Judgment.
- Teams will be faced with using their best Professional Judgment to reconcile the data, and for that reason we have underscored the need for the evaluation team to provide a narrative describing the evidence to support the use of Professional Judgment in LD identification.”

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Missouri

“Even if the numbers may not be present to support eligibility, each of the criteria for eligibility must be addressed with other types of data such as curriculum-based data and data from observations over time (could be either subjective or objective; subjective data needs to be supported by a second source).”

RPDC consultant

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IDEA Philosophically opposed to use of Professional Judgment?

- SLD eligibility the only category treated so specifically in IDEA implementing regulations;
- Purpose expressed in the overhaul: decreasing identification – or misidentification of students as LD;
- Added use of Response to Intervention.
- Is use of professional judgment consistent with that philosophy?

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Traumatic Brain Injury-MO

TBI criteria in Missouri requires diagnosis by licensed physician or neuropsychological assessment.

Provision for use of “Professional Judgment” – A child may also be deemed eligible if the child displays characteristics of TBI even though a medical diagnosis has not been made; in such cases, substantial data to document the medical basis for a head injury must be present in the evaluation/eligibility report.

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Exclusionary Criteria

- Lack of Instruction
- Limited English Proficiency (LEP)
- Social maladjustment

Lack of Instruction

“ A child must not be determined to be a child with a disability:

- (1) If the **determinant factor** for that determination is:
 - (i) Lack of appropriate instruction in reading.....
 - (ii) Lack of appropriate instruction in math.....and
 - (2) If the child does not otherwise meet the eligibility criteria.....” (emphasis added)
- 34 C.F.R. 300.306(a)

Lack of Instruction

Guidance from the U.S. Department of Education:

- Access to state content standards
- Instruction by qualified personnel

Lack of Instruction

Determining whether there has been appropriate instruction:
Data-driven decision

Lack of Instruction

Competing requirements of IDEA?
Delay of evaluation, delay of identification

Vs

Establishing deficits the result of lack of appropriate instruction

Lack of Instruction

OSEP:
Absence of data? Provide High quality instruction and collect data as part of referral process.
Sounds like Response to Intervention (RtI)?

Example: Homeschool?

Student transfers into district at an age that is consistent with ninth grade.
Homeschooled up to that point.
Parent requests a special education evaluation upon enrollment.
District conducts and finds the student eligible; under SLD category (math).

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Lack of Instruction: SLD

Regulations provide more guidance in the SLD eligibility area- team **MUST** consider:

- Data that demonstrates that prior to, or as a part of the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
- Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

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English Learner-formerly Limited English Proficiency (LEP)*

A child must not be determined to be a child with a disability:

(1) If the **determinant factor** for that determination is:

.....(iii) Limited English proficiency; and

(2) If the child does not otherwise meet the eligibility criteria....." (emphasis added) 34 C.F.R. 300(a)

*now "English Learner"

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LEP

How do you ensure whether the student's LEP is the determinant factor?

- Evaluation/tests/materials must be non-discriminatory – no racial or cultural bias
- Administered in native language of child or other mode of communication
- Evaluation must be done in a way most likely to yield accurate information
- Unless clearly not feasible (?)

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"Needs Special Education"

Does the student need special education, Section 504 accommodations, interventions available to all students, nothing?

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"Special Education" - 34 C.F.R. § 300.39

- (a) *General.* (1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—
 - (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
 - (ii) Instruction in physical education.

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“Special Education” - 34 C.F.R. § 300.39

- (3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
 - (i) To address the unique needs of the child that result from the child’s disability; and
 - (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

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In Missouri, a teacher who provides specialized instruction must have special education certification.

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71 Fed. Reg. 46577 (August 14, 2006)

- *Comment:* A few commenters provided definitions of “accommodations” and “modifications” and recommended including them in new § 300.39(b) (proposed § 300.38(b)).
- *Discussion:* **The terms “accommodations” and “modifications” are terms of art referring to adaptations of the educational environment, the presentation of educational material, the method of response, or the educational content. They are not, however, examples of different types of “education”** and therefore we do not believe it is appropriate to define these terms of art or to include them in new § 300.39(b). (emphasis added)

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Gordon C. v. State of Hawaii, Dept. of Educ., 47 IDELR 65 (D. Hawaii 2007)

“While the state regulation could be more specific, there is nothing in either the IDEA or in the state or federal implementing regulations to indicate that a student would qualify as a ‘student with a disability’ when the school voluntarily modifies the regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level. To the contrary, under the state regulations, the school may provide certain related services, even to a student who falls within one of the disability categories, without developing an individualized education program.”

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Gordon C. v. State of Hawaii, Dept. of Educ., 47 IDELR 65 (D. Hawaii 2007)

“The Hearings Officer further explained: ‘Differentiated instruction is a strategy used by the Third Grade Teacher to help students focus, perform and clue in better on the important parts of the lesson. Differentiated instruction is used because each student learns in a different way.’ Differentiated instruction is different from specially designed instruction as that term is defined in the Hawaii regulations.”

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D.A. v. Meridian Joint School District No. 2, 2014 WL 43639 (D. Idaho 2014)

Court found it was appropriate for hearing officer to highlight student’s overall success in the general curriculum because “when a disabled student ‘is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.’”

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D.A. v. Meridian Joint School District No. 2, 2014 WL 43639 (D. Idaho 2014)

- Student with “high-functioning autism.”
- Student received accommodations under Section 504. District found student not eligible under the IDEA.
- Court noted that 9th Circuit required it to apply *Rowley* FAPE standard (i.e., basic floor of opportunity; education program is reasonably calculated to provide some educational benefit) in eligibility cases.
- Court rejected parents’ claim that school and hearing officer focused selectively on academic successes.

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D.A. v. Meridian Joint School District No. 2, 2014 WL 43639 (D. Idaho 2014)

- Court noted that student passed courses with significant nonacademic components.
- Court found that student did not need special education. He passed, and sometimes excelled in, core subjects and met graduation requirements.

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Marshall Joint School Dist. No. 2 v. C.D., 616 F.3d 632 (7th Cir. 2010)

- Issue was whether student with significant physical impairments needed special education for p.e.
- Student previously had IEP and court noted his “huge gains” over previous years.
- Court agreed with school district that accommodations and modifications appropriately addressed student’s needs.

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Marshall Joint School Dist. No. 2 v. C.D., 616 F.3d 632 (7th Cir. 2010)

- Accommodations and modifications provided student access to the general curriculum and the opportunity to make gains and to progress like other students in skills and abilities that school aimed to teach in its curriculum.
- Even if it was true that the condition had adversely affected C.D.’s educational performance, that would not have ended the inquiry. If an IEP team determines that a child’s medical condition adversely affects his educational performance, the team must also determine whether that student requires special education. (paraphrasing judge)

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“Needs Special Education”

- Is there a need for specialized instruction to meet the student’s unique needs?
- Does it require instruction by a special education teacher?

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Emotional Disturbance

- Criteria for Emotional Disturbance
- Exclusionary criteria: social maladjustment

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Emotional Disturbance Criteria

Emotional Disturbance:

- “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; and,
E. a tendency to develop physical symptoms or fears associated with personal or social problems.”
- **Note that adverse effect on educational performance is an additional requirement.**

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ED criteria (cont'd)

“The term includes schizophrenia, but **does not apply to children who are socially maladjusted** unless it is determined they have an emotional disturbance.”

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Hansen v Republic R-III School District

- 8th Circuit Court of Appeals (2011)
- ADHD
- Difficulty focusing during tutoring
- Hyperactive, impulsive, inattentive behavior severely impaired his ability to learn
- Passed standardized test for promotion only after medicated for ADHD

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Eligibility Exclusions: Social Maladjustment

- IDEA eligibility specifically excludes “social maladjustment” from ED category (unless meets ED criteria)
- Lack of consensus on what a diagnosis of “social maladjustment” really means
- Historical context shows concern about “juvenile delinquents”

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Visual Impairment/Blindness

OSEP Letter to Kolter (2014)

Any condition that results in either blindness or partial sight AND that could affect a child’s educational performance may qualify the student to receive special education and related services (i.e. eligibility for IDEA).

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Visual Impairment

State’s criteria must not exclude children who would otherwise be IDEA eligible under the category of Visual Impairment.

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Visual Impairment

Letter to Kolter involved Washington D.C. D.C. criteria: exclude children with “convergence insufficiency” (where the eyes do not properly turn inward to focus), a condition that affects the ability to read and write.

OSEP: must consider how the impairment affects the child’s ability to read, write, do math, use computers, participate and progress in the general curriculum.

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Visual Impairment: MO

Diagnosis of visual impairment or progressive vision loss by optometrist or ophthalmologist; Visual acuity determined to be

- 1) For visual impairment of 20/70 to 20/200 in the better eye with best correction by glasses;
- 2) For blindness 20/200 or less in better eye after best correction by glasses or visual field measuring 20 degrees or less

AND IMPAIRMENT ADVERSELY AFFECTS CHILD’S EDUCATIONAL PERFORMANCE.

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Special education vs related services

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“Child With A Disability”

- If a child has an IDEA disability, “but only needs a related service and not special education, the child is not a child with a disability under this part.” 34 C.F.R. § 300.8(a)(2)(i).
- Similarly, a child is not a child with a disability under the IDEA if the student requires only accommodations and modifications.

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Exception: related services as basis for eligibility

If the related service is considered “special education” under state standards, the child is eligible.

- Speech?
- Students who are “profoundly” disabled?

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Disclaimer

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