

## **ESE UPDATE ON TWO “HOT” IDEA TOPICS**

### **THE CHILD-FIND AND EVALUATION PROCESS**



and

### **DISCIPLINE OF STUDENTS WITH DISABILITIES**



**Administrators' Management Meeting (AMM)**  
September 16, 2015



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There are many “hot topics” in special education law, but frequent questions continue to arise regarding the child-find/evaluation/eligibility process under the IDEA, as well as discipline of students with disabilities. This session will attempt to provide answers to frequently asked questions in these two important legal areas.

## **I. THE CHILD FIND PROCESS: LOCATION, EVALUATION AND IDENTIFICATION**

Recent court and agency decisions show that the law’s child find duty to locate, evaluate and identify is alive and well, even in an RTI/MTSS world. During this part of our session, we will examine the duty to refer a student for an evaluation when there is a reason to suspect that a child has a disability and the need for special education services. We will then examine identification triggers and review an overall checklist of “referral red flags” to assist you in avoiding potential litigation in the area of child find. We will also examine some recent agency and court opinions regarding evaluation issues and eligibility challenges.

### **A. The Law’s Child Find Requirement**

#### **1. The IDEA**

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

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

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

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

#### **2. Section 504**

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

A [federal fund] recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation...of any person, who,

because of handicap, *needs or is believed to need special education or related services* before taking any action with respect to the initial placement of the person in regular or special education....

34 C.F.R. § 104.35(a).

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

**B. Federal Agency Guidance on the Child Find Duty in an RTI World**

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

*Memo to State Directors of Special Education, 56 IDELR 50 (OSEP 2011).* States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RtI strategy. The use of RtI strategies cannot be used to delay or deny the provision of a full and individual evaluation. It would be inconsistent with the evaluation provisions of the IDEA for an LEA to reject a referral and delay an initial evaluation on the basis that a child has not participated in an RtI framework. Unless the district believes that there is no reason to suspect that the child is disabled and in need of special education services, an evaluation must be conducted within the applicable timeline. Should the district refuse to conduct an evaluation because no reason to suspect exists, prior written notice of the refusal must be provided to the parents.

*See also:*

*Letter to Ferrara, 112 LRP 52101 (OSEP 2012).* While districts cannot use RTI as a reason for failing to evaluate a student, a Texas regulation advising districts to consider RTI before referring a student is not inconsistent with the IDEA’s child-find requirement. While it is inconsistent with the IDEA for an LEA to wait until the completion of RTI activities before responding to a parent’s request for an initial evaluation by either refusing to conduct it (because it does not suspect that the student has a disability) and providing written notice of the refusal or conducting it in accordance with IDEA’s timelines, the Texas regulation does not prohibit a district or a child’s parent from referring a child prior to completion of RTI. Rather, it merely states that RTI “should be considered” before referral. If a parent believes that RTI is being used to delay or deny an evaluation, the parent may seek redress through a due process complaint.

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

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

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

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

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

*Polk Co. (FL) Sch. Dist.*, 56 IDELR 179 (OCR 2010). Where district's policies indicated that completing the RtI process was a prerequisite to qualifying for special education services and the district told the parent that the student first had to complete general education interventions before an evaluation could be conducted, district violated Section 504's evaluation requirements. By September of 2009, the district had sufficient evidence, based upon parent input, the student's academic performance and medical documentation that the student might need special education and related services because of his ADHD, but waited until March 2010 to conduct an evaluation.

*Tracy (CA) Unif. Sch. Dist.*, 115 LRP 17619 (OCR 2015). Although the student was diagnosed with ADHD and had problems finishing his work, the district refused to evaluate him for approximately four months. Under Section 504 and ADA, a district has an affirmative obligation to evaluate all students who may need special education or related aids and services due to a suspected disability. Here, since the beginning of the

school year, the student received low test scores in math, English and Language Arts. His teachers also reported that he had problems focusing in class, had academic troubles for years and needed extra time to complete assignments and other informal classroom accommodations. However, the district declined to initiate the evaluation process, arguing that it could only refer students for an evaluation after they received six to eight weeks of academic interventions. Such a blanket policy is inappropriate. “Although attempting other interventions ... may be appropriate in other circumstances, here, the District had specific information about this individual student to suspect a disability.” In fact, by the time the district evaluated the student and found him eligible for an IEP, his test scores were worse. Thus, the district is to provide the student with compensatory education and issue a memorandum to all staff explaining appropriate evaluation procedures.

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

As indicated previously, there have been no cases where a head-on challenge has been made to the overall use of an RtI model for identifying students with disabilities. However, there has been class action litigation challenging what appears to be an “RtI-like” model in Wisconsin, but in 2012, all of the developments were made null and void by the 7<sup>th</sup> Circuit Court of Appeals:

*Jamie S. v. Milwaukee Pub. Schs.*, 58 IDELR 91, 668 F.3d 481 (7<sup>th</sup> Cir. 2012). The district court erred when certifying a child find claim as a class action, and its decision in that regard is vacated, in addition to the decision that the school district had committed systemic child find violations. The district court’s order approving a settlement agreement between the class of students and the State Department of Education is also vacated, as well as an order requiring the district to take extensive remedial action. The class, which was defined as IDEA-eligible students “who are, have been or will be denied or delayed entry or participation” in special education, leaves no way to determine which students were members of the class. “In short, a class of unidentified but potentially IDEA-eligible disabled students is inherently too indefinite to be certified” as a class. Further, the unique nature of each child’s circumstances makes a class-wide resolution of the child find claims inappropriate. [Note: On August 20, 2012, in *Jamie S. v. Milwaukee Bd. of Sch. Directors*, 59 IDELR 194 (E.D. Wis. 2012), the district court dismissed the individual cases on the basis of failure to exhaust administrative remedies. The court also vacated its previous award of \$459,123 in attorney’s fees against the district, noting that the parents were no longer prevailing parties. It declined to decide, however, whether the Wisconsin ED could recover \$475,000 in attorney’s fees and costs that it agreed to pay as part of its settlement with the parents, since the ED was not a party to the district’s appeal].

Previous history: *Jamie S. v. Milwaukee Pub. Schs.*, 48 IDELR 219, 519 F.Supp.2d 870 (E.D. Wis. 2007). District failed to refer children with suspected disabilities in a timely fashion and improperly extended the initial evaluation process. In addition, the State DOE violated its legal responsibility to properly supervise, monitor and sanction the LEA’s non-compliance. While the district may have assumed that it had sufficient interventions in place to deal with issues such as poor grades, frequent absences,

maladaptive behavior, and suicidal ideation, that did not excuse its failure to refer countless students for special education evaluations. Further, the district had a practice of not referring students due to concerns that such referrals would stigmatize them and the district often went to great lengths to attempt alternative interventions in order to avoid having to recommend students for a special education referral. “as can be seen in the case of [the named students], the extreme hesitancy of educators to pull the special education referral trigger, even if done in good faith, did a disservice to the educational and other needs of the child....”

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

**D. Sample Recent Child Find Cases that Support the Notion of Looking out for “Referral Red Flags”**

*C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR 109 (E.D. Tex. 2015) (unpublished). A district has a duty to evaluate under the IDEA when it has reason to suspect that a child has a disability and may be in need of special education services. Here, the district had reason to suspect the need to evaluate a 3 year-old when his mother, a district diagnostician, played an audio recording of her son’s speech for the district’s SLP. Based upon the mother’s conversations with the SLP, the district had notice of the child’s disability by his third birthday on January 25, 2013. In addition, the district’s policy of not evaluating any child that is not enrolled in its programs violates the IDEA and likely contributed to the delay here. If the district had evaluated the child in a timely fashion, he would have received services approximately 30 days earlier. Thus, the hearing officer’s award of compensatory speech services is affirmed.

*Jana K. v. Annville Cleona Sch. Dist.*, 63 IDELR 278, 39 F.Supp.3d 584 (M.D. Pa. 2014). The parent’s failure to notify the district that a physician had diagnosed his daughter with depression did not excuse the district’s failure to conduct an IDEA evaluation. The duty

to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as “bullying;” she visited the school nurse on at least 54 occasions for injuries, hunger; anxiety or a need for “moral support;” the student’s grades, which has been poor to average in previous school years, plummeted when she began 7<sup>th</sup> grade; and the district was aware of at least one on-campus act of self-harm where she swallowed a metal instrument after using it to cut herself. This “mosaic of evidence” clearly portrayed a student who was in need of a special education evaluation.

*Rodriguez v. Independent Sch. Dist. of Boise City*, 63 IDELR 36 (D. Idaho 2014). Where the district requested documentation of an illness or accident in response to a parental request for homebound services based upon his increased anxiety about interactions with his classroom teacher and bus driver, it violated the IDEA. It was not the parents’ responsibility to prove the student’s anxiety was more severe than usual. Rather, it was the district’s duty to evaluate the student in light of the parents’ legitimate concerns and the student’s physician’s recommendation. Where the student went without services for 8 months, the district’s summary rejection of the parents’ request for homebound services resulted in a denial of FAPE.

*Demarcus L. v. Board of Educ. of the City of Chicago*, 63 IDELR 13 (N.D. Ill. 2014). District court did not err in finding that there was no child find violation. A parent seeking relief for a child find violation must show that the district 1) overlooked clear signs of disability and negligently failed to order an evaluation; and 2) had no rational justification for its decision not to evaluate. Here, the parent failed to meet either standard. While the child was rude and discourteous, had disrupted classroom activities and engaged in behaviors such as fighting and yelling when he did not get his way, there was no fault in the district’s belief that it could manage the child’s behaviors using classroom-level interventions. District personnel managed and de-escalated the child’s behavior through the first semester of 2011 while he was in second grade and the district conducted an IDEA evaluation in late 2011, after it suspended him twice for disrupting classroom activities and learned of his subsequent psychiatric hospitalization.

*Long v. District of Columbia*, 56 IDELR 122 (D. D.C. 2011). Where district did not evaluate student for three years and violated its child-find duty, case is remanded to the hearing officer to determine appropriate compensatory education. In this case, the district’s child find duty was triggered when a private psychologist diagnosed a learning disability in 2006. Contrary to the district’s assertions and the hearing officer’s findings, there was evidence that the district was aware of the evaluation in 2006 but did not conduct an evaluation until 2009. For instance, an IEP team member apologized for the district’s delay in following through on the referral process that was “initiated in 2006” when the charter school, for which the district was the LEA, referred the student for the evaluation in 2006. In addition, the district’s assertion that the student suffered no harm is rejected, where the IEP team determined that the student was eligible for services when

it finally completed the evaluation in 2009. The district's argument that it was not on notice of the suspected SLD until the parent presented a copy of the 2006 evaluation at the 2009 IEP meeting is also rejected, as the district's child-find obligations are triggered "as soon as a child is identified as a potential candidate for services."

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

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

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

*Compton Unified Sch. Dist. v. Addison*, 54 IDELR 71, 598 F.3d 1181 (9<sup>th</sup> Cir. 2010), *cert. denied*, (2012). Where failing 10<sup>th</sup> grade student was referred by the school to a mental health counselor (who ultimately recommended an evaluation), her teachers indicated that her work was "gibberish and incomprehensible," she played with dolls in

class and urinated on herself, district cannot avoid a child find claim based upon an argument that it did not take any affirmative action in response to high schooler's academic and emotional difficulties because the parent did not request an evaluation. Where the district argued that the IDEA's written notice requirement applies only to proposals or refusals to initiate a change in a student's identification, evaluation or placement and its decision to do nothing did not qualify as an affirmative refusal to act, the argument is rejected. The Court will not interpret a statute in a manner that produces "absurd" results and the IDEA's provision addressing the right to file a due process complaint is separate from the written notice requirement. "Section 1415(b)(6)(A) states that a party may present a complaint 'with respect to any matter relating to the identification, evaluation, or educational placement of the child,'" and the IDEA's written notice requirement does not limit the scope of the due process complaint provision. By alleging that the district failed to take any action with regard to the student's disabilities, the parent pleaded a viable IDEA claim. (Note: The dissent in this case noted that determining that a "refusal" to identify or evaluate requires purposeful action by the district and the parent did not have the right to bring a child find claim without a request and a "refusal" on the part of the district).

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

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

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

were less pronounced when he was first evaluated and found ineligible and were typical of a 5 or 6-year-old.

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

*N.G. v. District of Columbia*, 50 IDELR 7 (D. D.C. 2008). Where student exhibited at least two of the five characteristics of SED (pervasive depression and inappropriate types of behaviors), her academic performance was adversely affected as a result, and DCPS knew it, the school district should have evaluated her, particularly after being informed of her ADHD diagnosis. In addition, she failed four of her seven classes when she had previously been an A/B student.

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

#### **E. Florida Rule Requirements**

In order to address the concern that the failure to complete MTSS might be used inappropriately by school personnel as a basis, in and of itself, for refusing to conduct an evaluation under the IDEA or Section 504, Florida Rules were amended in 2014 to require school districts to affirmatively move to obtain parental consent to conduct an evaluation when certain circumstances indicate that a student may be a student with a disability who needs special education and related services. These circumstances specifically include, but are not limited to, the following:

1. When a school-based team determines that a kindergarten through grade 12 student's response to intervention data indicate that intensive interventions are effective but require a level of intensity and resources to sustain growth or performance that is beyond that which is accessible through general education resources; or
2. When a school-based team determines that a kindergarten through grade 12 student's response to interventions indicates that the student does not make adequate growth given effective core instruction and intensive, individualized, evidence-based interventions; or
3. When a child age 3 to kindergarten entry age receives a developmental screening through the school district or the Florida Diagnostic and Learning Resource Center and based on the results of the screening, it is suspected that the child may be a child with a disability in need of special education and related services; or
4. When a parent requests an evaluation and there is documentation or evidence that the kindergarten through grade 12 student or child age 3 to kindergarten entry age who is enrolled in a school district operated preschool program may be a student with a disability and needs special education and related services.

The Rules also require that within 30 days of a determination that a circumstance described in 1-3 above exists for a student, the school district must request consent from the parent to conduct an evaluation, unless the parent and the school agree otherwise in writing. With respect to item 4 above, if a parent requests that the school district conduct an evaluation, the school district must within 30 days, unless the parent and the school agree otherwise in writing:

1. Obtain consent for the evaluation; or
2. Provide the parent with written notice explaining its refusal to conduct the evaluation.

The Florida Rules also provide that prior to a school district's request for initial evaluation of a student in grades K through 12 suspected of having a disability, school personnel must make one of the following determinations and include appropriate documentation in the student's educational record to the effect that:

1. The general education intervention procedures have been implemented as required and the data indicate that the student may be a student with a disability who needs special education and related services;
2. The evaluation was initiated at parent request and the required MTSS activities will be completed concurrently with the evaluation but prior to the determination of the student's eligibility for special education and related services; or
3. The nature or severity of the student's areas of concern makes the general education intervention procedures inappropriate in addressing the immediate needs of the student.

Fla. Rule 6A-6.0331.

Florida Rule also sets forth timelines for completing evaluations once parental consent has been obtained. For a signed consent that was received on or before June 30, 2015, a school district must ensure that initial evaluations are completed within sixty (60) cumulative school days that the student is in attendance after the school district's receipt of parental consent for the evaluation. For pre-k children, initial evaluations are to be completed within sixty (60) school days after the school district's receipt of parental consent for the evaluation.

For a signed consent received on or after July 1, 2015, a school district is required to ensure that initial evaluations of students suspected of having a disability are completed within sixty (60) calendar days after the school district's receipt of parental consent for evaluation. For these purposes, the following calendar days are not counted toward the 60-calendar-day requirement:

1. All school holidays and Thanksgiving, winter and spring breaks as adopted by the district school board;
2. The summer vacation period beginning the day after the last day of school for students and ending on the first day of school for students in accordance with the calendar adopted by the district school board. However, the school district is not prohibited from conducting evaluations during the summer vacation period; and
3. In the circumstance when a student is absent for more than eight (8) school days in the sixty (60) calendar day period, the student's absences shall not be counted toward the sixty (60) calendar day requirement.

The sixty (60)-day timeframe for evaluation does not apply to a school district if:

1. The parent of the student repeatedly fails or refuses to produce the student for the evaluation; or
2. A student enrolls in a school served by the school district after the timeframe has begun, and prior to a determination by the student's previous school district as to whether the student is a student with a disability. This exception applies only if the subsequent school district is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent school district agree to a specific time when the evaluation will be completed. Assessments of students with disabilities who transfer from one school district to another school district in the same school year must be coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

#### **F. "Referral Red Flags": A Summary Checklist**

So, in summary, what does it take for there to be a "reason to suspect" or "reason to believe" that a student is disabled and in need of special services? Based upon existing case law, agency rulings and the specifics contained in Florida Rules as described above, I have developed a running checklist of referral red flags that could be, in combination, sufficient to constitute a

legal “reason to suspect a disability” and need for special services that would trigger the IDEA’s or 504’s child-find duty.

**Important Note:** When using this checklist, it is very important to remember that not one of these triggers alone (or even several together) would typically be sufficient to trigger the child find duty under Section 504 or IDEA, though some will require that parental consent be obtained to conduct an evaluation under Florida Rules, as noted. However, the more of them that exist in a particular situation, the more likely it is that the duty would be triggered and parental consent for an evaluation should be sought.

It is also important to note that it is more likely that the child find duty will be triggered under Section 504 before it would be under the IDEA because the definition of disability is much broader and all-encompassing than it is under IDEA. Under the IDEA, it is rare that a court would find it sufficient to trigger the duty to evaluate if there are no referral red flags in the area of academic concerns. However, OCR is likely to find the 504 duty to evaluate has been triggered, even in the absence of any academic concerns.

Especially in an MTSS world, look out for indicators in these areas and **“when there’s debate, evaluate (and re-evaluate too)!”**

## **1. Academic Concerns in School**

- Failing or noticeably declining grades
- Poor or noticeably declining progress on standardized assessments
- Student negatively “stands out” academically from his/her same-age peers
- In Florida and for K-12, student has been in the MTSS process and the school-based team determines that the student’s response to intervention data indicate that intensive interventions that have been implemented are effective but require a level of intensity and resources to sustain academic growth or performance that is beyond that which is accessible through general education resources (consent to evaluate must be sought within 30 days of the determination, unless parent and school agree otherwise in writing)
- In Florida and for K-12, student has been in the MTSS process and the school-based team determines that the student’s response to interventions indicates that the student does not make adequate academic growth given effective core instruction and intensive, individualized, evidence-based interventions (consent to evaluate must be sought within 30 days of the determination, unless parent and school otherwise agree in writing)
- In Florida and for age 3-K, student receives a developmental screening through the school district or the Florida Diagnostic and Learning Resource Center and based on the results of the screening it is suspected that the child may be a child with a disability in need of special education and related services (consent to evaluate must be sought within 30 days of these results, unless parent and school otherwise agree in writing)
- Student is already on a 504 Plan and accommodations have provided little academic benefit

## 2. **Behavioral Concerns in School**

- Numerous or increasing disciplinary referrals for violations of the code of conduct
- Signs of depression, withdrawal, inattention
- Truancy problems, increased absences or skipping class
- Student negatively “stands out” behaviorally from his/her same-age peers
- In Florida and for K-12, student has been in the MTSS process and the school-based team determines that the student’s response to intervention data indicate that intensive interventions that have been implemented are effective but require a level of intensity and resources to sustain behavioral growth or performance that is beyond that which is accessible through general education resources (consent to evaluate must be sought within 30 days of the determination, unless parent and school agree otherwise in writing)
- In Florida and for K-12, student has been in the MTSS process and the school-based team determines that the student’s response to interventions indicates that the student does not make adequate behavioral growth given effective core instruction and intensive, individualized, evidence-based interventions (consent to evaluate must be sought within 30 days of the determination, unless parent and school otherwise agree in writing)
- In Florida and for age 3-K, student receives a developmental screening through the school district or the Florida Diagnostic and Learning Resource Center and based on the results of the screening it is suspected that the child may be a child with a disability in need of special education and related services (consent to evaluate must be sought within 30 days of these results, unless parent and school otherwise agree in writing)
- Student is already on a 504 Plan or has a BIP and accommodations or strategies have provided little behavioral benefit

## 3. **Outside Information Provided**

- Information that the student has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- Information that the student has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- Information that the student is taking medication
- Information that the student is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider suggests the need for an evaluation or services

## 4. **Information from School Personnel**

- Teacher or other school service provider suggests a need for an evaluation under 504 or IDEA

## **5. Parent Request for an Evaluation**

- Parent requests an evaluation and some other listed items above are present (in Florida, consent to evaluate must be sought within 30 days of the request, unless parent and school otherwise agree in writing)

## **G. Recent Evaluation Cases and Agency Decisions**

There have been some recent decisions in the area of evaluation, re-evaluation and IEEs worthy of noting here:

*West-Linn Wilsonville Sch. Dist. v. Student*, 63 IDELR 251 (D. Ore. 2014). School district should have re-evaluated a student's behavioral needs and convene an IEP meeting before changing his educational placement. When the student began punching, shoving and using threatening gestures during his third-grade year, the district should have evaluated the student rather than discontinuing his participation in a mainstream music class, removing him from an inclusion PE class with others in his self-contained autism program and delivering his one-to-one instruction in a room next to the principal's office. Clearly, the district had notice of the need for a reevaluation by April 6, 2011, when the principal informed the director of student services that the special education teacher felt unsafe around the child. Although the district argued that it was merely implementing short-term solutions to accommodate the child until the end of the school year, its response "essentially turned the reevaluation process on its head." Thus, the district is ordered to reevaluate the student, convene an IEP meeting and identify an appropriate placement for the upcoming school year. The ALJ's award of tuition reimbursement, however, is denied based upon the parents' failure to provide the 10-day notice of private school placement to the district and their lack of cooperation with the district's efforts to develop an IEP for the child's 4<sup>th</sup> grade year.

*S.D. v. Portland Pub. Schs.*, 64 IDELR 74 (D. Me. 2014). School district must fund private school tuition for a 6<sup>th</sup> grader with a variety of reading and anxiety disorders based upon its failure to reevaluate the student. When the student's IEP team drafted his IEP, it was with the understanding that he was reading at level 7 in the Wilson Reading System. However, the student's new Wilson-certified instructor discovered early in the school year that the student was actually reading at a level 2. This discovery should have triggered a reevaluation of the student's IEP, rather than simply to continue instruction at a lower level. The district's failure to determine whether the student's decline stemmed from his previous teacher's failure to follow the Wilson program, a memory retention deficit, flawed proficiency assessments or some other reason amounted to a denial of FAPE.

*A.W. v. Middletown Area Sch. Dist.*, 65 IDELR 16 (M.D. Pa. 2015). District's delay in comprehensively evaluating teenager with an anxiety disorder is a denial of FAPE and entitles the student to compensatory education. The IDEA requires districts to conduct a "full and individual" initial evaluation of a student who is suspected of having a disability and districts must use a variety of assessment tools and strategies to gather relevant information about the student's functional, developmental and academic needs. Here, the district sought parental consent only to conduct a psychiatric evaluation of the student. The evaluation information did

not include information from which the district could develop a positive behavior plan or IEP goals or to rule out SLD. From the outset, the district knew that the psychiatric evaluation would not address educational matters and should have known that it would need to conduct additional assessments to determine the full scope of the student's needs. In addition, the district did not convene the IEP team until 13 months after it first had reason to suspect that the student had a qualifying disability and the student went without appropriate services in the interim.

*Brock v. New York City Dept. of Educ.*, 65 IDELR 135 (S.D. N.Y. 2015). Existing evaluative data did not support the IEP team's recommendation that the student be placed in a public 12:1+1 public school program. The failure to conduct a reevaluation in the previous six years resulted in substantive harm, as the district's reliance upon information from the student's private school was misplaced. Not only did the student's progress reports use broad grading criteria and "rudimentary grading differentials," the private school's data did not include any educational testing or standardized assessments that supported the district's proposed change in placement. Thus, these were insufficient substitutes for the mandatory triennial reevaluation where the existing data did not indicate how the student might perform in a public school setting. Where the district did not challenge the appropriateness of the private placement or argue that the equities in the case would preclude reimbursement for the private placement, the district is ordered to reimburse the mother and grandmother for private school tuition costs.

*Letter to Baus*, 65 IDELR 81 (OSEP 2015). If a parent disagrees with a district's evaluation based upon the district's failure to assess the child in a specific area of need, the parent has the right to request an IEE at public expense in that area to determine whether the child has a disability and the nature and extent of the special education and related services the child needs. At that point, the district is required to either request a due process hearing to show that its evaluation is appropriate or provide the requested IEE at its expense.

*B. v. Orleans Parish Sch. Dist.*, 64 IDELR 301 (E.D. La. 2015). The parents' noncompliance with the IEE guidelines the district provided justify the district's refusal to reimburse the parents for their IEE. A publicly funded IEE is subject to the same criteria that a district uses for its own evaluations. Because the district here applied the criteria set forth in the State Department's "Bulletin 1508," the IEE needed to follow those same requirements. When the district granted the request for an IEE, it informed the parents that the evaluation had to comply with Bulletin 1508 and told them how to access the criteria online. However, the psychologist who assessed the student failed to follow applicable criteria, and the district indicated 7 specific areas in which the IEE did not comply with the requirements for evaluations of SLD. Similarly, the district notified the parents of 6 deficiencies in the portion of the IEE that addressed the student's OT and 6 more in the area of PT needs. Indeed, the psychologist did not contact the district about the identified areas of noncompliance despite being advised to do so. Thus, the ALJ's decision that the parents were not entitled to reimbursement is upheld.

*Letter to Savit*, 64 IDELR 250 (OSEP 2014). It would be in conflict with the IDEA for a school district to have a policy granting third-party evaluators less time to observe students as part of an evaluation than they provide to district evaluators. Thus, it would be inconsistent with IDEA for a district to have a policy limiting evaluators to a two-hour observation window, unless the district also limits its own evaluators to a two-hour observation period. However, observations

of a class or proposed placement by parent attorneys and lay advocates are not an entitlement and can be restricted by state or local policy.

## **H. Recent Eligibility Cases and Agency Decisions**

There have also been some recent decisions in the area of eligibility worthy of noting here:

*M.M. v. New York City Dept. of Educ.*, 63 IDELR 156, 26 F.Supp.3d 249 (S.D. N.Y. 2014). Student with anxiety and depression but good grades is a “child with a disability,” as her emotional disturbance impacted her grades because she could not come to school as evidenced by the district’s agreement to provide two months of home instruction to her. Not only did the student miss several weeks of classes during the fall semester, but she did not attend at all from November 2007 to January 2008. She also did not earn the minimum number of credits required to move on to the next grade. Because district erred in finding student ineligible for IDEA services, parents may recover the cost of her residential placement.

*Doe v. Cape Elizabeth Sch. Dept.*, 64 IDELR 242 (D. Me. 2014). The former SLD student’s performance on three privately administered tests was not enough to show that the student continued to be eligible for IDEA services. The student’s above-average grades, her performance on state-mandated standardized tests, and the results of the district’s reevaluation supported the district’s conclusion that the student was no longer eligible for special education. The parents’ argument that the district should have focused on the student’s unusually low scores on the independent assessments is rejected where federal and state LD guidelines expressly require the team to consider the student’s good grades and solid performance on statewide assessments. Further, the team did not rely solely upon academic performance and also considered the results of the district’s psychological and academic evaluations, teacher observations and parent feedback. In addition, the district reconvened the team to discuss the results of the independent evaluations and explained why it afforded them little weight.

*D.A. v. Meridian Jt. Sch. Dist. No. 2*, 65 IDELR 286 (9<sup>th</sup> Cir. 2015) (unpublished). The district did not err in finding that the student was not eligible for services under the IDEA. High schooler’s Asperger syndrome does not have an adverse effect on his educational performance (which in Idaho includes academic areas such as reading, math and communication, as well as nonacademic areas such as daily living skills, mobility and social skills). Although the parents allege that the district focused too much on academic performance, the hearing officer and district court noted that the student had done well in classes that emphasized pre-vocational and life skills.

*Department of Educ. v. Patrick P.*, 65 IDELR 285 (9<sup>th</sup> Cir. 2015) (unpublished). The ED did not err in finding the student ineligible for IDEA services. A child needs to satisfy two sets of criteria in order to receive services as an SLD student: first, the child must demonstrate either inadequate achievement or severe discrepancy between achievement and ability. Second, the child must demonstrate either insufficient progress or a pattern of strength or weaknesses in performance consistent with SLD. The student here failed to meet the first criteria, as the student performed well in the classroom, was engaged in his classes and received good grades. Further, the student was only receiving Tier I accommodations that were available to all students

attending his private school, regardless of their disability status. The district court's decision is affirmed reversing the administrative hearing order in the parents' favor.

*Q.W. v. Board of Educ. of Fayette Co.*, 64 IDELR 308 (E.D. Ky. 2015). District's finding that the student no longer requires IDEA services is upheld. The student's alleged difficulties at home do not require the district to continue providing special education services. Under the IDEA, a student with autism is not eligible for special education and related services, unless his disability adversely affects his educational performance. The ordinary meaning of "educational performance" requires courts and hearing officers to focus on school-based evaluation. Here, the student did not appear to exhibit any academic, behavioral or social difficulties at school. Rather, his teachers testified that he earned good grades, participated in class, exhibited the same level of emotion as his peers and was "a joy" to have in class. While "educational performance" may extend beyond grades to the classroom experience as a whole, it does not include behaviors exhibited solely in the home. "Social and behavioral deficits will be considered only insofar as they interfere with a student's education."

*H.M. v. Weakley Co. Bd. of Educ.*, 65 IDELR 68 (W.D. Tenn. 2015). An ALJ's ruling that the frequently truant high schooler was "socially maladjusted" did not mean that the student was not IDEA-eligible. The student's lengthy history of severe major depression coexists with her bad conduct and qualifies her as an ED child. Social maladjustment does not in itself make a student ineligible under the IDEA. Rather, the IDEA regulations provide that the term "emotional disturbance" does not apply to children with social maladjustment unless they also meet one of the five criteria for ED. Since age 9, this student has been diagnosed with severe major depression and later medical and educational evaluations stated that she had post-traumatic stress disorder in addition to a recurrent pattern of disruptive and negative attention-seeking behaviors. Further, the depression was marked, had lasted a long time and affected her performance at school. Thus, it is "more likely than not" that her major depression, not just misconduct and manipulation, underlie her difficulties at school. Thus, the hearing officer's decision finding her ineligible under the IDEA is reversed.

*In the Matter of P.T.*, 65 IDELR 273 (N.Y. 2015) (unpublished). Even if a 5<sup>th</sup> grader developed an emotional disturbance based upon peer bullying, the lack of impact on the student's academic performance supports the district's determination that the student is not eligible under the IDEA. Having an emotional disturbance, such as anxiety or depression, will not in itself qualify a child for IDEA services. Parents must also show that the condition has an adverse impact on educational performance. Here, the student consistently earned good grades and received average to above-average scores on intelligence tests. Assuming that the student's mental and emotional state did rise to the level of emotional disturbance, the SRO was correct to find that it did not affect the student's educational performance. Thus, the parents are not entitled to reimbursement for a parochial school placement.

## **II. DISCIPLINE OF STUDENTS WITH DISABILITIES: SEVEN PRACTICAL TIPS AND SOME RECENT COURT AND AGENCY DECISIONS**

To do this important topic justice, at least a day or a day and ½ for training is probably required. Due to time limitations for this session, I have chosen to provide 7 practical tips that will serve as reminders in ensuring compliance with the law as it relates to discipline of students with disabilities. At the end of these materials are some noteworthy recent court and agency decisions in this area.

**Tip #1: Maintain clear and compliant discipline procedures applicable to students with disabilities (under both IDEA and 504) and adequately train all personnel on these procedures.**

First and foremost, school districts should have clear procedures in place to direct school administrators and other disciplinarians on the steps for handling disciplinary infractions committed by students with disabilities. These should be as clear and concise as possible, so that there is not a lot of room for discretion in terms of the actions that are to be taken. Assuming clear and compliant procedures are in place, school disciplinarians must then be trained on a regular basis with respect to them. The failure to train can not only leave the disciplinarian in potential legal trouble, but has the strong potential for landing the entire school district in legal hot water based upon an illegal “custom or policy” maintained by the district as a whole.

**Tip #2: Avoid making unilateral “changes in placement” through the use of suspension or other disciplinary removals for violations of the code of student conduct.**

For purposes of discipline, “placement” is defined as those services that are listed on a student’s IEP. A disciplinary removal of those services or a suspension for more than ten days at a time and, generally, for more than ten days cumulatively in a school year is considered to be a “change in placement” for a student with a disability.

The IDEA requires that prior to changing the placement of a student with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the student’s IEP Team; (2) the IEP Team must conduct a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan; and (3) the IEP Team must determine what services are to be provided to the student, for any removal period beyond ten days in a school year, in order that the student may continue to participate in the general curriculum and advance toward achieving his/her IEP goals. These procedures must be followed if/when a student is removed for more than ten days at a time or, generally, for more than ten days cumulatively in a school year for disciplinary reasons. If these procedures are not followed and illegal “changes of placement” occur, the remedy could include, among other things, compensatory education services or money damages for intentional violations of the law.

**Tip #3: Keep in mind that disciplinary action that may not be officially called a “short-term suspension” still might count toward the ten-day analysis.**

According to the federal government, any unilateral disciplinary removal that occurs outside of the IEP process is a “change of placement” day, whether it is officially called a “suspension” or not. Things like “home time-out,” removal to the principal’s office for the day, or sending a student home for a “cool-off period” are the same as a suspension in the 10-day count and in terms of whether a “change of placement” has occurred that would trigger the “change of placement” procedures under the IDEA.

**Tip #4: Develop alternatives to suspension that do not constitute a “change of placement.”**

Remember, it is the “change of placement” days that trigger the procedural requirements of the IDEA in the area of discipline. In the commentary to the 2006 IDEA regulations, the federal government reiterated its “long-term policy” that an alternative removal, such as an in-school suspension, would not be considered a part of the days of suspension toward a change in placement “as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.” Thus, alternatives to suspension can be created that do not change the current placement of the student and would not count toward the ten-day limit.

**Tip #5: Be careful when considering whether transportation is a “related service” for a student with a disability. It is important in the area of discipline.**

In the commentary to the 2006 IDEA regulations, the U.S. Department of Education commented that “[w]hether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child’s IEP. If the bus transportation were a part of the child’s IEP, a bus suspension would be treated as a suspension...unless the public agency provides the bus service in some other way.” The Department went on to note that where the bus transportation is not a part of the child’s IEP, it is not a suspension. “In those cases, the child and the child’s parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether behavior on the bus is similar to behavior in the classroom that is addressed in an IEP and whether the child’s behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child.” Thus, whether a day of bus suspension is counted toward the ten-day limit would depend upon whether transportation is a related service on the student’s IEP. If it is, to remove it would be a “change of placement” day.

**Tip #6: Keep appropriate and accurate data with respect to the use of suspension or other disciplinary removals from school.**

For many reasons, keeping appropriate data with respect to the use of suspension with students with disabilities is vital. First, school districts are required to monitor the extent to which suspension is used with students with disabilities to ensure that they are not over-suspending disabled students generally and are not suspending students disproportionately in accordance with race or other discriminatory indicators. That data must be tracked and reported accurately. Another reason for keeping and tracking appropriate data with respect to the number of suspensions to which a student is subjected is to ensure that illegal “changes of placement” have

not occurred. Procedures must be in place for “red-flagging” instances where students are coming close to a “change of placement” due to the use of unilateral suspensions/removals from school for disciplinary reasons.

**Tip #7: Remember that there are also special rules of discipline applicable to students who are disabled only under Section 504.**

Essentially, the bulk of the IDEA rules for disciplining students with disabilities have their “roots” in Section 504. This is so because Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability. Thus, in terms of discipline, the general notion is that students with disabilities should not be deprived of educational services if the conduct for which they are being disciplined is “based upon” (a/k/a “a manifestation of”) their disabilities. For the most part, the Office for Civil Rights applies the same rules of discipline for students under Section 504 that exist for those students who are also disabled under the IDEA, particularly the requirement for making manifestation determinations when a disciplinary change of placement occurs.

### **Recent Cases in the Area of Discipline**

*Ocean Township Bd. of Educ. v. E.R.*, 63 IDELR 16 (D. N.J. 2014). District is not required to allow 18-year-old with ADHD, impulse control and adjustment disorder to return to his home high school to finish out his senior year while his mother challenged his suspension for bringing a knife to school. The IDEA allows a district to move a student with a disability to an interim alternative educational setting for up to 45 school days for such offenses—regardless of whether the offense was a manifestation of disability. The student’s act of carrying a knife to school allowed the district to place him in the IAES for up to 45 school days. In addition, the subsequent MD review showed that the student’s conduct was not related to his disability; thus, the alternative setting became his “current setting” for stay-put purposes when the parent challenged it. While the student would not be able to finish his senior year with his peers if the district did not allow his return to the high school, the severity of the student’s misconduct, his history of problem behaviors, and the district’s interest in maintaining a safe learning environment supported an order for an injunction to continue the student’s alternative placement.

*Seashore Charter Schs. v. E.B.*, 64 IDELR 44 (S.D. Tex. 2014). District’s motion to change the autistic student’s stay-put placement from a K-8 charter school to a special education program in the student’s neighborhood high school pending the outcome of the due process hearing brought by the parent is granted. Given the charter school’s unsuccessful efforts to hire a special education teacher after the previous one resigned, the school was no longer capable of addressing the student’s aggressive behaviors. In contrast, the local high school was “ready, willing and able” to implement a program for the student with age-appropriate peers and post-secondary transition services. In addition, the student was substantially larger than his classmates and had a tendency to hit, bite, scratch and pull hair, even when accompanied by a teacher or aide. Thus, his continued presence at the charter school created a dangerous situation and a substantial risk of harm to others. Thus, it is ordered that he not return to the charter school and remain in the high school’s self-contained program until the hearing officer issues a decision in the due process case.

*Avila v. Spokane Sch. Dist.*, 64 IDELR 171 (E.D. Wash. 2014). While the parents are correct that a district can conduct a manifestation determination at any time a student exhibits inappropriate behaviors, the district here did not violate the IDEA by failing to consider the relationship between the student's conduct for which he was suspended and his autism. This is so because the 6 days of suspension over two school years did not form a pattern of removals that required a manifestation determination. This is required only when a student is removed for disciplinary reasons from his/her current placement for more than 10 school days in the same school year. In addition, the district provided the parents with prior written notice of its refusal to conduct a MD, explaining that it was not required from removals of less than 10 school days.

*Wayne-Westland Comm. Schs. v. V.S.*, 64 IDELR 139 (E.D. Mich. 2014) and 65 IDELR 15 (E.D. Mich. 2015). District's motion for an injunction temporarily prohibiting a teenager with a disability from entering the high school grounds is granted where an administrator's statement indicates that the student has become physically violent on multiple occasions. A court may, in appropriate situations, temporarily enjoin a dangerous student from attending school when the student poses an immediate threat to the safety of others. Here, the district's complaint showed that the 6-foot, 250-pound student kicked, punched and spit on students and staff; threatened to rape a female staff member; and threatened to stab two staff with a pen. After the IEP team reduced the student's attendance to one hour a day, the student attacked the school's security liaison. When told to leave the school building, the student tried to force his way back into the building and four staff members were required to hold the school doors shut to keep him out. Since then, the student had also threatened to bring guns to school, made racist comments to staff, and punched the school's director in the face. Thus, the district may temporarily educate the student through an online charter school program. NOTE: On February 4, 2015, the court granted a permanent injunction barring the student from entering any premises owned by the district or attending school events. The district was able to prove all four factors required to obtain permanent relief: 1) that it would suffer irreparable harm; 2) the remedies available at law are inadequate to compensate for that harm; 3) the balance of hardships tip in its favor; and 4) the injunction would not be against public interest. This is so because of the student's history of physical violence that demonstrated an "extreme risk" of imminent and irreparable injury. Remedies such as money damages would be inadequate to address any injuries to others resulting from the student's conduct and schoolmates and staff would suffer a far greater injury than the student, who can continue his education through an online program. Protecting the safety of others is in the public's interest.

*Troy Sch. Dist. v. K.M.*, 64 IDELR 303 (E.D. Mich. 2015). District's request for a temporary restraining order is denied where it was not shown that the district would suffer irreparable harm or imminent injury if the teenager returned to his public high school. The IDEA's stay-put provision requires that a student remain in his then-current educational placement during any pending administrative proceedings. While a court can authorize a change in placement when a student engages in violent or dangerous behavior, it cannot do so unless the district shows that maintaining the student in his current placement is substantially likely to result in injury to the student or others. Here, the district did not meet that burden where the incident that resulted in the student's most recent suspension occurred in the absence of the "safe person" required by his IEP and no serious injuries were recorded. Thus, the student is not substantially likely to injure

himself or others if the district implements his IEP. NOTE: In a subsequent case regarding placement for the student and appealing a hearing officer decision, the court upheld the parent's challenge to the district's proposed placement in a center-based program for children with ED. Based upon testimony from psychologists and autism experts, the student could have made educational progress in a general education setting. While the student has had multiple behavioral incidents in mainstream classes, several of which resulted in emergency evacuations or police intervention, the experts testified that the student was on "high alert" because he was so fearful during the school day—"Police involvement, restraints and seclusion can be frightening for any student, but more so for a student with disabilities." According to the psychologists and autism experts, the student is highly intelligent, learns quickly, has a strong work ethic and wants to be successful. In addition, experts have opined that he needs to interact with nondisabled peers to acquire social and behavioral skills and that he could benefit from a mainstream class if provided appropriate support services. Thus, the ALJ's decision that the district denied FAPE is upheld and the order requiring the district to provide a one-to-one psychologist with autism training as the student's "safe person" is clearly permissible under the IDEA.

*Buckley v. State Correctional Institution-Pine Grove*, 65 IDELR 127 (M.D. Pa. 2015). State prison erred in discontinuing special education services to an incarcerated teenager with ED and the provision of "self-study packets" to be completed in the student's cell denied FAPE. As allowed by the IDEA, the public agency was able to show that the prison had a bona fide security interest that would allow them to modify the student's IEP where the student's prison record reflected four instances of assault and approximately 25 other incidents of serious misconduct. However, the official comments to the 1999 IDEA regulations state that the IEP team must consider possible accommodations for an incarcerated student who poses a security risk. Here, the prison did not convene the student's IEP team and instead enforced a policy requiring all eligible inmates in its restrictive housing unit to study in their cells. Further, the right to modify the IEP of an incarcerated student who cannot otherwise be accommodated does not allow a public agency to discontinue IDEA services altogether. An education program should be revised, not annulled, in light of safety considerations. Thus, the student is awarded a full day of compensatory education for each school day that he was placed in the prison's restrictive housing unit.

*Dear Colleague Letter*, 64 IDELR 249 (OSEP/OSERS 2014). Absent a specific exception in the law, all IDEA protections apply to students with disabilities in correctional institutions. This includes the IDEA's child-find duty, such that agencies cannot assume that a student who enters jail or a juvenile justice facility is not a student with a disability just because he or she has not been previously identified. School districts should work with individuals who are most likely to come into contact with students in the juvenile justice system to identify students suspected of having a disability and ensure that a timely referral for evaluation is made. While it is acknowledged that child-find and proper identification of students in correctional facilities is complicated by the fact that they often transfer in and out, the evaluation process must continue once the parent's consent for evaluation has been obtained, even if the student will not be in the facility long enough to complete the process. In addition, if a student is transferred to a correctional facility in the same school year after the previous district has begun but not completed an evaluation, both agencies must coordinate assessments to ensure the evaluation is completed in a timely manner. Finally, the IDEA's disciplinary safeguards also apply to these

students, including the right to a manifestation determination upon 11 days of a disciplinary exclusion. “These disciplinary protections apply regardless of whether a student is subject to discipline in the facility or removed to restricted settings, such as confinement to the student’s cell or living quarters or ‘lockdown’ units.”

*Dear Colleague Letter*, 114 LRP 51901 (OCR 2014). Residential juvenile justice facilities, as federal fund recipients, are no less responsible for providing FAPE in a discrimination-free environment than are public schools. Thus, they must abide by federal laws, such as Section 504 and Title II of the ADA when disciplining, evaluating, placing and responding to alleged harassment of students with disabilities. All public schools, including those in juvenile justice facilities, are obligated to avoid and redress discrimination in the administration of school discipline. As a result, they must ensure that they comply with provisions governing the disciplinary removal of students for misconduct caused by, or related to, a student’s disability. In addition, state and local facilities must implement reasonable modifications to their policies, practices, or procedures to ensure that youth with disabilities are not placed in solitary confinement or other restrictive security programs because of their disability-related behaviors. In addition, residents of such facilities must be educated with nondisabled students to the maximum extent appropriate in compliance with Section 504’s LRE mandate.