

Differentiating Perspective from Parent and School Board Attorneys

Sarah Koren, Esq.

ESE Attorney

Orange County Public Schools

Laura Pincus, Esq.

Deputy General Counsel

Palm Beach County Public Schools

and

Ann Siegel, Esq.

Director of Advocacy, Education & Outreach

Disability Rights Florida

Framing the Issues

Is RtI infringing upon child find responsibilities?

How are new parental rights within LRE mandates working?

Are access points curriculum being implemented as intended?

Are School Districts complying with ESY mandates?

Response to Intervention and Eligibility

What the Law Says

- State Board of Education Rule 6A-6.0311
 - Students suspected of having a disability must be subjected to “general education intervention procedures.” But not required where a team determines not appropriate for a student with a “speech disorder or severe cognitive, physical or sensory disorders, or severe social/behavioral deficits that require immediate intervention to prevent harm to the student or others.”
- State Board of Education Rule 6A-6.0331
 - “Nothing in this section should be construed to either limit or create a right to FAPE ... or to delay appropriate evaluation of a student suspected of having a disability.”

What the Law Says

- EBD: State Board of Education Rule 6A-6.03016
 - Persistent
 - “not sufficiently responsive to implemented evidence based interventions”
 - Consistent
 - Emotional or behavioral responses
 - Adversely affects performance in the educational environment
 - Cannot be attributed to age, culture, gender or ethnicity
 - Must conduct or review/revise an FBA as part of the general education intervention
 - Must have BIP
 - Evaluation must contain student’s response to general education interventions implemented to target the function of the behavior identified in the FBA

Parent Attorney Perspective

- A parent has a right to request evaluations.
- A student does not have to “fail first” to be considered for an evaluation.
- States and LEAS have an obligation to ensure that the evaluation of children suspected of having a disability are not delayed or denied because of the implementation of an RtI strategy. (OSEP Memo June 21,2011)
- Interventions should be tailored to the student’s unique needs, not a one size fits all program.
- Students should not be left in RtI indefinitely, if it is not working move on.
- Parent and school should collaborate.

School Attorney Perspective

- Conundrum: What happens when the student has ineffective teachers?
 - Who serves as the “intervention police/gatekeeper?”
 - What is remedy to student?
 - Delay eligibility for the opportunity to properly implement interventions?
 - Concede eligibility for a student who may have made gains with well delivered interventions (Eligibility by Duress)
- Once eligible, what is the magic “ESE” pill that will work when other interventions haven’t?
 - Is it a more restrictive environment and if so, why?

What We Can Agree Upon

- Not acceptable to delay an evaluation if requested by parent and/or recommended by team members
- Decisions need to be children-focused and individualized
- Data needs to be taken with fidelity.
- Measuring and analyzing students' RtI data to inform and improve instruction/interventions is always a necessity for highest student outcomes.
 - Especially true when a student is identified as having a disability.
 - This practice should continue through graduation for any student who demonstrated academic or behavioral needs beyond core instruction.

Least Restrictive Environment

What the Law Says

- “To the maximum extent appropriate, children with disabilities, including children with disabilities... are educating with children who are not disabled....”
- “Special classes, separate schooling, or other removal of children with disabilities from the regular classroom environment occurs only when the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

20 U.S.C §1412(5)(B) and 34 CFR §§300.550-330.556

Parent Attorney Perspective

- Sacramento City Unified School District v. Rachel H., 14 F.3d 1398 (1994)
 - Supreme Court held that Rachel Holland, a young lady with Down Syndrome, should be mainstreamed into a regular class even if the only benefits to her were non-academic in nature.
 - Falvey (2004) concluded “no studies conducted since the late 1970’s have shown an academic advantage for students with intellectual and other developmental disabilities educated in separate settings.” In fact, research has consistently shown that students with disabilities who spend more time with typically developing peers perform better academically when compared to students served in more restrictive placements.”

Parent Attorney Perspective

- All students benefit from the inclusion of students with disabilities with their non-disabled peers.
- A student with a disability should not be removed from education in an age-appropriate, general education classroom solely because of needed services or supports in the general curriculum.
- Students with disabilities do not need to learn skills in segregated settings first and then generalize in LRE.
- Segregated settings do not prepare students for inclusive community life.
- The school may be responsible for students through the 21st year but parents are responsible for life.
- Parents must consent to their student's placement in a separate day school.

School Attorney Perspective

- Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989)
 - “By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act.” [LRE and FAPE]
 - “Although Congress preferred education in the regular education environment, it is also recognized that regular education is not a suitable setting for educating many [children with disabilities].”

School Attorney Perspective

- Class sizes can be overwhelming for some students
- Meaningful benefit must be measured
- Ultimately School District's responsibility
- ***Parents must now consent to center school placement
 - Increase litigation
 - Burden of Proof changes
 - Parents do not have time to prepare for the challenge

What We Can Agree Upon

- School and parents should work together to determine LRE.
- LRE is based on the student's unique needs not on the eligibility.
- Expectations must always be set high and can never be defined by a student's eligibility or school placement.

Access Points

What the Law Says

- FAC 1.0943: Requirements for Participation in Alternative Assessment
- Florida Statutes 1003.438 was Repealed
 - Students entering 9th grade will not longer work toward a special diploma
 - Florida Statutes 1003.4282
 - Students may obtain a regular high school diploma through equivalent, applied or integrated or career education courses ... identified by content-area experts as being a match to the core curricular content of another course.

What the Law Says

- Instruction in access points curriculum and the Florida Alternative Assessment now require written consent from the parent. 1003.5715, Fla. Stat.

Parent Attorney Perspective

- Students with disabilities should have access to the general education curriculum.
- The need for accommodations and/or modifications should not deny a student's access to general education standards.
- Parents must consent to having their child placed on access points.
- This decision will result in limiting a student's post-secondary options.
- We should have high expectations and presume competency.

School Attorney Perspective

- High expectations are good. But what happens when they are not reasonable?
- Has the legislature limited opportunities for some?
- Increase litigation?

What We Can Agree Upon

- The determination to place a student on access points must be supported by data.
- Student expectations must be set high.
- Assume competence.

Extended School Year

What the Law Says

- “Special Education and Related Services that (1) are provided to a child with a disability (i) beyond the normal school year of the public agency; (ii) in accordance with the child’s IEP; and (iii) at no cost to the parents of the child; and (2) meets the standards of the SEA.” 34 CFR 300.309
- “Services must be provided if a student’s IEP team determines that the services are necessary for FAPE. ESY may not be limited to particular categories of disabilities or unilaterally limit the type, amount, or duration of those services.” 6A-6.03028, FAC

Parent Attorney Perspective

- Regression/recoupment is not the sole criterion
 - The following should also be considered:
 - Critical point of instruction
 - Emerging life skills
 - Nature or severity of disability
 - Interfering behaviors
 - Rate of progress
 - Special circumstances (e.g. transition from school to post-secondary education or work)

Parent Attorney Perspective

- School districts may not limit the type, amount, or duration of ESY services.
- IEP teams should not discourage parents from sending a student to ESY if it is determined that the student requires ESY services in order to receive FAPE.
- ESY programs should be appropriately tailored to the needs of the individual child.
- ESY may not be limited to “particular categories of disabilities.
- ESY programs, by definition, include the provision of related services.
- Least restrictive environment applies equally to extended school year and school districts must offer a continuum of educational placements for extended school year services. *In T.M. by A.M. v. Cornwall Central School District*, 63 IDELR 31 (2d Cir. 2014)

School Attorney Perspective

- LRE requirements when only ESE students receive the service
- Bringing new teachers “up to speed” in a short amount of time
- Hiring effective teachers
- Curriculum/Intervention choices
- Is ESY being recommended even when not necessary?

What We Can Agree Upon

- ESY needs to be meaningful to the student
- ESY can help students when appropriate services are implemented with fidelity

Conclusion: What we Can Agree Upon

- IEP meetings should remain collaborative and professional, even when parties disagree and even when attorneys are at the table.
- Reasonable minds may differ. How these differences are handled on both sides will impact the student.
- Litigation should be a last resort to be used in cases where there is no way to resolve the differences.