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THE LEADER IN GLOBAL EDUCATION
FAIRLEIGH DICKINSON UNIVERSITY

The Wisdom of Guy McBride

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Disclaimer

These samples of the Wisdom of Guy McBride are culled from replies Guy has posted to queries and comments on the National Association of School Psychologists Listserv. Many of them were written in haste to respond to urgent questions. They are NOT legal opinions, are not intended as such, and must not be taken as such. They are the comments and observations of a school psychologist who has made a hobby of studying and wondering about special education law and related topics. As Guy observes in many of these comments, you must not look to his observations for legal guidance, but must read the law for yourself, a process Guy facilitates with the many hyperlinks included in his messages.

The information that is provided at this web site is general information. It may or may not reflect current legal developments.

In all areas of law, given the same facts and the same statute, judges may issue different rulings. One ruling may be binding in your geographical area, but not in another jurisdiction. State regulations may differ in specific procedural rules and content. If you are seeking answers to legal questions, you may understand the general rule, but you must also determine how the rule or concept is applied in your area. If this seems to be different, you need to find out if there is a difference in the judicial case law and regulations, or if the difference is due to an individual bureaucrat's interpretation of the law. This information is not intended to constitute legal advice or substitute for obtaining legal advice from your own counsel.

ADHD regulations for special education...

This is interesting. Your district appears to be trying to make OHI synonomous with either a discrepancy model of SLD (current regulations) or a low achievement model of SLD (proposed by some but not consistent with current regulations.)

I'll just provide a sampling of quotes from a variety of subjects to illustrate why I think that is a troublesome interpretation of the regulations.

"Educational performance" means more than just academics. If a student has significant behavioral interference due to a neurobiological disorder, that is properly considered an adverse educational impact, as it impacts their functioning in school and their ability to benefit from their public education. Executive dysfunction also impacts educational performance." http://www.tourettesyndrome.net/Advocacy/SpecEd/advocacy_eligibility.htm

The federal regulations require those decisions to be made by an IEP team on an individual basis. "the determination that a child who is advancing from grade to grade is eligible under this part must be made on an individual basis by the group within the LEA responsible for making eligibility determinations."

§300.520(a)(1)

The criterion in the regulations for determining eligibility is NOT that a child meet specific low achievement standards but, rather, only that the student need special education in order to receive FAPE. "Each State shall ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child is advancing from grade to grade." (§300.121 Free appropriate public education (FAPE))

In the discussion in Attachment 1, OSERS basically repeats that interpretation, saying, "The group determining the eligibility of a child who has a disability and who is progressing from grade-to-grade must make an individualized determination as to whether, notwithstanding the child's progress from grade-to-grade, he or she needs special education and related services."

Although one might argue (although I've not heard it argued) that Attachment 1 does not carry the force of law, dicta in Appendix A is part of the Final Regulations and has always carried the force of law. In Appendix A, Question 1, OSERS says, I think quite unequivocally, "Further, a student need not fail in the regular classroom before another placement can be considered. Conversely, IDEA does not require that a student demonstrate achievement of a specific performance level as a prerequisite for placement into a regular classroom."

In order to justify the criteria being proposed by your system, I think the argument would have to be that no ADHD child who failed to meet the criteria described in your email would ever need specialized instruction rising to the level of special education. Given the rather broad definition given to "special education" in the federal regulations, I'm of the opinion that the guidelines your district is recommending could not be effectively defended on those grounds:

"(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 he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children."

"Adverse educational impact," like many other key phrases in spedlaw (FAPE, LRE, "change of placement") have never been operationally defined by the feds. If your criteria were non restrictive, that is, were clearly guidelines but non binding, then you'd probably be safe. For example, NC requires a 15 point discrepancy to meet LD guidelines, but the federal criteria do not. Because we can't have criteria more restrictive than the federal criteria, we have an elastic clause. I think you'd have a better chance of defending your criteria if you included a similar "out" for IEP teams; what you have written in its current form appears to usurp their authority. For example, you might consider something like the following.

"Alternatively, if the IEP team determines that there was adverse educational impact other than that described in the guidelines above, the team shall state in writing the assessment procedures used, provide assessment results documenting adverse educational impact, state the criteria applied to judge the severity of that educational impact, and determine whether the adverse educational impact described is not correctible without the provision of special education." Readers from NC will recognize that I am paraphrasing the NC Learning Disabilities Discrepancy Alternative, which reads:

"In cases where the multidisciplinary team determines that assessment measures did not accurately reflect the discrepancy between academic functioning and intellectual functioning, appropriate documentation must be used to verify the discrepancy. If the multidisciplinary team determines that the assessment measures did not accurately reflect the discrepancy between achievement and ability, the team shall state in writing the assessment procedures used, the assessment results, the criteria applied to judge the importance of any difference between expected and current achievement, and whether a substantial discrepancy is present that is not correctible without the provision of special education." (NC Procedures,

Section .1505)

I don't know what impact, if any, taking only one criterion from the federal definition (inattention) and skipping the others (strength, vitality) would have practically, but just as a general rule I'd never recommend providing a Reader's Digest version of the federal regulation as local criteria. I'd also include the following clarification from OSERS regarding how it interprets "alertness."

"Clarifying 'limited strength, vitality, or alertness' under 'OHI.'

The final regulations also clarify that the term 'limited strength, vitality, or alertness' in the definition of 'OHI' (when applied to children with ADD/ADHD) includes 'a child's heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.'"

http://www.ed.gov/offices/OSERS/Policy/IDEA/brief6.html

I have no quarrel, actually, with your administration's desire to put some restrictions on the tendency of some IEP and 504 teams to take a doctor's prescription pad diagnosis and turn it into a lifelong entitlement to extended time on the end of grade tests. But based on the information you provided, my sense is that you're setting yourselves up for more trouble down the road. There's really no reason why anyone should listen to me, however, so if your district persists in writing local guidelines, at the very least I'd respectfully suggest they run them by your SEA, which is responsible for enforcing and seeing that you enforce the regulations in a manner consistent with federal law, before implementing same.

Hoping that something in the above proves helpful . . .

Grade v. age norms

At least in my state (NC), the question as to whether discrepancies are to be calculated using age or grade norms is settled by regulation. The federal regulations themselves say in part:

(a) A team may determine that a child has a specific learning disability if—

> (1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, if provided with learning experiences appropriate for the child's age and ability levels

That's "age." Not "grade."

Of course no child should ever be included or excluded based upon a single procedure, formula, or test score. The IEP team is burdened with interpreting the test data within the context of all the evaluative data available to it.

If it is your argument that services should be denied because Johnny had not been provided with learning experiences appropriate for his age and ability levels, the team certainly has the power to deny the student eligibility for that reason.

However, denying services based upon dyspedagogia is descending down a slippery slope. Clearly, of course, it would be inappropriate (and unlawful) to label a child disabled due to lack of instruction (apedagogia). But current research suggests that between fifty to eighty percent of the children we are currently classifying would not have needed special education had we taught them properly.

In my county, we adopted D.C.Heath about ten years or so ago. D.C. Heath is based upon a whole language approach. We did not (during that first year) have backup programs in place for children who needed systematic phonics instruction. The number of children below the fiftieth percentile remained constant. However, the number of children scoring below he 25th percentile doubled. That year, I do not know of a single IEP team that denied services to any child because the teachers had failed to teach him properly. If we're going to deny children access to services because of inappropriate instruction (retention), clearly we should be doing it because of any inappropriate instructional intervention. Johnny has had a lateral entry teacher the past three years who had had not a single course in reading before taking over his class. Do we claim his lack of progress was due to our hiring incompetent teachers and deny him services? Clearly, we do not.

The LD model is a deficit model. We have all tested kids in first grade, second grade, and then again in the third or fourth grade when they finally make it into special education. The same kid. But in first grade he was "okay." When we test him in fourth grade, he's a failure. He knows it, the school knows it, and our test scores confirm it. Most of these kids are so far behind, there's not a chance they will ever recover. If they ever had high expectations for themselves, they have vanished like shadows at sunset in the black light of our institutional judgment--YOU HAVE FAILED (Ironic, because in most cases, it is we who have failed the child). Retention simply nails the lid on that educational coffin shut.

By using grade norms, we would, as a result of our institutional incompetence, further delay any possibility of the child receiving specially designed instruction to meet his needs. "Gee, Mrs. White, a learning disability is only diagnosed when a child makes significantly less than expected

progress. But since we held Johnny back, we didn't expect him to be reading at grade level. In fact, we're surprised he made any progress at all. So even though his age appropriate peers are heads, shoulders and waists above him in their reading achievement, he's not eligible for any help."

It actually makes perfect sense. Just like waiting four to six years for a kid to REALLY fail before offering appropriate services makes perfect sense.

Which is why after more than thirty years in the business I still have trouble sleeping some nights.

Guy

ANNUAL REVIEW OF IEP'S

Purpose:

Federal and state laws require that a classified student's IEP (Individualized Education Program) be reviewed at least one time per year. As the term "annual review" indicates, the primary purpose of this meeting is to review the student's current IEP, which includes his/her current educational program, modifications, accommodations, and current educational goals and objectives. This formal yearly review allows the IEP Team to revisit the terms of the IEP, to determine whether it is adequately meeting the individual needs of the student, and to assess whether the student is making adequate progress toward annual goals.

In many school districts, the "annual review" is strategically scheduled toward the end of the school year allowing the IEP Team to review progress at a time when it makes the most sense to do so. Annual reviews held during this time of year also allow for more appropriate educational goals/objectives to be written and for placement recommendations to be made prior to the natural transition to the next grade. Based on a review of the student's progress during the previous year and input from IEP Team members, new IEP's are developed during the annual review meeting that typically go into effect the following school year.

The IEP Team:

Members of the IEP Team may sometimes vary according to the purpose of the meeting (i.e., evaluation planning meeting, eligibility meeting, annual review). During the annual review process, state law indicates that the IEP Team must include the student's case manager, a special education teacher, a general education teacher, the parent, and students at least 14 years of age (or younger whenever appropriate). Other professionals such as related service providers, other child study team members and additional teachers may also participate in the annual review. Each IEP Team member serves a specific purpose and is expected to provide information about the student from a particular perspective.

- **Case Manager:**

- Schedules, facilitates, documents meeting
- Provides information about special education law, least restrictive environment, parent's rights, etc.
- Provides information about the child's disability and how it impacts educational performance
- Provides other relevant information about student's history, functioning and progress
- Compiles and distributes IEP document to appropriate teachers / staff

- **Special Education Teacher:**

- Provides information about the student's progress toward special education goals and objectives
- Provides information about the student's social, emotional and behavioral functioning
- Shares relevant student work samples (portfolio)
- Provides recommendations to the IEP Team regarding new special education goals and objectives, modifications and accommodations, and placement
- Prepares a written summary about the student's progress to be given to the parent and to be placed in the student's permanent file

- **General Education Teacher:**

According to the Individuals with Disabilities Act Amendments of 1997,

> *"The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii)." (Section 614(d)(3))*

In that capacity, the general education teacher:

- Serves as a "general education representative" by providing information to the IEP Team about the student's level of functioning in general education (any or all content areas)
- Shares work samples (or portfolio) to demonstrate progress in general education

- Provides information about accommodations made in general education and their impact on the student
- Helps the IEP Team determine the "least restrictive environment" by providing knowledge about general education curriculum and structure

- **Parent:**

- Provides the IEP Team with general information about the student including medical history, developmental history and any other pertinent information
- Provides the IEP Team with information about the student's work/study habits in the home
- Assists IEP Team in developing goals/objectives, modifications and accommodations, and strategies to assist the student in the educational setting
- May occasionally bring in other professionals to participate in meeting

- **Student:**

- Attends meeting after age 14 (or younger whenever appropriate) and participates to extent of ability
- Provides information about own learning style, strengths and weaknesses, and any other information he/she is capable of sharing

- **Other Professionals:**

- Depending on the situation and the particular student's needs, other child study team members or related service providers may attend the meeting. These people, such as the school psychologist, social worker, learning consultant, speech/language specialist, counselor or other professional, may share information about the student's learning style, functioning or progress made in therapy/counseling. Occasionally, parents bring other professionals to participate in the IEP Meeting.

Form Created by:

MaryEllen Messemer
School Psychologist

To download a copy of this document, press this link

Assisting the Deaf Child

The advice you have been given has all been excellent. Unfortunately, in many parts of this country, administrators are hung up on the idea that providing a Cadillac when a Ford would do is nothing short of immoral; so I thought having some additional scripture along with John Willis's resources to back up your position might be helpful in establishing that we're really just talking basic transportation here; not giving someone a limousine

34 CFR 300.345 states in part:

> (e) Use of interpreters or other action, as appropriate. The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

34 CFR 300.501 says in part

> (5) The public agency shall make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English.

Advocates are always available for any parent; qualified interpreters may be harder to find. In North Carolina, I have genuinely enjoyed working with advocates from ECAC. The location of the counterpart to this agency in your state can be found by clicking http://www.pacer.org/natl/wwwlinks.htm#ptis Even if they cannot provide direct assistance, they generally can be very helpful in finding the resources you need.

There are similar parent-friendly organizations all over the country, any of which could provide assistance. LDonline also provides a listing of state resources at http://www.ldonline.org/finding_help/local_org/ and not those for LD children. You can scroll down and click on your state.

You asked about deaf advocacy in particular, however. One website mentioned by John Willis, deafworldweb

also maintains a listing of deaf related organizations all over the United States. I assume you're trying to find some quick and easy way to identify a qualified interpreter (a separate issue in and of itself). Click on your state, then on the next web page click "organizations A-Z" for a listing of possible resources.
http://dww.deafworldweb.org/int/us/

It might also be helpful to point out that while deafness has been described by OCR (among others) as "a low incidence disability," it is not low incidence in the courts. IDEA '97 simply mirrors the rights granted under ADA/504, and parents would most likely file their regulatory complaints, therefore, with OCR--which unlike OSERS has a real knack for getting involved in the micro-management of a school system.

I would also mention that there has also been at least one federal case (Rothschild v. Grottenthaler, 2nd Circuit, 1990) in which the court said that schools must provide deaf parents with interpreters. Also, OCR has said that deaf parents have a right to be fully involved in ALL their children's activities--including having an interpreter at PTA or PTO meetings. (Irvine Schools, 1993). See

http://www.nad.org/infocenter/infotogo/legal/school2.html

http://www.tcnj.edu/~deafed/lawweb.htm#rothschild

Some school boards

http://www.brewsterschools.org/boe/policies_10001925.htm

and state departments of public instruction

http://www.oa.state.mo.us/deaf/pub_schools.html

even have this written into their official polices. I liked the Missouri explanation and have saved you the trouble of searching for it. It is appended below.

As a by the way, there are different ways of communicating in sign language. While ASL is by far the most common, it is not the only language deaf people use. It would be prudent to be sure your interpreter and your parents are speaking the same language before hiring someone. And make sure you get his or her name on the record somewhere, along with his or her qualifications. It's officially just an OCR "should," but if there are

subsequent disagreements, it is practically speaking a "must."

Guy

Excerpt from "Public School Obligations to Deaf Individuals,"

http://www.oa.state.mo.us/deaf/pub_schools.html

The U.S. Department of Justice has promulgated regulations to implement Title II of the ADA, which applies to activities of public entities such as school systems. 28 C.F.R. Part 35. The accompanying analysis specifically addresses the question of duties of school systems to provide accessibility to parents with disabilities:

Deaf people may need a sign language interpreter to follow and participate in the proceedings. Other people with hearing impairments do not use sign language. They may need a computer-assisted transcript or an assistive listening system (e.g., a loop system or an FM or infrared amplification system) in order to understand and participate in the same activity. If the school has videotapes or films, or if it broadcasts on cable television, captioning may be the most appropriate way to give access to deaf viewers.

In order to make sure a deaf individual is alerted to a fire or fire or other emergency, a school system should install visual (flashing) fire alarms in areas used by deaf individuals. Examples of accommodations for deaf persons include visible fire alarm systems, amplification systems that are compatible with hearing aids, entry systems that do not depend on ability to use an intercom or respond to a buzzer or other auditory device.

A telecommunication device for deaf persons (TDD) may be necessary, so that the school and parent can communicate directly about illnesses, schedules, discipline of a child and other problems.

The primary concern is whether or not the auxiliary aid or service is effective to make the spoken information available and to give the person with impaired hearing an opportunity to participate effectively. When there is a disagreement or uncertainty about the appropriate auxiliary aid, the regulations require the public agency to give "primary consideration" to the requests of the individual with disabilities. In analysis of this regulation, the Justice Department states:

> The public entity shall honor the choice [of the deaf individual for a particular auxiliary aid] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under Sec. 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.

56 Fed. Reg. 35711-12 (July 26, 1991).

A federal court has ruled that school systems must provide interpreters when deaf parents meet with teachers or attend school programs such as orientation programs. Rothschild v. Grottenthaler, 907 F. 2d 886 (2nd Cir. 1990). The Office of Civil Rights for the U.S. Department of Education has held that PTA programs and activities are covered by the ADA, in that the school district provides significant indirect assistance to the PTA. Irvine Unified School District, 19 IDELR 883 (OCR 1993).

The Office for Civil Rights has also determined that sign language interpreters permit deaf people to participate meaningfully in federally-assisted programs. It has ruled that public school systems must give access to extracurricular programs, and must give access when they offer services to parents as well as to students.

The agency may not assess any additional charge for the provision of an auxiliary aid or service. 28 C.F.R. 35.130 (f).

School systems should routinely publicize the method that deaf persons can use to request necessary services such as interpreters. A public entity must have a procedure that a deaf person can use to request service at school system activities, accessible by TDD. TDD-accessible telephone numbers should be clearly identified in telephone directory listings, school system letterhead, and information disseminated about school systems services.

Failure to provide a qualified sign language interpreter or other auxiliary aid or service for a deaf parent or child under these circumstances would be a discriminatory practice.

Legal Question - IDEA and Bus Suspension

OCR said in a 1989 letter of finding that bus suspensions, if the child had been receiving bus service, and if he was prevented from receiving services under a 504 Plan, could result in a significant change of placement. Malinda Maloney, an LRP Attorney specializing in spedlaw, wrote in a memorandum published shortly after the 1997 regs were released, that bus suspensions, under those circumstances, would therefore count against the ten-day time limit. Wisconsin's attorney general also says that bus suspensions "count." http://www.dpi.state.wi.us/dpi/dlsea/een/com99006.html

California, according to its regs, apparently requires sped students to receive alternative transportation for any bus suspension. http://www.pai-ca.org/pubs/504501.htm

In general, however, we are only required to reconvene the IEP team if there has been a significant change of placement, which under IDEA 97 means that the kid has missed more than ten consecutive days. Or if there had been a series of short term suspensions that resulted in a change of placement. So a single short-term bus suspension should not trigger any additional rights based on the federal law.

If there were a significant change of placement resulting from a series of short-term suspensions, the IEP team would have to be reconvened. The options everyone has given were excellent, and I would only add that I would recommend that they be considered within the context of an IEP Team meeting. Oh, and two other options that could be considered (neither original with me}, would include paying the parents to transport the child or contracting with a taxi cab company. I did like Suzan's shadowing option, but if the child's behavior has become that problematic, I'd suggest implementing that strategy within the context of an FBA and BIP developed with parental participation.

Guy

Suspensions/sped students

This one I really love. A bus suspension isn't really a suspension. Prior to 1999, I always thought if a bus suspension kept a sped kid from getting to school, it should count toward the ten days. But (surprise!) I was wrong!!! This is the sort of stuff that principals learn from spedlaw attorneys at their regional workshops, and they just LOVE to show up a PAEC given half a chance. I do not pretend that it makes any sense.

Unless transportation is in the IEP as a related service, we have no legal obligations. I'd suggest working with the parents to find a way to get the kid to school anyway, because I don't know how it would play out in a federal court if a Mom sued us for trying to put her in jail because her sped child was truant as a result of our having kicked him off the bus. But that's just me. Some principals love litigation. In any event, what the feds said in Attachment I to the Final Regulations was:

"Whether 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 is a part of the child's IEP, a bus suspension would be treated as a suspension under ¤300.520 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where all other services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension would not be a suspension under ¤300.520. In those cases, the child and his or her parents would have the same obligations to get to and from school as a nondisabled child who had been suspended from the bus. However, public agencies should attend to whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether bus behavior should be addressed in the IEP or behavioral intervention plan for the child."

Surprised? I was. It's why I love spedlaw. There is always a new surprise lurking around the corner.

Guy

Changes in IDEA

In 1994, Virginia said that if a child's misbehavior was not related to his handicapping condition, then the child was not entitled to FAPE during the period of suspension. The Education Department tried to cut off their funds for 1995; the 4th Circuit said that they couldn't do that without giving Virginia due process.

Despite an initially unfavorable ruling from a federal hearing officer, the 4th Circuit concluded in early 1997 that Virginia was correct--that there was nothing in IDEA (pre IDEA 97) that gave rights to a child who was suspended or expelled due to behavior not related or a manifestation of his or her disability. And they made sure Virginia got all its money. God bless the 4th Circuit.

http://www.ed-oha.org/cases/1994-76-o.html

http://www.law.emory.edu/4circuit/feb97/952627.p.html

The 4th Circuit did see a substantial constitutional issue as being involved, but under the tenth amendment.

"A substantial constitutional question under the Tenth Amendment would be presented were the Secretary of Education's interpretation of the IDEA upheld, as the withholding of the Commonwealth's entire IDEA funding allotment because of its refusal to provide private tutors to the 126 disabled students expelled or suspended for serious misconduct wholly unrelated to their disabilities resembles impermissible coercion, if not forbidden regulation in the guise of Spending Clause condition." (Virginia v. Riley, 4th Circuit, 1997)

Shortly after that ruling, Congress passed IDEA 97 which explicitly gave disabled children a right to FAPE if they were suspended for more than ten days (consecutive). If Congress decides to return us to pre 1997 or even pre 1975 days, I don't see any reason to hope that the courts would overturn those statutes.

The article sent to the Listserv seems to imply that while there are "differences" in the House and Senate versions that the amendments being considered are pretty much the same. As I understand it, they are not.

The two amendments being considered are the Sessions amendment and the Norwood Amendment.

The Sessions amendment follows in its entirety; I only have a summary of the Norwood amendment, which follows the Sessions proposal. The following comments, edited somewhat, were originally submitted by me to LRP's "The Special Educator."

Norwood 's bill and Sessions bill stirred up an incredible amount of hostility from parent advocacy groups. Basically advocacy groups have

been arguing that there should be no changes until the next reauthorization, acting on the general principle, oft times illustrated, that every time Congress does anything they usually make something else worse.

Both bills would undermine disabled children's right to FAPE. Illustrating the complexity of these issues, however, Norwood has been supported by the National School Board Association. http://congress.nw.dc.us/nsba/keyvotes.html I have no reason to believe that they would not support Sessions as well. Furthermore, the bills are not mutually exclusive. There are endless possibilities wherein a compromise bill could include the best (or worst, depending on your perspective) of both proposals.

From an administrative perspective, IDEA '97 disciplinary regulations are a nightmare to enforce. For example, a child is not entitled to services after ten days cumulative, unless a school administrator in discussion with a special education teacher determines some services are needed to ensure that a child continues to meet the goals of his or her IEP and progress in the general curriculum Except, of course, if the ten days result in a change of placement. When is more than ten days cumulative a change of placement? When they constitute a pattern. The regulatory language regarding "change of placement" is gibberish. I think the confusion arose in no small part because OSERS did an end run around Congress. They started out in their draft regs saying that ten days cumulative was a change of placement triggering the child's right to FAPE. Congress objected, saying they only meant to apply the standard in Honig, so OSERS went back to the drawing board. They changed the language. But substantively, they managed to preserve disabled children's rights (although in the process they made sure no one understood just exactly what they were.) Do the regulations tie administrators' hands? OSERS argues that they do not. But in order to show that a child is dangerous, schools must be able not only document an endless litany of complaints against the child, but also show that they implemented positive behavioral instructional strategies. Schools almost never seem (I have no data, just personal observation) to go into that sort of a situation with "clean hands," that is, having followed all of the procedural requirements, dotting every i and crossing every t. OSERS said in their very first satellite transmission regarding the new regulations that if parents and school were agreed, then the rest of the disciplinary language didn't matter. So the canny administrator tries to get an agreement. If the parents are disagreeable, however, that can tie their hands very quickly.

What angers me as a practitioner is the ubiquitous ambiguity in the present regulations. I do not believe it is the underlying right to FAPE that caused this problem, but the overwhelmingly complex and confusing regulatory burden OSERS imposed upon the schools. People fear what they do not understand, and they do not understand those regs.

While I have read enough to know that neither amendment excites me personally, within the context of my professional responsibilities, I do not have to take a stand on which is better or worse since it is unlikely anyone really cares what I think. I do try to provide semi-objective interpretations legislation that will reduce our chances of inadvertently breaking some rule or another. That is not high minded, but it is highly challenging none the less.

Up to this point in time, manifestation determinations were largely symbolic, because basically what we were talking about were semantic differences. If it was a manifestation, then the child could not be suspended, but the school could change his placement as long as it offered him FAPE. If it was not a manifestation, then the school could suspend him, but it had to provide him with services needed to progress in the regular curriculum and meet the goals of his IEP; or, in short, provide FAPE. Either way, the child got served. Parents might prefer to have the alterations in placement or services labeled as a rose ("change of placement") and not an onion ("suspension"), but as long as their child was served, they were unlikely to do much about it (i.e., hire a lawyer and sue us.) These bills, particularly the Session bill, could alter that considerably. A manifestation determination under Sessions with a finding of "no nexus" would have immense ramifications for a child. The upshot is that I would expect to see parents threatening and undertaking litigation much more frequently in this area if the Sessions bill is

passed.

Under the Norwood amendment (as I understood it), the district's rights to suspend a child would not be dependent upon a manifestation determination if the kid brought the weapon to school. I see less possibility for litigation under that amendment as written above. From that perspective, that gives the advantage to Norwood , but under Sessions, some children would still be protected, even if not all children were protected. I am not comfortable at the idea of having gun toting sped kids loose on the streets, a possibility under either bill.

I have grown cynical over the years about Congressmen bearing gifts; more often than not whenever they give us what appears to be a loophole, it invariably turns into a noose. So, at the risk of seeming repetitive, I am most definitely in agreement with my supervisor, who believes that we need to wait and see what Congress actually passes before taking any action. It is not, however, too early for advocates (on one side or the other) to contact their Congressmen about these proposals.

Guy

AMENDMENT NO. 604, AS MODIFIED

Purpose: To amend the Individuals with Disabilities Education Act regarding discipline. At the appropriate place, insert:

TITLE __--INDIVIDUALS WITH DISABILITIES
SEC. __01. DISCIPLINE.

Section 615 of the Individuals with Disabilities Education Act (20 U.S.C. 1415) is amended by adding at the end the following:

``(n) UNIFORM POLICIES.--

``(1) IN GENERAL.--Subject to paragraph (2), and notwithstanding any other provision of this Act, a State educational agency or local educational agency may establish and implement uniform policies regarding discipline and order applicable to all children under the jurisdiction of the agency to ensure the safety of such children and an appropriate educational atmosphere in the schools under the jurisdiction of the agency.

``(2) LIMITATION.--

``(A) IN GENERAL.--A child with a disability who is removed from the child's regular educational placement under paragraph (1) shall receive a free appropriate public education which may be provided in an alternative educational setting if the behavior that led to the child's removal is a

manifestation of the child's disability, as determined under subparagraphs (B) and (C) of subsection (k)(4).

``(B) MANIFESTATION DETERMINATION.--The manifestation determination shall be made immediately, if possible, but in no case later than 10 school days after school personnel decide to remove the child with a disability from the child's regular educational placement.

``(C) DETERMINATION THAT BEHAVIOR WAS NOT MANIFESTATION OF DISABILITY.--If the result of the manifestation review is a determination that the behavior of the child with a disability was not a manifestation of the child's disability, appropriate school personnel may apply to the child the same relevant disciplinary procedures as would apply to children without a disability.".

SEC. __02. PROCEDURAL SAFEGUARDS.

Section 615 of the Individuals with Disabilities Education Act (20 U.S.C. 1415) (as amended by section __01) is amended by adding at the end the following:

``(o) DISCIPLINE DETERMINATIONS BY LOCAL AUTHORITY.--

``(1) INDIVIDUAL DETERMINATIONS.--In carrying out any disciplinary policy described in subsection (n)(1), school personnel shall have discretion to consider all germane factors in each individual case and modify any disciplinary action on a case-by-case basis.

``(2) DEFENSE.--Nothing in subsection (n) precludes a child with a disability who is disciplined under such subsection from asserting a defense that the alleged act was unintentional or innocent.

``(3) LIMITATION.--

``(A) REVIEW OF MANIFESTATION DETERMINATION.--If the parents or the local educational agency disagree with a manifestation determination under subsection (n)(2), the parents or the agency may request a review of that determination through the procedures described in subsections (f) through (i).

``(B) PLACEMENT DURING REVIEW.--During the course of any review proceedings under subparagraph (A), the child shall receive a free appropriate public education which may be provided in an alternative educational
placement.".

Summary of Norwood amendment

"Each State receiving funds under this Act shall require each local educational agency to have in effect a policy under which school personnel of such agency may discipline (including expel or suspend) a child with a disability who carries or possesses a weapon to or at a school, on school premises, or to or at a school function...in the same manner in which such personnel may discipline a child without a disability...Notwithstanding any other provision of Federal law, a child expelled or suspended shall not be entitled to continue educational services, including a free appropriate public education, required under Federal law during the term of such expulsion or suspension, if a State...does not require a child without a disability to receive educational services after being expelled or suspended."

Changes in IQ--Definitions

The United States Constitution guarantees equal opportunity, not equal results.

OCR in its work on High Stakes Testing defines "bias" as "Bias-In a statistical context, a systematic error in a test score. In discussing test fairness, bias may refer to construct under representation or construct irrelevant components of test scores. Bias usually favors one group of test takers over another."

"Systematic error-A score component (often observed indirectly), not related to the test performance, that appears to be related to some salient variable or sub-grouping of cases in empirical analyses. This type of error tends to increase or decrease observed scores consistently in members of the subgroup or levels of the salient variable. See Bias."

It goes on to say that one of the issues considered in federal courts included "The significance of any fairness problems identified, including evidence of differential prediction criterion and possible cultural biases in the test or in test items."

They go on in the document to cite the Joint Standards, which says "In a statistical context, (bias refers to) a systematic error in a test score. In discussing test fairness, bias (also) may refer to construct under representation or construct-irrelevant components of test scores that differentially affect the performance of different groups of test takers."

Although disparate impact raises a legitimate and reasonable concern of bias, it is not sufficient to establish bias. Of course in Larry P. v. Riles, the 9th Circuit found there was insufficient evidence establishing the validity of IQ tests to place black children in mentally retarded classes (1984). There have only been a couple of other cases on the same topic, however, and none of the other courts reached the 9th Circuit's conclusion. Factors the courts considered included data that showed the tests predicted achievement equally well for each groups; data showing that factually there was a lack of item or language bias; and data showing that race of examiner made no significant difference in outcome (Sattler, 2001).

I do not know why these differences exist. I do know that the instruments we are using can be defended. Even when looking at achievement tests, where the difference in impact is even greater in high stakes testing states, courts have thus far been reluctant to conclude bias exists simply from the fact of disparate impact. I do not believe the "final word" has been heard in that area, but neither do I anticipate any radical changes from what we have already seen.

A major reason why the focus of advocates, educators, and legislators has shifted from the psychologist and his/her test is that research makes it clear we do not see the child until he or she is experiencing problems. This perspective is different from that argued in Larry P., wherein the court at least considered the proposition that our test results caused children to be placed in sped classes, thereby reducing teacher expectations for their performance, thereby decreasing children's expectations for themselves. The fact was and is that lower expectations (whatever the reason) were there long before we ever saw the children. It's my opinion based on the above that our tests do not create a new reality for these children; they simply reflect it.

And if our tests are in fact correctly reflecting that reality, then it is not the test that is biased based on the definitions above.

Guy

Confidential records

FERPA rights are a regular education responsibility. There is no additional burden on special education to keep sped records confidential from regular education teachers.

We maintain separate folders for sped records because our sped teachers are responsible for maintaining the files for audits. We don't want them mixed up with other records, and we certainly don't want regular education teachers mucking with them. But that's not statutory.

When we do our evaluations, our office sends a sheet for the cum file saying the kid was tested, the date, and where the reports may be found.

I would hope that schools are providing regular education teachers with more than a listing of educational goals. The burden on regular education is to provide all of the modifications and accommodations listed in the IEP, irrespective of whether they were at the meeting or not. Failure to do so may not lead to the same outcome as in Doe v. Withers (where the teacher was shafted), but it could be expensive for the district nevertheless.

The entire record needs to be kept, in my opinion, for at least three years even for non placements. If parents request that it be destroyed before then for a non identified child, keep a record of the request. A non placement decision is an adequate defense, for example, if a parent requests stay put for her suspended child on the grounds that she referred the child previously and therefore the school knew or should have known the student was disabled.

Also, having a report on file doesn't count for diddly if the parents were not given their rights. You test the kid. Two and a half years later, the parents come back and say, "We put our kid in residential placement. We have an IEE that says he was handicapped. We want reimbursement." Well, in most cases, you can tell them to stuff it. First of all, they were supposed to tell you first. Second, in most states the suit would be time barred. Assuming, of course, you had given the parents their rights. The parents will argue, "We never knew we had due process rights until a month ago." If your paperwork shows that you had a consent for testing where they signed saying they'd received those rights, you've got something to work with. If you don't, your only hope is that the hearing officer believes in your integrity more than he believes in the parent's integrity. "Gee, your honor, we always give parents their rights. We just burned the record to save file space." Good luck.

I had responded to Jules off listserv about transcripts, and while I was partly right, I was partly wrong. This is a murky area, as California discovered last spring when it was sued for allegedly failing to provide modifications and accommodations on high stakes testing that would not invalidate the test.

Regional OCR offices have issued differing interpretations, but the most authoritative appears to be the 1996 Runkel letter. Unfortunately, the standards set forth below are still overly broad and subject to interpretation:

> "(1). Eligibility for honor roll and academic awards cannot be denied automatically on the basis of disability status under IDEA or Section 504. Below-grade level performance should not automatically exclude a student from consideration.
>
> (2) Notations on permanent transcripts are only appropriate to designate modified curriculum (i.e. reduced mastery criteria/modified essential elements) - not instructional delivery modifications.
>
> (3) School districts can establish eligibility criteria for class ranking (i.e. weighted classes) as long as IDEA or Section 504 students are not arbitrarily excluded. The system must be based on "objective rating criteria" and special education or modified courses should not be weighted more lightly automatically. (p.21)"

One thing seems clear to me, at least, and that is if the course requirements are the same, if the child is required to pass the same end of course test, and all that is being modified is the method of instruction, then it would be discriminatory to imply that there was something "special" about a special class.

With respect to the resolving any ambiguity over the marking of transcripts or recording grades, there is a 1993 letter to a counselor at

http://web.indstate.edu/soe/iseas/grading1.html

which is also on point but still vague and which certainly cannot be counted upon as carrying the force of law. Still, asking the questions (and getting the answers) might be helpful in at least giving a glimmer on how OCR might view a school's transcript policy. I gather it is something they would address on a case by case basis. I hate being vague, but the vagueness is not of my creation.

With respect to the last question, asking about workshops on real law v. scary law, the fact is I've always thought all spedlaw was scary. It doesn't matter how well you know the law, there are hardly ever any "slam dunks" any more. School attorneys would never let their clients go into expensive litigation if they knew they were going to lose. (Not ethical ones, anyway.) But lose schools do, more than 40% of the time.

LRP runs the best workshops around, and their national workshops are absolutely wonderful. Go to

http://www.lrpconferences.com/natlinst/index.html

for information on the 23rd annual conference. Wonderful. But still scary. Some well known spedlaw attorneys also offer workshops covering more limited areas; I would not turn down the chance to attend one, especially if their resumes include presentations at LRP. While there are occasionally a few losers, generally LRP only employs the best of the best. But you're still only getting one lawyer's perspective in those settings. LRP offers its conference materials at

http://www.lrpconferences.com/materials.html

While the tapes and reference materials are excellent resources, they're not a substitute for being there. Still, we usually buy them if the budget won't allow someone to attend.

Guy

Determining eligibility

Some of your past comments on the Listserv sounded as if they were lifted from this letter from Thomas Hehir to Wisconsin in 1996. This is proving to be an educational exercise, at least for me. http://web.indstate.edu/soe/iseas/Assess12.html (You may already have this, but I did not see it on your website.) Excerpts from the OSEP letter follow: "States may establish reasonable criteria for determining whether students need special education and related services, so long as individual determinations are made for each student and the full range of the student's special educational needs is considered. However, the State's criteria may not (1) serve to diminish adherence to Part B's evaluation procedures; or (2) operate to exclude any students who, in the absence of the State's criteria, would be eligible for services under Part B. AND EVEN MORE INTERESTING: In determining whether a child's impairment adversely affects educational performance, the multidisciplinary team must consider non-academic as well as academic areas. Therefore, the assessment is more than the measurement of the child's academic performance as determined by standardized measures. While State operational criteria are useful in determining whether a child needs special education and related services because of an impairment, the multidisciplinary team must have the ultimate authority to make such determinations using their professional judgment based on the child's evaluation.

I'm still curious about the ruling against a 50% discrepancy rule in Riley v. Ambach. Apparently, the case went to the 2nd Circuit Court of Appeals in 1981, but that was before court decisions were being posted on the Internet. (I've found the 2nd Circuit case cited as a precedent establishing the guidelines under which administrative appeals must be exhausted before coming into federal court.)

Guy

From Ron Dumont RE: Ambach.

Guy

I believe that Ambach persuaded the folks writing the law to leave it in as a "guideline." John and I call it the "presumptive clause" of the law. "If a child has a 50% discrepancy, you can presume them guilty (of being LD). If they don't have a 50%, you cannot exclude them solely on that basis."

This past year, the Part 200 regulations were re-written. Much public debate was supposed to be involved. At one point NY had posted on their web site this portion of the law with the 50% clause crossed out. Unfortunately when they came out with the final product, the clause was still there.

John and I are amazed when we do workshops and ask for a show of hands for how many people have ever excluded a child based on a lack of a 50% discrepancy. We always find lots of hands going up despite the fact that Riley v. Ambach was done in 1982! Oh well

Ron

Guy M. McBride wrote:

I just read Riley v. Ambach (1980) on your website for the first time.

There has certainly been a lot of water under the bridge since that decision. No court would invoke the 11th Amendment in denying a parent compensatory educational costs, and Congress even allows parents now to recoup attorney fees. Also, while I occasionally do see these cases reported in the TSE, most lawyers would know to exhaust administrative procedures before hitting the federal court alleging a 504 claim--unless, as in this case, administrative procedures would have been clearly futile and unavailing of remedies.

I was a school psychologist from 1972 to 1979 in the Rocky Pt., NY, public school system. This case would have hit pretty close to home, had I stayed. In 1980, due process lawsuits still seemed just a dim threat. Oddly, I do not remember ever hearing about a 50% discrepancy rule, although as I read this case, I should have been testing for it in 78-79. If I was, I do not remember what criteria I was applying.

Even more oddly, despite Riley v. Ambach, NYS appears to have continued using the 50% rule into the present. How did they manage to do that, given this 20 year old district court decision? I would really like to know how a state education agency could ignore a federal court.

Discrepancy scores

The original question was posted on the Trainers' Listserv because "the discrepancy model" does not exist. Instead, there are multiple models. IDEA '97, of course, says no one procedure may be used to determine any child's eligibility, and OSERS/OSEP are on record as saying as no single formula may be used. However, the question is, "Is one discrepancy model better than another?" Frank is basically saying that none of them are worth a bucket of warm spit. Charles is saying if only we all switched to Naglieri's test or the K=ABC we'd get different results but offers no evidence to suggest that the children identified would be more deserving/needy/"really LD" (or the children disenfranchised less deserving/needy/"really LD.")

North Carolina is debating its age-old fifteen point discrepancy formula, which basically says that if there is a 15 point discrepancy, you can consider the kid for services if it's due to intrinsic processing problems and the kid needs sped. { Inherent or intrinsic processing problems must be documented, but there is no burden to test for them; they can be inferred from observational or test data gathered both prior to and after the referral.)

We're stuck with federal criteria which OSERS interprets as requiring a severe discrepancy between achievement and ability. The terms severe, achievement, and ability, however, are undefined.

So I'd like to come back to the original question. Do you think North Carolina's procedures are just hunky dory, and if so, why? Or is there a better way we should be using to document discrepancies, and if so why? Or do you all agree with Charles that the only thing we need to do is switch to another test? North Carolina, like several other states in the recent past (Tennessee and California, I believe) is seriously looking at ways to improve its regulatory guidance. So the advice you offer here could have an impact not just on how one or two psychologists on the Listserv do business, but on children in every school system in our state.

Guy

North Carolina Criteria

"Specific Learning Disabled. Specific learning disability is an inclusive term used to denote various processing disorders presumed to be intrinsic to an individual (e.g., acquisition, organization, retrieval, or expression of information; effective problem-solving behaviors). For the purpose of special education services, school-age children classified as learning disabled are those who, after receiving instructional intervention in the regular classroom setting, have a substantial discrepancy between ability and achievement. The disability is manifested by substantial difficulties in the acquisition and use of skills in listening comprehension, oral expression, written expression, basic reading, reading comprehension, mathematics calculation, and mathematics reasoning. A learning disability may occur concomitantly with, but is not the primary result of, other disabilities and or environment, cultural, and/or economic influences. [Ref. 1999, Procedures, .1501, A., (11)].

H. Specific Learning Disabled.

(1) Eligibility Criteria. The following criteria shall be met in identifying school-age students as learning disabled and in need of special education:

(a) after at least two invention strategies have been implemented in regular education or other programs, the student still exhibits learning difficulties;

(b) achievement measured in age standard score units is l5 or more points below intellectual functioning;

c. the disability is not primarily the result of sensory deficits; motor deficits; mental disability; behavioral/emotional disability; or environmental, cultural, linguistic and/or economic influences. If a student's learning problems can be attributed to any of these exclusionary factors, then the primary disability is not a learning disability;

(d) the student exhibits characteristics of learning disabilities consistent with the definition. [Section .1505, C. (8)]

Discrepancy Determination. Subtract achievement age standard score from the IQ score, assuming both measures have a mean of 100 and standard deviation of 15. If the test does not have a mean of 100 and standard deviation of 15, statistical procedures shall be implemented. Determine if the discrepancy is 15 points or more between achievement and ability. [1505., C., 8(c) iii]

When there are verbal/performance IQ discrepancies of at least 20 points on the Wechsler Scale, the higher scale IQ may be used to determine the achievement-ability discrepancy providing there is evidence that the higher score accurately reflects the student's intellectual functioning. Because of the importance of the intellectual assessment to the identification process, group intelligence tests, unjustified prorated scores or extrapolated scores and abbreviated forms shall not be used. [1999 Procedures, 1505, C.(i)]

In cases where the multidisciplinary team determines that assessment measures did not accurately reflect the discrepancy between academic functioning and intellectual functioning, appropriate documentation must be used to verify the discrepancy. If the multidisciplinary team determines that the assessment measures did not accurately reflect the discrepancy between achievement and ability, the team shall state in writing the assessment procedures used, the assessment results, the criteria applied to judge the importance of any difference between expected and current achievement, and whether a substantial discrepancy is present that is not correctible without the provision of special education. [1999 Procedures, .1505, C. (8) (c) (iii)]

Disproportionality in Special Education/SLD

The reduction of disproportionality was a key concern of Congress in writing IDEA '97, but it is the Office for Civil Rights that appears to have taken the lead in addressing this issue.

I do not have the experience you are soliciting. In general, however, disproportionality has been cited as a major problem in the mentally retarded and emotionally disabled categories, with the former, however, drawing special concern. The federal statute said,

> (8)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.
>
> (B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.
>
> (C) Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart.
>
> (D) Although African-Americans represent 16 percent of elementary and secondary enrollments, they constitute 21 percent of total enrollments in special education.

I previously submitted a question along similar lines to this Listserve; one respondent said that their school system had intensified efforts to increase the effectiveness of interventions in the intervention or assistance team prior to referral. My understanding is that the efforts resulted in reduced referrals, but unfortunately the proportionality held. Someone else indicated that in reaching a consent agreement, their district had agreed to reevaluate all the native Americans enrolled in their school system; the reevaluations, however, were confirming what had been found in previous assessments, so OCR's recommendations for reassessment were apparently not helpful in reducing the disproportionality for that group.

Wake County in North Carolina was investigated based on allegations of disparate impact in several areas (disciplinary actions, I believe, were also a concern) by OCR last fall, and I know they signed a consent

agreement--primarily, I inferred, because some of its schools were experiencing significantly more disparate impact than others. I have not been able to find the details of the agreement on the Internet, nor do I know if the actions they undertook have been effective.

I do think it would be important to determine whether or not the over representation you cite was a consistent phenomenon across all schools in your district; or particularly problematic in some. If the latter were to be the case, I think it would be prudent to focus internally on what the teams were doing differently as a starting point. (I think that's what OCR would do.)

OCR has said that disproportionality does not in and of itself prove discrimination. But this is a major area for them, and providing a convincing defense that YOUR disproportionality is not discriminatory could be problematic. Unless a school system offers up an agreement that is satisfactory to the complainant, these investigations have been known to run on for months with no end in sight.

It is important to understand that disparities in student performance based on race, national origin, sex, or disability, alone, do not constitute disparate impact discrimination under federal law. Furthermore, nothing in federal law guarantees equal results. (OCR, Draft High-Stakes Decisions, 2000, p. 60.)

Theoretically, even if your practices do result in disparate impact, you would be able to justify it if the tests you are using serve a legitimate educational interest--assuming the complainant can't come up with a way to accomplish the same goals with less disparate impact.

Where the use of a test results in decisions that have a disparate impact on the basis of race, national origin, or sex, the test use causing the disparity must significantly serve the legitimate educational goals of the institution.168 This inquiry is usually referred to as determining the "educational necessity" of the test use or determining whether the test is "educationally justified."169 The test need not be "essential" or "indispensable" to achieving the institution's educational goal; 170 rather, the educational institution must show a manifest relationship between use of the test and the institution's educational purposes. (OCR, Draft High-Stakes Decisions, 2000, p. 3)

Though that sounds simple enough, this can be a tough row to hoe, as more than one district has discovered.

I wish I had a solution, because this is a nation-wide dilemma.

Guy

Reference: Making High-Stakes Decisions for Students

http://www.ed.gov/offices/OCR/testing/TestingResource.pdf

Ed. code websites

Although it is extremely useful to download a searchable copy of the regulations, the sheer volume of the material is overwhelming. It did not need to be that way; it's just that OSERS is apparently run by people who love computer games, so they gave you clues at the beginning of the book that lead you to clues at the end of the book, but if you don't read what went in between, you get headed off in a totally wrong direction. Anyway, they do provide cheat sheets, as it were, so if you have a specific problem, they pull the material from all the different parts together and give you hints on how they should be resolved. Mostly, it's stuff you could have found for yourself, but when it's all pulled together in one place, sometimes what you had read several times before takes on a whole new meaning. Even they are not all in one place, however.

For example, if you want to find OSEP's new documents on IEPs, (a handy dandy little document for helping train lateral entry sped teachers who never heard of IDEA), you would need to go to:

http://www.ed.gov/offices/OSERS/OSEP/

If you wanted to view their overheads on the letters they've sent out trying to explain the regulations, you could click on the yellow IDEA 97 button. Then you'd look for OSEP overheads and click on that. However, there are some other really neat documents on that IDEA 97 page, including one that very clearly explains your obligations to private schools in (as I recall) less than 30 pages. But I might be mistaken; it may run longer. Also, you would want to scroll down to the very bottom, past all the irrelevant junk, to a part called "Fact Sheets." Or just click on

http://www.ed.gov/offices/OSERS/OSEP/factsheets.html

There you can download their explanations of terms like: Functional Behavioral Assessment; Positive Behavioral Interventions and Supports; School wide Approaches to Behavior; Social Skills Instruction; and Youth with Disabilities in the Juvenile System

Before you do that, however, you might want to check out their "new overheads" on the OSEP page. (Tip: if you aren't planning to actually use them as overheads, download the text versions. They print out using about half the paper.) They have new ones available on ESL and Transportation.

And for more basic stuff, check out

http://www.ed.gov/offices/OSERS/IDEA/regs.html

There are a whole bunch of handouts you can print out there, as well. There's also a Q and A on discipline. There is no discernible logic to the process, and it is almost impossible to put in flow chart form without at a half dozen explanatory footnotes. But if you print it out and give it to all the administrators responsible for discipline, then you can at least say, "Well, I TOLD them what to do. It isn't MY fault they didn't do it. Here, look! I gave it to them in writing!" That should save you from a Section 1983 lawsuit, at least.

Then push all the other buttons at the top when you're done; there's interesting information under all of them. Eventually, they will take you to all the "old" overheads and materials they developed to train people on IDEA 97. Or, for the text version, try clicking on:

http://www.nichcy.org/Trainpkg/toctext.htm

Oh, and smile. This is your life.

Guy

FBA/weapons

The disciplinary regulations are incredibly complicated. I mean incredibly. And they don't make a whole lot of sense. But some things are clear.

If a child does not have a disability then an FBA and BIP are not required.

If a child DOES have a disability, then the regulations require the school to convene the IEP team to conduct an FBA and a BIP, if one does not exist, after ten days cumulative suspension, or to revise the BIP if one does exist. The school is supposed to do that within ten days after suspending the kid for more than ten days, and the team is supposed to develop an "assessment plan" at that meeting. When the FBA and BIP are supposed to be in place, I am not altogether clear, but I assume as soon as possible.

A school administrator is also supposed to consult with the child's special education to determine if additional services are needed in order to insure that the child continue to progress in meeting his IEP objectives and progress in the general curriculum. (I'm paraphrasing, always dangerous, because there's a danger my language might be misread to mean something not in the regulations. That's why I always advise people to READ THE REGULATION YOURSELF. Don't take anybody else's word on it because, even if that person is right, you might not be correctly understanding him. Did I confuse you? Good, because I'm always confused about this stuff.)

There are at least two places where the rights of kids suspected of having a disabilty are addressed by OSERS/OSEP. One is Section 300.527. In that section, it says that child may assert his rights (note the "may" and note it is the "child" not the school that is referenced) if the school had knowledge or should have had knowledge that the kid had a disability. Then it goes on at some length to explain when the school should suspect (had knowledge) that a child had a disability.

> (b) Basis of knowledge. An LEA must be deemed to have knowledge that a child is a child with a disability if--
>
> (1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;
>
> (2) The behavior or performance of the child demonstrates the need for these services, in accordance with Sec. 300.7;
>
> (3) The parent of the child has requested an evaluation of the child pursuant to Secs. 300.530-300.536; or
>
> (4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or

performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system

http://www.ideapractices.org/searchregs/300subpartE/Esec300.527.htm

Court action in this area has been limited, I think, because I've found nothing at the circuit court level or above. It does seem clear that while the threshold is fairly low, it is not non existent. If, for example, Johnny, a kindergartener had been referred to the office 31 times for misbehavior, a court might conclude the school should have had a suspicion. If on the other hand a parent of a tenth grade child had told a third grade teacher that she thought her child might have a disability, the court almost certainly would not entertain that as conclusive evidence that the behavior of the child demonstrated a need for special educational services under Section 300.7.

Sammy is 11 years old. His brother is in a gang. He has always gotten good grades, got along with the other kids, is liked by his teachers, but he wants to join his brother's gang. He wears the gang colors to school and gets suspended. If that's the ONLY concern, the child might be maladjusted, but it is unlikely (different judges in different courts might disagree) that anyone would ever classify him as disabled. (Wearing gang colors is not a protected free speech activity; not even the ACLU would defend it.)

Springer is a teenager. Again, same profile. He gets in with fast friends, he starts experimenting with drugs, he gets suspended from school, and he even gets depressed as a result. No reason to suspect him of having a disability either. No rights under 300.519 ff. No right to private school tuition reimbursement. Bad conduct does not establish eligibility. Not even the depression establishes eligibilty, because there's no nexus between it and the child's school problems. The school problems came first as a result of bad conduct or, if you prefer, bad choices. (Springer v. Fairfax, 4th Circuit, 1998)

I had not gotten into this discussion, partly because I'd addressed it before, but mostly because it is such a complex area--change a few facts (a history of bad grades, a disciplinary record as long as your arm, a different judge, Mom had written a letter to the teacher four weeks earlier saying she thought her kid was emotionally disturbed and wanted him tested) and the outcome could be different.

But I think you're missing the forest for the trees. While we have a Child Find obligation (and could be vulnerable if we totally disregard a child's behaviors, sweeping them under the rug because we don't want him to have any protection, to a subsequent law suit for private school tuition reimbursement), the main burden under the law for asserting the child's rights falls to the parent. If a parent is concerned, s/he's going to be mostly concerned about getting the child services (i.e., getting him back in school or, failing that, getting him instruction at home or in an alternative setting). The school's main concern should be in getting the child referred and tested as soon as possible to determine if he or she is or is not eligible. The disciplinary regulations are incredible complicated even for a disabled child. Trying to apply those rights to a non identified child to me seems like a nightmare. (How do you determine, for example, if a behavior is related to or a manifestation of the child's disability, if you're not sure he's got a disability?) Section 300.527 doesn't say that the kid's just got a right to FBA and BIP--it says the child may assert all of the rights under that section--including, one would assume, the right to stay put. You just don't want to go into a hearing without any assessments backing you up.

Oh, I said that there was another place where OSERS/OSEP addressed the issue, and that's in its Fact Sheets. The language there taken out of context could be misinterpreted to mean that all students should be getting an FBA/BIP, "The Individuals with Disabilities Education Act (IDEA) requires that, at a minimum, the FBA be conducted when disciplinary sanctions result in extended periods (i.e. either before or not

later than 10 business days after either the first removal beyond 10 cumulative school days in a school year or commencing a removal that constitutes a change in placement) in which a student is removed from school" But they just left out the word "disabled" before "a student." Section 300.527, which has the force of law, is quite explicit in limiting the impact to disabled children.

If you do not believe that a child has a disability, then do nothing.

If you do suspect that a child has a disability, then refer him to your Child Find services or school psychologist. At least twelve states, I know, have some sort of pre-intervention teams. In those states, it would be appropriate to develop some sort of behavioral plan as a prereferral intervention. You need not call it an FBA/BIP. The most important Fact Sheet that you should be looking at, however, is not the one on FBA's and BIPs but the one on PBIS. Whether one is going for a 45 day extension in a due process hearing or a Honig injunction in court, IDEA 97 requires the hearing officer (and courts established the precedent) to look at what the school has done to help a disabled child. Positive behavioral instructional supports are referenced more than twenty times in the regulations. All too often I see behavioral plans that basically mimic the system's Student Code of Conduct--"upon throwing a spitwad the third time, Johnny will be administered thirty lashes in accordance with the school's disciplinary policy." Courts will consider the school system's usual litany of complaints ("He's as mean as a snake, your honor, and here's a list of all the awful things the toddler did") but then they're going to ask, "What did you do to help this child?" If your answer is, "Say what?" you're probably not going to prevail. (Oberti v. Board of Education, 3rd Circuit, 1993). http://law.uark.edu/arklaw/libraryr/reserve/negocomp/oberti.html

There's not a lot of good caselaw here, but I've appended a summary following.

Guy

Rodiriceus L. v. Waukegan School District , No. 60, (7th Circuit, 1996.) In this pre-IDEA 97 case, the court said that a "child previously diagnosed as disabled is not entitled to preliminary injunction under stay-put provision to prevent expulsion where school officials had neither knowledge or reasonable suspicion to based rational decision that child was in fact disabled and not one single individual, teacher, guardian, parent, or school official proposed or suggested that child needed special education." Although the decision favored the school, the language of this 7th Circuit case also laid the foundation for the wording in IDEA '97 as to when a district would be deemed knowledgeable that a child had a disability.

Hacienda La Puente Unified School Dist. of Los Angeles v. Honig, 9th Circuit, 1992; Ashland School Dist. SEA OR 1998 Ruling on Pre Authorization Law. Even before IDEA '97, this decision took into account whether facts such as a parent's written concerns or requests for evaluation, a child's poor school performance, and statements made among staff persons were indicative of reasonable grounds to suspect disability. IDEA '97 Final Regulations (300.517(b))limited the application of the law only to those situations when teachers make their remarks to other personnel who are responsible for child find or special education referrals in the agency.

Corpus Christi Ind. Sch. Dist., IDELR 41 SEA TX 1999. As this Texas hearing officer noted, "the threshold for finding that a school should have suspected a disability is a relatively low one." In that case, a kindergarten child had been referred 31 times to the principal's office, the system had not referred him, and the officer found for the parents.

Sonoma Valley Unified Sch. Dist. 31 IDELR 153 SEA CA 1999. The knowledge that a child was doing poorly academically may not in and

of itself necessarily constitute basis of knowledge of disability. (Finding for the school.)

Hoffman v. East Troy Community Sch. Dist., 29 IDELR 1074 (E.D. Wisconsin 1999). In a Wisconsin district court ruling with similar features to the Sonoma Valley case above, parents were denied tuition reimbursement--but only after hearing officer had awarded the parents nearly $100,000! The parents had contended that the school "should" have known there child had a disability because, among other things, he fell asleep in class and was performing poorly (but had passed all but one of his courses at year's end.) The findings of the court were: 1. Parent appealed an administrative decision and claimed that the school district had violated IDEA by failing to identify his son as having a serious emotional disturbance that required special education and related services. Parent sought reimbursement for placement in a private residential facility. Court granted the district's motion for summary judgment. 2. Held: The preponderance of the evidence shows that the district had no reasonable cause to believe that the student had exceptional educational needs. His most serious problems were sleeping in class and declining grades. The district's commitment to pre-referral intervention was appropriate. 3. Held: Student's parents were not adequately informed about referral and evaluation procedures, but this procedural violation did not result in a denial of educational benefit to the student, nor was it harmful or serious enough to warrant reimbursement, especially in light of the equitable consideration that the parent withheld information about the student's problems.

The most important point to notice in the above ruling is that the federal judge did not discount the argument that a child might be entitled to services if the district should have known he was disabled and did nothing about it; only after examining the relevant facts did he conclude that the prereferral interventions were appropriate. Neither did the judge dismiss the argument that the parents should be reimbursed because they had not been informed of their rights. Instead, he carefully weighed the school's failure to inform them against the parents' failure to inform the school of the seriousness of their child's problems. If the facts in that regard had been different, the same parent arguments might have prevailed.

IDEA '97 imposes a heavier burden on parents seeking tuition reimbursement to give the schools prior notice before seeking tuition reimbursement, but none of those burdens would be applicable if the parents had not been given their rights in writing. Thus the failure to provide parents with their rights would significantly narrow the grounds upon which schools could argue their case under IDEA '97, even if it did not strengthen the parent case.

While the above citations offer some guidance as to how the IDEA '97 Regulations are being interpreted, none of the cases would be considered determinative in my Circuit (the 4th.) Different courts in different circuits may interpret the same facts differently, but the caselaw cited above could nevertheless still be persuasive.

Is an FBA/BIP required after a manifestation determination?

Legally, FBA/BIPs where the behavior was a manifestation of the disability are quite clearly required.

According to Perry Zirkel, Iaccocca professor of education at Lehigh University, and an expert in spedlaw, "the statute and final regulations do not clarify" whether an FBA/BIP are required if the behavior was not a manifestation of the child's disability. However, his recommendation, similar to Susan's, was to do it. (LRP's TSE, May, 1999, "Discipline Under the New IDEA Regs")

That makes sense because the law and regulations are clear in saying that if a disabled student is suspended for more than ten days cumulatively (whether it results in a change of placement or not), then an "assessment plan" must be developed within ten business days. (The BIP would follow completion of the FBA as soon as possible.) Since a manifestation hearing need not be held unless the school believes that there has been a change of placement, logically (and logic is a poor substitute for a knowledge of the law, I realize) one might reasonably conclude that the FBA/BIP would be required irrespective of the manifestation determination. Since at least some judges must be assumed to be reasonable, it's always better to be safe than sorry.

Whether there was a pattern of behavior or a single incident is irrelevant to the burden placed upon the IEP team under the regulation.

If the behavior differs from the behavior addressed in the original BIP, would the BIP be considered inappropriate?

If the child has a BIP, then the team must meet within ten business days to review and modify the plan and its implementation, as necessary, to address the precipitating behavior. So the question the team has to address is whether or not there needs to be any changes in the plan to make it appropriate. I have seen little (okay, no) case law on FBA/BIPs, but it seems to me that the team needs to decide that on an individual, case by case basis. Paraphrasing OSERS, if the parents are on board and in agreement with your plan, then you probably don't have to worry about it, but the team would still have to meet as I read the regulations to complete that review.

If the parents have a complaint about the plan, then I'd suggest (and this is just me) you do three things. First, review the plan and make sure you believe it to be defensible, i.e., is it written to address the child's behavioral problems, does it include positive behavioral instructional supports (PBIS), and IS IT BEING IMPLEMENTED in the settings where the child is having problems? Second, keep good data on the plan's implementation and its impact on the child's behavior. Third, share that data with the parents, and assure them that if the plan is not effective, the team will be more than willing to reconvene and readdress the issues.

The case law I'm seeing reported does not (as I noted above) deal specifically with FBA/BIP's, which I'd predict would be more of an issue when seeking a 45 day emergency placement from a hearing officer due to the child's dangerousness or in seeking a more permanent Honig injunction from a judge. I've summarized and paraphrased a review by Melinda Baird, Esq (copyrighted 2001).

Guy

Although not exactly on point, if you're interested in discipline cases, these are some cases you might want to try to track down:

Balbi v. Ridgefield Public Schools, 33 IDLER 97, (Conn.Sup. Ct 2000)--Parents prevailed when they contended that the school district should have treated this child, suspended for threatening another student with a nice and stealing personal property, as a sped kid even though he'd been previously dismissed from the program.

Board of Education of Frederick Cty v. J.D. III, 33 IDELR 182 (4th Circuit.) The school prevailed (God bless the 4th Circuit) even though the parents produced evidence showing their ninth grade child was ADHD, had bipolar disorder, was OCD, and abused marijuana. The kid passed all his honors courses, the school and parents disagreed over whether they had sought a sped evaluation, and when the kid was hospitalized, the parents placed him in a private boarding school in Connecticut. The H.O. found for the parents when the sought private school tuition reimbursement, but the district court reversed saying that the child's problems were caused by social maladjustment. The 4th Circuit confirmed. (I can't properly express the warm glow I get when discussing the 4th Circuit in simple words.)

Richland Sch. Dist. v. Thomas P., 32 IDELR 233 (W.D. Wis 2000.) The parents won this one, because the school found in a manifestation hearing that the fact that this ADHD kid drove a getaway car for several other students who did about $40,.000 worth of vandalism was not related to his disability. The school psychologist actually got up and testified that because the kid chose not to enter the building with his friends, that showed he was in control of his behavior (and not therefore impulsive.)

Demers v. Leominister Sch. Dept, 32 IDELR 201 (D. Mass. 2000) Split decision. This is really a helpful case, because it doesn't really bear on discipline. A sped kid drew a really violent, nasty picture (projectives, anyone???) and school suspended him, demanding the parents get him psychiatric care. Parents filed under Section 1983, which the court threw out, telling them to go through due process. I won't bore you with Section 1983, but parents who have tried that route have never been successful.

Randy M. v. Texas City ISD, 32 IDELR 168 (S.D. Texas 2000) An LD kid tore the breakaway pants off a female student. The school didn't think that was related to the child's learning disability, and while the parents disagreed, they never offered evidence to contradict that school's case. Judge found for the schools.

Parent v. Osceola Cty. Sch Board, 32 IDELR 144 (M.D. Fla. 1999). This kid slashed another kid with a box cutter. In this case, the team found no relationship between the behavior and the disability because the kid planned to bring the weapon to school. They suspended him, then sent him to an alternative school where he made progress. The school decided to continue him at the alternative school for another year, and that's when Mom got her attorney. The court, finding for the school, said that the alternative school provided benefit, that his disruptive behavior posed a danger to others, the kid had engaged in repeated acts of misbehavior, and they thought he'd still be a danger to himself and others if reinstated. While personally, based on the facts presented, I'd have thought the Manifestation determination to be a wrong one, the fact that the school provided appropriate services from which the child received benefit appeared to be the winning factor here.

Brown v. Ramsey, 33 IDELR 216 (E.D. Va. 2000). Basically a Section 1983 discipline case in which the parents challenged a basket hold technique applied by school personnel. The parents couldn't show the child had ever been hurt by the technique (although they claimed it choked him), the court dismissed a PTSD claim by the parents (Post Traumatic Stress Disorder for those of you without a sped acronym dictionary) saying there was "no legal support for this type of prove in corporal punishment cases." The federal court noted that the threshold for establishing a Constitutional claim for excessive corporal punishment was a high standard requiring much more than the commission or an ordinary common law tort. (Another aspirant seeking the Golden Egg under Section 1983 bit the dust. GM)

Gesell Revisited

I found some more information about doofuses who used Gesell back in the eighties. This case was cited in the Fair Test Examiner in the fall of 1988.

"Challenge to Gesell as Kindergarten Placement Exam

Use of the Gesell School Readiness Test to place children in kindergarten has been successfully challenged by an upstate New York family.

The parents in the case were taken by surprise by a notice from the Norwood-Norfolk School District that their daughter would have to undergo testing for placement in kindergarten. Using the fifteen minute long Gesell test, which claims to determine a child's "developmental age," the plaintiff's daughter was deemed "unready" for regular kindergarten, and was placed in a "developmental" kindergarten.

Upon investigation, however, the parents discovered that 61% of the children in the Norwood-Norfolk district were also found to be unready for regular kindergarten. Most of the children who finished the developmental kindergarten were then placed either in regular kindergarten or a so-called "pre first grade" program. During the 1986-87 school year, only two children were moved from the developmental kindergarten directly into a regular first grade class. This led to many children not entering second grade until age 8, a year behind their peers.

After meetings with school and district officials resulted in no change to their daughter's status, the parents went to a legal services attorney, Linda Mills, who filed a class-action brief with the State Department of Education on behalf of all the affected students. The complainants alleged that use of the Gesell to place students in developmental kindergartens violated several state and federal laws, including the New York statute giving children the right to enter kindergarten at age 5.

Mills claimed that since the school district was treating the affected children as if they were handicapped, they were entitled to the protections afforded by laws regulating the education of handicapped children, including section 504 of the Rehabilitation Act of 1973, the Education for All Handicapped Children Act and the New York Special Education law. These statutes guarantee individual evaluations and educational programs, procedural due process and possibilities for placement in regular kindergarten classes.

In affidavits accompanying the parents' complaint filed with the State Department of Education researchers from the University of Michigan, the University of Colorado and the State University of New York (SUNY) at Albany all were heavily critical of the Gesell.

Dr. Samuel Meisels of Michigan wrote: "...Other information (besides test scores) is required before a valid judgment can be made about whether a child should...effectively be denied a free and appropriate public education on the basis of unsound test labels..." Dr. Lorrie Shepard of Colorado said that the extremely high percentage of children placed in developmental kindergarten "calls into question the validity and reliability of the test." Dr. Deborah C. May of SUNY-Albany reported the results of her study of children placed in developmental kindergartens that found that these children were more likely to score below their peers in later years than those who had been in regular kindergarten. May's study also showed that children whose parents had removed them from developmental kindergartens were more successful in school than those who had been through a developmental program.

According to reviews contained in several recent editions of the prestigious Mental Measurements Yearbook, the Gesell School Readiness Test is normed on a sample of only 640 children aged 2-6 years, nearly all of whom were white and lived in Connecticut. In addition, the Yearbook notes that the makers of the Gesell did

not provide validity studies to demonstrate that the test measures what it says it measures, and that test administrators may have as little as one day's training.

After the plaintiffs refused a settlement that would have affected only the their child, the school district gave in and reached a settlement covering all the children who had been placed in developmental kindergartens. The arrangement provides for drastic changes in the district's kindergarten placement system in the Norwood-Norfolk school district, including the parents' right to place their child in regular kindergarten, provision of test names and scores used in placement decisions, and parental notification of the right to refuse placement of their children in developmental kindergarten.

(For copies of the pleadings in this case please contact the Harvard Center for Law and Education, Larsen Hall, 14 Appian Way, Cambridge, Mass. 02138. 617-495-4666"

http://www.fairtest.org/k12toc.htm

http://www.fairtest.org/examarts/fall88/GESELL.html

Guy

Gifted Program Screening

For an understanding of the legal issues involved, you probably should review OSEP's August, 2000 memorandum, "Questions and Answers about Provisions in the Individuals with Disabilities Education Act Amendments of 1997 Related to Students with Disabilities and State and District-wide Assessments," at

http://www.dssc.org/frc/AssessmentQ&A.html

I think the statement, "Because of the benefits that accrue as the result of assessment, exclusion from assessments on the basis of disability generally would violate Section 504 and ADA" is on point. However, attaching the OSEP memorandum would give your opinion more credibility. It was distributed to every program administrator in my state.

There was an update on that memorandum issued on January 12, 2001, which was also distributed to program administrators in NC. It is not directly on point, and while I have read it several times, I am not sure I understand it--what they seem to be saying and what my state is actually doing are not consistent, so I must be reading it wrong. But the two memoranda do go together. Oddly, I can't find it on the OSEP website, but it is available from Oregon:

http://www.ode.state.or.us/sped/fedpapers/ieprole.htm

OSEP memoranda have never in and of themselves carried the force of law, but the language requiring that sped students participate in district-wide assessments is found both in IDEA '97 and in several places in the final regulations as well; download the regulations and do a phrase search on "district-wide assessments" if you're obsessive compulsive--or just take a look at

http://www.ideapractices.org/searchregs/300subpartB/Bsec300.138.htm

One caveat: A test given to all students in a particular grade level would be considered "district-wide."

However, if a test was only given to SOME regular education students having met particular criteria or taking a particular course or course of study, then the test presumably would not be "district wide" and probably not covered by all of the above.

Guy

K-BITs and K-TEAs--Questions Regarding Best Practice in the Pre-referral Process

The subject of using K-BITs and K-TEA brief forms as screening devices within the context of pre-referral assistance teams has been discussed before on this Listserve, but it usually goes off on a tangent rather quickly.

I have volunteered to serve on a state committee attempting to compile a state book on "Best Practices" and would like some input.

I have four questions. Answers to any one of them would be appreciated. Personal opinions, while always valued, will not help me here.

1) For those of you using screening instruments like the K-BIT, Slosson, and K-TEA Brief Form during the pre-referral process, I would appreciate any district guidelines you might have regarding their use in making a NON referral decision.

2) If anyone works in a state where their state department of public instruction has specifically said that screening tests may or may not be used during the pre-referral process, I'd appreciate knowing their rationales. Web links would be especially helpful.

3) Also, if anyone has had direct experience with an OCR investigation of alleged disparate impact wherein screening tests like the K-BIT were indicted as being discriminatory (or alternatively, where OCR approved them for use in the pre-referral process), I would appreciate details.

4) If any state school psychology association has issued a "best practices" guideline for pre-referral interventions that addresses the issue of using quickie IQ and achievement tests as gateways, I would appreciate your telling me how I could obtain them.

For anyone interested, my own personal opinions/concerns follow.

At least one study, Ron Dumont's, showed the K-BIT as coming in about five points higher than the WISC; some studies have replicated that finding, others have not. When looking at the impact upon decision making, the K-BIT is "off" a WISC III score ten points or more about 42% of the time, according to Ron's study, 34% of the time being higher, but 8% of the time being lower. Yet that same paper concludes by saying that the K-BIT is a good screening instrument for intelligence. Of course, an AK-47 is a good tool, too. It is how it used, not the quality of the instrument itself, that is really at issue.

I have three concerns about giving a K-BIT as part of the pre-referral screening. My first concern is that I have seen it used to "screen out" children who "probably" would not qualify since his/her scores all fall in the slow learner range, but whose classroom performance is so poor that their teacher plans to recommend retention. I know of at least once case where a regular education teacher told the parents, "Your child does not quality" based on pre-referral screenings, when a complete evaluation showed that he did in fact meet state criteria for placement. I do not believe the K-BIT and K-TEA (Brief) are technically adequate for making (non) eligibility decisions for slow learners--even when used within the context of older testing (e.g., a child evaluated a year earlier who is re-referred.)

My second concern revolves around my belief that the role of the assistance team in providing effective interventions is improperly distorted when the introduction of screening tests changes its function to that of gatekeeper. In North Carolina, the teacher of any child who is suspected of having a learning disability or emotional disability must refer that child to the assistance team. Unless we have current evaluations already in hand showing some other disability (blindness, for example), that means virtually every child referred by staff must go through the assistance team first. So while the assistance team is defined as a regular education function, it is also clearly a part of the special education referral system. A state form letter goes out to parents telling them that If the interventions are not successful, their child will be referred. I believe parents would rightly conclude we had mislead them mightily if the team implied that it had decided not to refer based on effective interventions (while actually basing its decision low average screening scores), and then the child was then retained. In short, I believe the only legitimate reason for making a non-referral decision would be that the assistance team had effectively addressed the child's presenting problems.

I also have some concerns about parental rights not being given. In 1990, OSEP sent a letter to South Carolina saying that someone had asked if they could give screening tests to children in the pre-referral process. OSEP initially thought that was fine, but then, after talking to someone in the school system, it concluded that these

children included many that were suspected of having a disability. They said that the tests could only be given if the parents gave written consent as required by CFR Section 300.500. Some NC districts, relying upon a NC DPI Q&A that I believe was based on that 1990 OSEP memorandum, have therefore been getting parents to consent to the screening using a separate consent form. However, when the OSEP letter got translated into current practice, the part about 300.500 seemed to have been dropped. CFR Sect. 300.500 in the federal regulations said then and now that if a test not given to all students is given to a child suspected of having a disability, then written parental consent must be obtained. IDEA 97 says that the consent must be as defined in Section 300.505. Section 300.505 of the current regulations says that the consent must be an informed consent, that is, the parents have to be told how the data will be used. The Catch 22, however, is found in Section 300.503, which says that any parent who is asked to provide consent under 300.505 must be given Prior Notice--which as we all know includes being given all their rights to due process (in North Carolina, what we refer to as The Parent Handbook of Rights.) The written parental consent being obtained during the screening process does not seem (to me, at least) to adequately apprise parents of their IDEA 97 rights.

I have been unable to get an unequivocal response from my department of public instruction on the use of such screening instruments in the pre-referral process. On the one hand they discourage their use in the state Q and A's, but they never actually say using them is forbidden. Hence this e-mail.

Guy

Searching

Anyone know the legality of a teacher searching a student's backpack...and under what conditions it is permissible, if it is....

-------REPLY

This is one of those issues that can be quickly researched on the Internet. Basically, my understanding is that the teacher must have a reasonable expectation (less than a probable cause standard but more than just a hunch) that the search will turn up some incriminating evidence. Within the context of today's shooting in San Diego, courts will tend, I think, to err on the side of the school system in rendering their judgments. You might find the following monograph interesting:

http://eric-web.tc.columbia.edu/monographs/uds107/school_school.html

Guy

To keep or not to keep, that is the question

Any info on federal requirements for keeping protocols?

I find this a confusing area myself and welcome the opportunity to revisit it. I have interpreted your question more broadly to include requirements on keeping, releasing, and destroying protocols. The basic answer to your question is that records may be destroyed when they are no longer needed for educational purposes, but parents must be given prior notice first, in case they are needed for other purposes. (CFR Section 300.573; Appendix B, see references below)

Educators are caught between test publishers and federal regulators on these issues, which promise to grow more rather than less heated as time goes by. LRP has addressed those issues in at least two national workshops, one in 1994, the other in 2000. A compiled summary follows.

OSEP has defined test protocols as being educational records since 1981 (Inquiry of Hill, EHLR 211:259, Dept of Ed., 1981). FERPA regulations applying to educational records applied to test protocols if they contained personally identifiable information, according to OSEP. (The argument being tested, apparently, was whether, since the test protocols were in the sole possession of the psychologist, they needed to be shared. OSEP said that once the scores had been released, the parents had the right to review the underlying paperwork.)

FERPA itself also prohibits a district from destroying education records while a parental request to review them is pending. Although parents are not generally entitled to copies of the protocols (unless failure to provide them would effectively prevent the parent from exercising his/her right to inspect them), OSEP and OCR have both opined that that Section 504 and IDEA may include a right to copy them if they're needed for a due process hearing. (Although some test publishers have recommended districts require a court to subpoena them, if they're been requested by a parent attorney, I don't recommend making him/her jump through hoops to get them. Remember, if we lose, we're going to end up paying for the time the parent attorney spent getting past all our hurdles.) (Ref. OCR, 1984, In re Tri-County, Illinois; OSEP, Inquiry of Hafner, 1979). When tests

or test records do not contain personally identifiable information, then parents do not nave the right of access according to OSEP.

While this seems simple, the problem is compounded by publishers such as Riverside (e.g., see their copyright for the BVAT) which prohibit the use of their test by any agency that is bound by custom, practice, or regulation to divulge the content of the items or to tell a parent which items were gotten correct or incorrect (I'm paraphrasing, but that's the gist. Since the test content is pretty easily discernible from a review of the test protocol, does that mean public school systems are prohibited from using the BVAT? Or are we only prohibited if we intend to comply with federal law? I don't know. I do know that I would prefer that one of you provide the test case!)

OCR did issue a letter in 1990 which found that a district's policy of destroying protocols violated Section 504 because they were relevant to the district's recommendation that a child be placed in a program for children with behavioral disorders, a recommendation with which the parents disagreed. (St. Charles Community School District, 17 EHLR 18, 1990.)

As noted below, if the sped records are no longer needed for educational purposes, parents may also request that they be destroyed. If the district does not need them, it must comply.

Guy

Sec. 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child. (b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

Excerpt from Appendix B, Final Regulations, regarding 300.573

Discussion: The regulations provide that parents must be informed when personally identifiable information is no longer needed to provide educational services to the child. This notice would normally be given after a

child graduates or otherwise leaves the agency. As the note following this section in the NPRM pointed out, personally-identifiable information on a child may be retained permanently unless a parent requests that it be destroyed.

The purpose of the destruction option is to allow parents to decide that records about a child's performance, abilities, and behavior, which may possibly be stigmatizing and are highly personal, are not maintained after they are no longer needed for educational purposes. On the one hand, parents may want to request destruction of records as it is the best protection against improper and unauthorized disclosure of what may be sensitive personal information. However, individuals with disabilities may find that they need information in their education records for other purposes, such as public and private insurance coverage.

In informing parents about their rights under this section, it would be helpful if the agency reminds them that the records may be needed by the child or the parents for social security benefits or other purposes. Even if the parents request that the information be destroyed, the agency may retain the information described in paragraph (b) of this section. In instances in which an agency intends to destroy personally- identifiable information that is no longer needed to provide educational services to the child (such as after the child has graduated from, or otherwise leaves the agency's program), and informs parents of that determination, the parents may want to exercise their right to access to those records and request copies of the records they will need to acquire post-school benefits in the future. In the interest of limiting the use of notes in these regulations, the note following this section would be removed.

Case help 504

Snippet from reply message:

While MR eligibility does say approximately 2 SD's for both> ABS and cognitive, using the correlation between tests actually bolsters your 504 claim because it says the child's cognitive ability gives him the presentation of MR, and ABS scores (using the correlation etc.) do not dispute that. Thus the presentation of MR, or perception of a disability exists and that falls under 504.

No it does not. There are three legs or parts to the Section 504definition. The second two legs (a record or perception of a disability) only entitle a child to protection from discrimination. No affirmative rights exist without a professional diagnosis of a disability. Section 504is broader than IDEA 97, and it includes a variety of disabilities not covered under IDEA, but it is not capricious. ADA is based on Section 504. The United States Supreme Court last year in a series of ADA/504 cases limited individuals rights further when it "ruled that the determination of whether a person has an ADA 'disability' must take into consideration whether the person is substantially limited in performing a major life activity when using a mitigating measure.
http://www.tourettesyndrome.net/DocumentLibrary/eeoc_enforcepsych.htm

For example, if a child has 20/200 vision correctable with glasses, or if a child is taking medication for a health problem, and the medication mitigates the condition, he or she would not be disabled. (Although, if the medication itself had sufficiently adverse side effects, then eligibility might be re-established.)

The misconception that everyone is disabled under Section 504 arises because of having read a little but not enough of the federal interpretations. Reading the special education statutes is a little like plucking the petals of a flower to answer a question, e.g., "Yes she loves me, She loves me not." Until you remove the last petal, you're not sure what you've got.

OCR does start its discussion of disabilities by saying, "All qualified persons with disabilities within the jurisdiction of a school district are entitled to a free appropriate public education. The ED Section 504regulation defines a person with a disability as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment or (iii) is regarded as having such impairment. http://www.ed.gov/offices/OCR/fape.html

However, further readings closes (http://www.ed.gov/offices/OCR/hq5269.html) that in order to qualify, "The impairment must have a material effect on one's ability to perform a major life activity. For example, an individual who has a physical or mental impairment would not be considered a person with handicaps if the condition does not in any way limit the individual, or only results in some minor limitation. However, in some cases Section 504 also protects individuals who do not have a handicapping condition but are treated as though they do because they have a history of, or have been misclassified a shaving, a mental or physical impairment that substantially limits one or more major life activities. For example, if you have a history of a handicapping condition but no longer have the condition, or have been incorrectly

classified as having such a condition, you too are protected from discrimination under Section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded. Persons who are not disabled may be covered by Section504 also if they are treated as if they are handicapped, for example, if they are infected with the human immunodeficiency virus."

Putting it succinctly, if there was no current impairment (the child had a previous record or was only perceived as having an impairment), then the disability could not be having a material effect on the child's ability to perform a major life activity (e.g., learning).

This is becoming a critical issue in high stakes testing states (likely, given recent federal legislation, to soon include all of us). Teachers would be providing every Tom, Dick, and Harriette with an 85 IQ with modifications on end of grade tests if "the perception" of a disability were enough to qualify a child. What used to be viewed as an incredible burden is now being perceived as a goose that literally lays golden eggs (as teachers use extended time and one to one testing to bring up test scores and increase their chances of getting bonuses.) I have seen 504 Plans drawn up because teachers and parents "believed" the child had a disability with absolutely no supporting documentation.

Section 504 accepts a wider variety of coupons than IDEA when you get to the cash register; but you still need the ticket to get on the roller coaster.

"Learning Styles"

I recently did a quick review on "Learning Styles" using the Internet and Buros' Mental Measurements Yearbook, 11th Edition.

The idea of matching instruction to learning styles is nothing new. Different researchers have over the years taken a variety of approaches. In the 1970's, my school system in Rocky Point , New York , tried to match teaching style to a child's preference based upon classroom observations in an effort to boost reading performance. It was, in retrospect, for the most part nonsense. We tried to determine based on observational data to which model a child would respond most enthusiastically--program directed linear model (PDLM), in which the teacher provided the kid with information on what to do and when to do it; program directed choice model (PDCM), in which the teacher provided the kid with information on what to do but not in what order to do it; and TD (teacher directed) model in which, basically, the teacher told the kid what to do and stood over him until it was done. (This was twenty six years ago, of course, so I may not recall Spaulding's Model exactly as he would have described it.)

Today's learning styles models vary in complexity but basically seem to incorporate much of what we have studied over the past fifty years of research into models based, not on observations, but on pupil inventories. Much like the Kuder Preference Test, they usually rely upon forced choice questionaires upon which a personality profile is based. They generally seem to include questions relating to visual and auditory preferences, but they may include tactile and kinesthetic subscales, active versus reflective, and other potentially relevant factors, or even (in the case of the Learning Styles Inventory), preferences for temperature.

Some on-line questionaires are available "for free." Reliability and validity is not reported, and the tests probably are not worth diddly. But since the user is paying less than diddly to access them, there is no danger of being cheated.

There is even a NC college oriented questionaire that can provide you with a computer generated personality profile along with suggestions on how to use that information to advantage. The language of the questionaire may be too difficult for the average fifth grader, but some of the suggestions on interpreting a completed profile might be helpful to the average middle or high school student.

http://lts.ncsu.edu/resources/workshops_events/guides/instructional_design/learning_styles.htm

For a simpler questionaire, see:

http://www.ldpride.net/learningstyles.MI.htm

This provides a simple checklist; the area with the most checks is (allegedly) your preferred learning style.

A model used at one local elementary school was The Learning Styles Inventory. There are separate forms for grades 3-4 and grades 5 and

above. A packet of information can be obtained by mail by clicking

http://www.learningstyle.com/

and entering the requested information. It is also possible to get a profile done on-line for five dollars. I have insufficient information to recommend the test. The profile itself was first published in 1979. It was, I believe, revised in 1990. At that time, it was reviewed by two reviewers for Buros' Mental Measurements Yearbook. One of the reviewers said, among other things, "[T]heir instrument exeplifies all of the problems characteristic of instruments designed to measure learning styles . . . The authors do not provide evidence of test-retest reliability . . . The authors provide no information on the normative group . . . In summary, the LSI has no redeeming values." The second author was kinder ("The LSI provides some good indices on aspects of learning style") but also noted that "many statistical problems are apparent" and "it would be worthwhile to investigate why [the reliability coefficients] are so low." As we all know, if reliability is low, validity has to be lower.

I hope this was helpful.

Guy

SED

The kid went to two Middle schools where he got in trouble. He is now in an Alternative School, where he's done quite well. Are you trying to send him back to a regular Middle School, in the belief that he is "cured?" With the new IDEA 97 codifying discipline into about ten different sections (CFR 300.519 to 300.529), the question of nexus is insignificant compared to the incomprehensibility of the regulations. (Although I am often amused by the law, sometimes OSERS does manage to annoy me; in the introduction, for example, they talk about the importance of defining "change of placement," and then when we look to Section 300.519 for the promised clarification, all we get is gibberish.)

However, the issues of which you speak have been with us since Honig v. Doe in 1983.

If the child had not been suspended for more than ten consecutive days, the question of manifestation need not have arisen. Since it did, the team was required to consider the factors outlined in the law (appropriateness of IEP, was it implemented, did it impair the child's ability to understand the consequences of or control the behavior) and then reach a decision. Parent advocates will always object to a finding of nexus. If the kid had a lisp, and the other kids picked on him, the advocate would say there was a nexus because the child's emotional state resulting from his disability significantly reduced his ability to control his actions. That doesn't mean you have to always accept their point of view. On the other hand, if it is persuasive, there seems little to be gained from spending tens/hundreds of thousands of dollars in a court hearing to validate your decision.

The bottom line is that the difference between nexus and no nexus still seems to be more in the rhetoric, not in the substance. So, from that perspective, you're damned if you do and damned if you don't, because the burden is still basically the same. Walk through it. You decide there is a nexus and you suspend the child. You are obligated to provide him with FAPE (but not FAPE in the LRE). Whether there is or is not a change of placement or manifestation, after ten days cumulative, we still have to provide the kid with whatever services are needed to enable him to meet the objectives of his IEP and progress appropriately in the general curriculum. Now--if the IEP says that you're trying to teach the kid to get along with others (a badly written goal, but that's not my forte), then it's going to be hard to do that if he's at home all alone. But that's not a problem arising out of your determination that it was a manifestation. That's a problem with the placement.

As another example, suppose the team decides that there is not a nexus and you have to provide FAPE in the LRE. Your team then decides that homebound is the LRE for the kid because he's as dangerous as Bonnie and Clyde put together. Your team's decision is final, unless Mom appeals, in which case the last placement (unless you put the kid in a 45 day interim placement for drugs or weapons, or a H.O. did it for dangerousness) is stay put. (If he's in the 45 day placement, he still has to go back to his last placement after 45 days, unless you get a 45 day extension from a H.O. or a Honig injunction from a judge barring the child from school.) But Mom could have done that if you said you thought it was a manifestation--gone to due process and invoked stay put. In any event, the problem you have is still with the placement--not with your decision that it was not a manifestation.

In your case, however, since the Alternative School wasn't an interim placement, but presumably a change of placement, stay put would

(probably, one can never predict what judges will do) be the Alternative School setting, absent a dangerous determination by a H.O. or judge. So how is that bad? The kid is not in regular school, you've got him in a setting that is working for him, and Mom is happy. Could life be better?

In answer to your other question, would you be better or worse off doing stuff or not doing stuff, the answer is always that you'd be better off doing something than not doing anything. In part, that's because Congress codified the standards in Oberti v. Board of Education (1993) in IDEA 97. If the parents can show that a child had a pattern of behavior that went un-addressed, if their attorney can show that you did not conduct an FBA and devise a BIP (required after ten days cumulative removal for disciplinary reasons, irrespective of nexus), or that your teachers were not implementing the BIP as written, your goose would in all probability be effectively cooked because you failed to provide the child with the procedural rights (FBA and BIP) accorded to him under IDEA 97. Districts that try to avoid the problem of nexus by failing to identify kids or by misclassifying as something other than BED are, as you are discovering, naive. (Quaint though it sounds, trying to help kids is also right thing to do; even if you do get blown away by a court, at least you can still sleep at night. And sleep is important, too.)

Oberti is an interesting case and can be found at:

http://law.uark.edu/arklaw/libraryr/reserve/negocomp/oberti.html

It isn't as relevant now as in 1993, but it illustrates well what can happen when a school goes before a judge with a litany of complaints (justifiable though they might be--Raphael was one mean child) and nothing else.

It's also worth remembering that your right to refer a child to law enforcement remains unencumbered and separate from this process. Being dragged off by the local sheriff in handcuffs can be appropriately sobering for some children. (IDEA 97 adds as a condition to that that you would have to give them the kid's sped record if you turn them in, but the 99 regulations clarified that FERPA had not been repealed by that--you would still need the parent's written consent before releasing the records.)

Anyway, I hope this is helpful.

Guy

Legal Requirement to Evaluate

The SLP says you can be sued if you don't test the kid for Asperger's.

Well, sure. You can be sued no matter what you do or do not do. You can be sued for not breathing. The parents probably wouldn't win if they sued you for not breathing, but in spedlaw, you just never know how a judge or hearing officer will rule in any specific case.

You need the parent's written consent before doing any new testing. I don't know how you run things in your state (it can vary, based on federal law) but usually we'd convene the IEP team, say, "Mom, we want to assess your child for this or that," and ask for written consent before doing an adaptive. If Mom said Yes, we'd do the assessment(s), including an adaptive assessment. If she said "No," in our state we could take her to due process, but state laws vary. We wouldn't take her to due process anyway. If she had refused our offer to have her child tested, the odds are she wouldn't sue us for it. Nothing is ever certain; that's what makes the spedlaw game so intriguing. There are cases out there where parents have said, "They SHOULD have taken us to due process, because the right to FAPE belonged to my child, not to me." And Hearing officers and judges have agreed. But those sorts of situations don't occur very often. Mostly, if Mom changed her mind, you'd just work things out.

I really don't see any problem here though. I don't know how the SSRS works, but there is some interesting data on the Vineland as a screening for Asperger's. If you gave that, you and the SLP wouldn't be at loggerheads; you'd be saying, "Yes, we are assessing for it. If as a result of the initial assessments, there is an indication that further evaluation is needed, I will recommend it at that time."

Anyway, the stuff from AGS regarding the Vineland and Asperger's can be found at their website. http://www.agsnet.com/vineland/sparrow.asp

Technically, of course, your SLP is correct. Section 300.531 says, "(h) In evaluating each child with a disability under §§300.531-300.536, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

There was a significant lawsuit not so long back where parents did get some substantive compensatory educational services because their child was suspected of being autistic, but nobody told them. (The psychologist SAID he told them, but nobody believed him.)

So, not being familiar with your situation, with the parents, with just how "odd" this child is, or anything else of any real importance, I'm not advising you one way or the other. Usually, however, I'd rather dot my i's and cross my t's, just to be on the safe side. I'd convene the team, talk with Mom, and then decide what course of action to take. I'd not take Mom to due process under any circumstances. I know some people like to sue Moms and Dads. I've just never been one of them. The thing is, if you err trying to please the parents, there's less than one chance in a thousand that you're going to end up in a court-like forum. If you go to due process over principle, there's a one hundred percent chance you're going to end up in a court-like forum, whether you are right or not.

Guy

Single Subtest Determination - Another WJ-III question

North Carolina has issued guidelines saying that "Broad Reading" and "Broad Math" are not eligible areas for placement under the state and federal SLD categories. The guidelines further state that it is inappropriate to place a child based upon one subtest, so either a cluster score or at least two subtests showing a severe discrepancy in one of the seven areas should be used.

We probably would have made that a "must," but the Federal Regulations and OSEP prohibit the states from basing eligibility upon a single procedure or formula.

Guy

Section 504 of Rehab. Act

I do not have the Act before me, but Section 504 of the Vocational Rehabilitation Act of 1973 can be viewed at:

http://www.edlaw.net/frames.html

The Americans with Disabilities Act of 1990 is much broader in its impact than Section 504, but with respect to children's rights in the educational setting, virtually identical. OCR enforces both acts simultaneously when conducting an investigation of discrimination allegations.

The implementing regulations for Section 504 are found I believe at 34 CFR 104 and the most recent revision (November, 2000) can be viewed at:

http://phoenix.lrp.com/EAO/

There are a number of Internet documents purporting to describe Section 504 and the ADA, but some of the

advice given is faulty. Being only 99% correct can be fatal, so I usually recommend sticking to the advisories from OCR for definitive scripture. Still, when all is said and done, their online offerings seem to raise more questions than they answer.

http://www.ed.gov/offices/OCR/publications.html

So if you're in a position where you have to advise someone on a problem not directly addressed in an OCR publication (e.g., "Is a child with a temporary disability eligible for transportation as a related service?"), and need to use other sources of documentation, I would suggest using the old newspaper rule of thumb--if you've got three concurring sources, you're probably on safe ground to report it.

Guy

Is this a LD?

Every case is different. That's one reason why Steve Edelman is correct in saying we need to look at all the data--not just whether a kid has a discrepancy or not. (Another reason is that most if not all states have Learning Disability Discrepancy Alternatives, what I call "elastic clauses," and if teams don't consider all the data available, relying solely on their state's discrepancy formula to guide them, they open the window of vulnerability in any subsequent litigation.)

Parenthetically, child who suffers traumatic brain injury may be testing out average on standardized tests, but it is not the child's absolute knowledge that it is critical in determining eligibility but his or her ability to learn new materials nor is a discrepancy between ability and achievement required.

In almost all instances, memory of one sort or another is adversely affected by damage to the brain. We assume in identifying SLD children that past learning is a predictor of future learning. So if a child has made average progress, we assume he will continue to make average progress. That assumption does not necessarily hold for the TBI child.

Which is why my state says school psychologists are not qualified to reevaluate for TBI without extensive training and a year's supervised practice. Assessing a child's ability to learn in the presence of a traumatic insult to the brain is an entirely different assessment problem than for a normal child when standardized tests can be interpreted as reflective not just of past learning but also predictive of future learning.

Federal dicta in the area of LD/Gifted answers some of the questions, but it has left us virtually rudderless with respect to the central question, When does a disability adversely affect a child's learning and when does a disabled child need sped?

1. Is a child with a high IQ excluded from services? No. " There is no categorical exclusion for children with high IQs in Part B; therefore, if a student with a high I.Q. is not achieving at his expected performance standard for reasons other than those specified in 34 CFR 300.541(b), (the criteria for determining the existence of a specific learning disability (SLD)), and otherwise meets the criteria for that disability in accordance with that provision, the child can properly be identified within the meaning of that disability. Each child who is evaluated for a suspected learning disability must be measured against his own expected performance, and not against some arbitrary general standard."

http://www.childpsychologist.com/ld/osep_policy_letter.htm

2. Does the presence of a severe discrepancy between ability and achievement automatically entitle someone to services? Again, no.

OSEP wrote (but take this dicta with a grain of salt, because they back tracked later on), "In the second situation the students would not satisfy the Federal requirement that there be a failure to achieve commensurate with (their) age... although there was a failure to achieve commensurate with their ability levels. (b) In the case where a student's disability does not interfere with the student's ability to benefit from participation in the regular education program without supplementary aids and services, and the student is progressing from grade to grade at the same rate as his or her age peers, then that student is not entitled under the Act to special education. (c) The requirement of discrepancy from age-appropriate performance reflects a fundamental premise expressed in the Education of the Handicapped Act that children with disabilities are entitled to special education if their disability adversely impacts their ability to benefit from regular education and that there is a need for special education."

BUT SEE BELOW.

Reference: Ibid.

3. How then does a team determine whether it is adversely impacting their ability to benefit from regular education and that there is a need for special education? You can not simply take the Rowley standard for FAPE and apply it to regular education children who are not yet identified, nor can you take the dicta above, apply it as policy, and assume you're on safe ground.

Amy Rowley was getting passing grades and being passed from one grade to the next with relative ease. But the court wasn't saying and did not say that Amy wasn't handicapped. She was in fact already identified hearing impaired, and that was not an issue before the court. The court did not say Amy did not need special educational services. They only said that she did not need a hearing interpreter because she was receiving FAPE (benefit from her special education.) In the letter cited above, OSEP modifies its original dicta and correctly reflected more recent court decision in their response, which was, "a child's educational performance must be determined on an individual basis, and should include non-academic and academic skills. Since the measurement of "educational performance" is different for each child, the Department has not developed a single definition for this term. Similarly, the term 'adversely affects' must be determined on an individual basis." Thank you, OSEP. Our tax money at work. A more beautiful example of bureaucratic gibberish could not be found until issuance of The Final Regulations. (Totally off topic, but my favorite is Section 300.519(b).)

This problem is not unique to SLD. In discussing ADHD, they are unequivocal in saying that if you've got ADHD that doesn't mean you're automatically entitled to services. "Gosh," you think, "Bedrock I can rely upon."

TO BE ELIGIBLE UNDER PART B, A CHILD WITH ADD/ADHD

(as with all other children covered under this part) must meet a two-pronged test of eligibility (i.e., have a condition that meets one of the disability categories listed under §300.7, and need special education and related services because of that disability). CHILDREN WITH ADD/ADHD ARE A DIVERSE GROUP. Some children with ADD/ADHD may be eligible under other disability categories if they meet the criteria for those disabilities, while other children may not be eligible under Part B, but might qualify under section 504 of the Rehabilitation Act.

Ref: http://www.ed.gov/offices/OSERS/IDEA/Brief-6.html

But the same problem raises its ugly head--how do you determine that a disability adversely affects a child's education or that the child "needs sped or related services"?

OSERS had a chance to address the issue of defining "adversely affects," but in its general comments on definitions, it said,

"With respect to the term ``adversely affects educational performance,'' in order for a child to be eligible for services under Part B, the child must meet the two-pronged test established under Sec. 300.7(a), which reflects the statutory definition in section 602(3) of the Act. This means that the child has one of the listed conditions that adversely affects educational performance, and who, because of that condition, needs special education and related services. Revising this language in the manner suggested by commenters could result in an unwarranted expansion of eligibility under Part B. It should be pointed out that a child who is academically gifted but who may not be progressing at the rate desired is not automatically eligible under Part B. Neither is the child automatically ineligible. Rather, determinations as to a child's eligibility for services under Part B must be made on a case-by-case basis in accordance with applicable evaluation procedures"

They get paid for coming up with stuff like that. I really do admire them.

Anyway, if you guess wrong, and you conclude that the disability did not adversely impact the kid, and a court disagrees, the 4th Circuit will protect you from Section 1983 lawsuits and hold you harmless from Section 504 lawsuits (unless you were really, really stupid or downright malicious about the whole thing. Which is why I always advise, "Be nice.") But other circuits may not concur (do not concur on Section 1983 liability; some are sending those cases back to lower courts for hearings.)

http://www.wrightslaw.com/law/caselaw/case_damages_sellers.html

If someone has a more definitive court response than I have outlined above, I would like to see it. In fact, I think we all would.

Guy

You asked about single subtests, broad scores, deficits, and using standard scores . . .

The underlying concepts in determining what tests may be used for determining eligibility are reliability and validity. Not only are these required ethically (see the Joint Standards) but legally under IDEA '97 Final Regulations and Section 504.

In my opinion, individual subtests on the WJ III should not be used in making eligibility decisions because the subtest reliabilities do not justify that level of confidence. Although North Carolina recently issued guidelines saying that a composite score should be used in making a placement decision (or two subtests in one of the seven areas wherein both documented a severe, that is, 15 point discrepancy), the guideline does not always "work." Professionals still need to exercise professional judgment. For example, Broad Written Language on the WJ III has reported reliability coefficients exceeding .90, but Written Expression, a composite score, has a reliability coefficient of less than .90. I would not and do not recommend its use in making a placement decision even though it is composed of two subtests.

Another exception to the two subtest rule may occur when one of the subtest scores is based on an invalid score. The WJ III Compuscore, while not printing standard scores, takes that invalid subtest, combines it with other subtests, and generates a composite score. There is no reason I can think of to accept such a score as being any more reliable than a single subtest score, and the single subtest scores on the WJ III are not reliable enough for high stakes decision making. As another Listserver pointed out, apparently Riverside had taken the composite score out when one of the subtests had a zero raw score, but then it put the composite back in because consumers said they needed it. I just scratch my head and try to go on. (It's difficult when you're grieving for the lost sanity of all those consumers.)

Although individual sources differ, in general screening tests like the K-BIT and K-TEA Brief Form have reliabilities in the high eighties, whereas assessments used for identification purposes generally have reliabilities in the mid to high nineties. I have not reviewed every possible achievement assessment, but I know that some single

subtests on some assessments have reliabilities within that range. If a single subtest is sufficiently reliable and validated for use, then in my opinion it would not be inappropriate to use it, even in NC.

You ask about the Broad scores, presumably off the WJ III. In 1975, Congress adopted a formal definition of SLD based upon a 1968 definition. Two years later, OSERS issued an operational definition which actually conflicts with the formal definition. However, both definitions carry the force of law. The regulatory definition included the seven areas of eligibility. North Carolina tried to use the formal definition (cutting the seven areas back to five, one in reading and one in math). The LDA/NC complained to OSEP in the early nineties, and OSEP wrote them back, saying, the state is obliged to assess children in all seven areas. (OSEP is a part of OSERS which is part of the Department of Education.)

http://www.ideapractices.org/regs/SubpartA.htm#sec300.7 (Scroll down to 10 for formal definition) http://www.ideapractices.org/searchregs/300subpartE/Esec300.541.htm

(federal operational definition) (Normally, one would turn to Attachment 1 for further information; but the only substantive information OSERS gave was that it planned to review the criteria before the next reauthorization.)

In any event, OSEP said specifically:

> "None of the seven areas listed in 34 CFR 300.541(a)(2)(i)-(vii), the Part B regulation which establishes the criteria for determining the existence of a specific learning disability (SLD), can be categorically excluded from a multidisciplinary team's evaluation to determine whether a child has a SLD. To the contrary, each of these areas must be taken into consideration, and a state policy which requires otherwise may be suspect."

http://at-advocacy.phillynews.com/osep/osep_ld.html

Somewhere in my files, I have an OSERS review of the state's programs from around the same date, citing the state definition for not complying with federal regulations.

North Carolina, however, stuck with the five areas until 1997, when, shortly after the IDEA '97 regulations were published, it revised both its formal and operational

definitions to include the seven areas. I suspect many people thought it had something to do with IDEA '97, but IDEA '97 and the OSERS draft regulations made no changes from the wording in 1975 and 1977, other than to add some language regarding the rights of parents to participate. Wisconsin, on the other hand, had its federal funds cut off around that time (1996), because OSERS said its SLD definition was not in compliance with the federal regulations. The timing of NC's capitulation was probably coincidental, but I wouldn't bet a quarter on it.

http://www.dpi.state.wi.us/dpi/dlsea/een/4-1-96ld.html

Neither federal law, federal regulations, nor state regulations have any provision for combining the two math and two reading areas into one. Failing to assess in all areas of suspected disability could subject your LEA to sanctions. I'm not saying it would. I am saying if someone complained, your SEA would leave you turning slowly in the wind while whistling a happy tune.

The wording in the federal regulations isn't "deficit," it's "discrepancy." That's an important difference. Under current regulations, there is no specific level of deficit required for placement, although a number of practitioners in the field (including some right here in NC) are recommending a Low Achievement criterion as a replacement for the discrepancy model. If you review the OSEP Executive papers on SLD, only one that I recall actually endorses the discrepancy model. To me it makes no sense, but we have a law that we obliged to follow until Congress in its wisdom decides to change it. While I'd bet a quarter that Congress or OSERS will change it in the next reauthorization, that is not a guarantee that there actually will be a change. While I'd hope for an earlier revision, the fact is that we may not see OSERS final product until 2004 or 2005.

http://www.air.org/ldsummit/ (Full texts are supposed to be available sometime this fall; you actually can see the workshops here, too.)

I suppose I should let Ron Dumont handle the question of what constitutes a severe discrepancy, because he's better at thinking outside of the box than I am. In North Carolina, we have what is generically called the Learning Disabilities Discrepancy Alternative. We have a straight 15 standard score discrepancy formula. (I know, I know, regression is better. I don't want to hear it. The 15 point discrepancy formula, implemented in 1985, was a whole lot better than the Bond Tinker formula we'd previously

used.) Okay. The kid doesn't get a fifteen point discrepancy. The IEP Team thinks the kid is L.D. anyway. It just has to describe the tests it used, the criteria it applied, explain why it doesn't think the standard scores accurately reflected a severe discrepancy, and fill in all the other boxes correctly. The kid is in with fourteen points, ten points, or whatever points. The federal definition simply says that you have to have a severe discrepancy between ability and achievement. None of those terms are defined. The state requires you to give an IQ test and a achievement test. It cannot compel you to adhere to their guidance regarding their use. In fact, there is nothing in the federal operational definition that requires you to use an IQ test or an achievement test in making that determination, although on the other hand nothing I see inhibits the state from making you give it regardless. (I hadn't thought of that before, frankly. You have to give the test. You don't have to use it. That's absolutely insane, but I think I'm right).

For more information on using your state's discrepancy alternative, see the article: http://www.indiana.edu/~div16/the_school_psychologist.pdf ("Yes, Virginia, There is a Discrepancy Clause.")

It has ALWAYS been true that decisions regarding eligibility were not to be made based on a single procedure. However, the recent debacle over the WJ III (problems with subtest 11, the error in the directions to subtest 2, the scoring error on page 87, the problems with zero subtests for five year olds, the Compuscore fiasco, etc, etc.), should emphasize the truth in Kevin McGrew's statement regarding testing error or error of measurement. No test is perfect. (The WJ III may be a little less perfect than others, but that's not the issue here.) The bottom line is that legally, ethically, and morally, knowing what we know about our instruments' limitations, we should not be determining eligibility for any child based upon a child achieving a certain numerical discrepancy, nor should we be excluding any child because he or she has failed to achieve such a discrepancy. We need to consider the child within the context of ALL our assessment data.

Different states use different discrepancy cutoffs. There is no consensus. Some use one standard deviation, some use 1.5, some use 2.0, some use different cutoffs based on grades, some use different cutoffs based on initial v. reevaluation. A few have no criteria at all--they just send out the federal definitions and leave it up to each LEA to make their own decisions. And a whole lot of states are in the process of changing their criteria. The thing is it doesn't really matter if you understand the law. Those criteria, whatever you have been lead to believe, are merely guidance. The team is the

final arbiter, no matter where you live. (If you need further information on what other states are doing, contact me privately.)

The problem with over simplification (as opposed to saying, "Read the regulations for yourself") is that sometimes you end up with potentially misleading drivel.

While a specific deficit is not required, a fifteen point discrepancy (or severe discrepancy between ability and achievement) is obviously not sufficient and (as I did say) should not be the sole criterion for determining eligibility. Adverse educational impact is a sine qua non for any eligibility decision. OSERS/OSEP give no specific guidance in operationalizing that phrase, although it does say that the IEP team must determine it on an individual basis. Failing grades would be one indicator, certainly, but a child is not required to fail in order to be eligible. The regulatory requirement says if a disabled child needs special education in order to receive FAPE, then he would be eligible for classification under IDEA. That's also vague. (Some might characterize it as misleading drivel.) But it does not require a specific deficit level.

Excerpts from the Final Regulations, Appendix A, and Attachment 1:

"Children advancing from grade to grade. (1) Each State shall ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child is advancing from grade to grade."

"Further, a student need not fail in the regular classroom before another placement can be considered. Conversely, IDEA does not require that a student demonstrate achievement of a specific performance level as a prerequisite for placement into a regular classroom."

"The regulations do not require that a child has to fail in the less restrictive options on the continuum before that child can be placed in a setting that is appropriate to his or her needs."

Sorry I misunderstood your question about processing deficits and your desire to obtain some consistency.

"A foolish inconsistency is the hobgoblin of small minds." Unfortunately, Emerson didn't write the regs.

My first suggestion would be to look at the manual for the processing test you're using and apply the standards recommended by the test authors. Unfortunately, some manuals suggest cutoffs at the 50th percentile (e.g., the Lindamood test will identify as many as fifty percent of students tested as being "at risk," and we certainly can't have that.) So my modified recommendation would be, "Look at the manual and exercise some common sense." But even that bothers me . . . I don't think you should be playing numbers games at all with those tests, at least not within the identification process.

You should, in my opinion, only be using them in formulating an intervention plan once the child is identified.

Although there is a great deal of research in reading, one may not assume that the same processing deficits causing dyslexia will also similarly impact math and written language, nor, for that matter, the opposite.

According to presentation I recently heard from Dr. Stephen Hooper, a neuropsychologist at the Levine Clinic in North Carolina, research is suggesting the following deficits are most closely linked with:

Reading: Phonological awareness, rapid naming, phonological memory, orthographic awareness, lexical knowledge/vocabulary, selective attention, and working memory

Writing: Sensorimotor functions, selective/sustained attention, phonological awareness, lexical knowledge/vocabulary, visual spatial abilities, memory, executive function/working memory

Arithmetic: Selective attention, visual spatial functions, memory, executive functions, working memory, language capabilities

I claim no expertise in this area. However, while there is overlap in the above, there is not insofar as I can determine professional consensus outside the area of reading. Lyon, et al., in the Fordham paper, "Rethinking Learning Disabilities," report that "there is little evidence that the precise causes of different forms of LD are the same." If the different forms of LD have different causes, which seems probable, establishing a single cutoff based on a single processing score or single definition based upon a processing model also seems improbable.

Torgeson in his executive summary for the OSEP conference (referenced in an earlier e mail) while stating a number of possible advantages to a processing deficit model, also said that there are two difficulties in implementing such a model. The first is that we still do not completely understand what psychological processing capabilities are needed to attain good learning outcomes; and second it isn't always possible to determine with assurance that the "processing deficits" we see identified on processing tests are truly intrinsic to the child and not due to the result of a lack of appropriate instruction. For those reasons, Torgeson did NOT recommend a processing model be adopted in the next reauthorization.

Wise and Snyder in their paper on "Judgments in Identifying and Teaching Children with Language Based Reading Difficulties" (same OSEP conference), said that while research has shown that children at risk for a learning disability should improve phonological awareness, decoding, and fluency, they go on to say that research has not identified one best methodology, nor does the research show that transfer continues after direct instruction has been discontinued for those children. (I'm just reporting, not opining here.) They also noted that double deficits in phonological awareness and naming speed seemed to be the most resistant to treatment. Hence (and here I am opining) it may not be the amount of deficit on a specific test, but the number of deficits, that would be most indicative of a learning disability.

Complicating things even more, you don't have the authority to establish standards; you can only establish guidelines. That's because (1) the moronic federal criteria reign supreme, no matter what you do, and (2) the IEP team has absolute authority to make decisions within those federal criteria. Neither the state, nor the SEA, nor your LEA can limit the IEP team's power in that regard. The state regs look like laws when you print them out, but they aren't. The state can make you give tests, but it can't tell the team how to interpret them.

If that's not enough to ruin your day, OSEP has opined that while a child has to have an intrinsic processing disorder, you don't have to formally test for it. You could just infer it from observational data, which is what a lot of IEP teams do in NC, which at best results in an over simplification, at worst a gross distortion of the intent. (E.g., "Johnny got the same wonderful instruction all his classmates got, but while 90% of them got average scores on the end of grade test, he didn't remember diddly. We infer he has a memory problem.") Remember that "evaluation" as defined in the federal regulations refers to ALL the assessment data you obtain, including observations,

teacher reports, criterion referenced tests, and just about everything but the kitchen sink (unless you can document the child's problems are really the result of traumatic brain injury after having been hit by one.) You could, for example, infer a processing disorder from observations during testing. I have seen a neuropsychologist (Dr. Gail Roden) do some wonderful things by testing the limits, adding a rating scale, and observing behavior on a Wechsler administration. (A little more complicated than that--she gave all the supplemental tests, recorded every response verbatim, used index scores rather than IQ scores to evaluate performance, and included a great deal of process information, e.g., the length of time it took respondents to respond verbally, in her report, and then analyzed it all within the context of a neurological model of learning. I'm not there, and I probably never will be there.)

There seems to be a great deal more support in the present research for a Low Achievement model of LD than there is for either the generally discredited discrepancy model (which we are still legally bound to follow) or for the processing model (which would be the way to go if we only knew which road to take and where it would end up.) In other words, if you're thinking of implementing a processing model as a way to exclude kids, my advice is DON'T DO IT.

Personally, if I had my druthers, we'd throw out all three models. In the best of all possible worlds, and God gave me the power to write the federal and state regs the way I wanted to write them, I'd adopt, " If it looks like a duck, walks like a duck, it's probably a duck," as the formal definition.
http://www.avko.org/Essays/what_is_dyslexia.htm

And then for my operationalized definition, I'd write, "If the kid's got learning problems, and learning problems aren't caused by anything else, he's probably a duck." We could make bundles selling duck tee shirts.

Guy

LD Determination Exclusionary Factors

I'm not sure how your form is worded, but (1) a finding that economic factors "impacted" on learning is not determinative; and (2) it's the team's decision, based upon a review of all the evaluative information that is final--not the school psychologist's. Cultural, environmental, or economic factors' impact on learning only come into play if the team determine that the child's learning problems are PRIMARILY the result of one of the exclusionary factors.

http://www.ideapractices.org/regs/SubpartE.htm#sec300.541

Johnny hates school because he can't read. He's laid out twenty three days this year. The team rightfully concludes that the absenteeism has impacted adversely upon his learning, but it also concludes that his reading problems aren't PRIMARILY the result of his laying out of school. They can still place him.

Of course kids could be excluded from eligibility based on an exclusionary factor being primarily responsible for his learning problems. That's why they are called exclusionary factors. Teams typically ignore them unless they are really, really blatant--e.g., the kid is ESL and has only been learning English for two years. But they've been known to sign off even there, if the discrepancy is big enough--e.g, the kid has made no progress in learning English and there's a 30 point discrepancy between nonverbal IQ and achievement.

However, on reevaluation, if we haven't done any new testing, in NC we are not required to complete a new team report documenting a discrepancy. So the issue is not addressed formally. Informally, it is supposed to be considered as part of the eligibility determination, of course, but research suggests that (in districts other than my own!!!) that teams never pay much attention to the criteria, period.

The following are from the OSEP summit last August. They take time to download, but if you're interested, they reflect what OSEP is hearing at the national level.

White Paper On Classification: http://www.air.org/ldsummit/download/Fletcher%20Final%208-10-01.pdf

(Executive Summary; discusses some of the problems in applying exclusionary factors)

White Paper on how schools REALLY classify kids: http://www.air.org/ldsummit/download/MacMillan%20Final%2008-10-01.pdf

(Executive Summary; talks the disparity between what the state says SLD children are supposed to be and how schools are operationalizing the definition. Basically, schools are serving the most needy kids, regardless of what the state says.)

Guy

Retention and Social Promotion

I know of no research on children held back who are advanced two grades. I am doubtful it happens often enough to do a meaningful study.

The NASP handout, previously suggested, is excellent. Principals and teachers generally ignore it. They might find data from the United States Department of Education (ED) more difficult to ignore.

On July 1, 1999, the United States Department of Education issued a guidebook entitled, "Taking Responsibility for Ending Social Promotion."

The following selections about retention are taken directly (cut and pasted) from the ED document and represent the opinions of that agency regarding the retention of students. (Only internal reference numbers have been deleted.)

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Research indicates, and common sense confirms, that passing students on to the next grade when they are unprepared neither increases student achievement nor properly prepares students for college and future employment. At the same time, research also shows that holding students back to repeat a grade (retention) without changing instructional strategies is ineffective. Much evidence suggests that the achievement of retained students still lags behind that of their peers after repeating a grade, making it an ineffective strategy for enabling students to catch up. Retention in grade also greatly increases the likelihood that a student will drop out of school--and being held back twice makes dropping out a virtual certainty.

Both being promoted without regard to effort or achievement or retained without extra assistance sends a message to students that little is expected from them, that they have little worth, and that they do not warrant the time and effort it would take to help them be successful in school.

Neither social promotion nor holding kids back without help is a successful strategy for improving learning. -Sandra Feldman, American Federation of Teachers

This guide holds that the issue of ending social promotion has too often been posed as a debate over the relative benefits and disadvantages of promotion versus retention. The results of both policies are unacceptably high dropout rates, especially for poor and minority students, and inadequate knowledge and skills for students. Neither practice closes the learning gap for low-achieving students, and neither practice is an appropriate response to the academic needs of students experiencing difficulty mastering required coursework.

Retention, sometimes viewed as the only alternative to social promotion, is a policy that holds back students who have failing grades at the end of a school year. Retention is most often a policy of repetition--students are given an additional year to repeat a grade to go over the same academic content, often taught the same way, that they failed to master the previous year.

Research also indicates that retention is a serious problem in our schools. . . A recent study tracing a cohort of children from 1987 to 1996 (and based on the percentage of students who are one, rather than two, years over age for their grade) estimated that 21 percent of students were enrolled below grade level at ages 6 to 8. By the time the students were 12 to 14 years old, 31 percent were below grade level for their age. Data from the Child Health Survey and National Household Education Survey suggest that by first grade 7 to 10 percent of students have been retained.

Of particular concern is the fact that across all of these measures grade retention varies substantially by family income and parent education. Using more conservative estimates (based only on students who are two or more years over age for their grade), in low-income families and families in which the parents have less than a high school education, almost 7 percent of students are at least two years older than their classmates, whereas in higher-income families less than 2 percent of students are two or more years over age. Retention also is more than twice as likely among boys as among girls, and more than twice as prevalent among African American students as among white students. Across all age groups, 2.6 percent of white students, 3.8 percent of Hispanic students, and 5.9 percent of African American students are two or more years over the expected age for their grade.

Decades of research indicate that both retention and social promotion, if not accompanied by effective programmatic intervention, fail to provide long-term benefits for low-performing students. The practices of retention and social promotion were being questioned in the research literature as early as the 1940s, and hundreds of independent studies and research reviews since then have added to the body of negative findings. This research indicates that neither practice, as typically implemented, improves failing students' chances for educational success.

[R]esearch shows that retention also has serious negative effects on students. Students retained and retaught the same material using the same instructional practices usually do not catch up to their peers. The National Association of School Psychologists has reported that retained children tend to have low self-esteem, get into trouble, and dislike school. Retention can be a particularly traumatic experience for children who view it as punishment and a highly stressful event.(16) As with students who are socially promoted, often students who repeat a grade are treated as "lost causes." Teachers assume that the retained students have limited potential and thus have low expectations of them.

The discussion of high-stakes testing and holding students accountable for performance must be understood in the context of the possible disproportionate effects of promotion and retention policies on low-income and minority children. Disadvantaged children begin school without many of the supports enjoyed by their more advantaged peers. The National Association of State Directors of Special Education, in particular, has pointed out the disproportionate representation of students from racial and ethnic minority groups in special education. Children in poverty are more likely to have disabilities and therefore need special education services to a greater extent than other children. Schools located in communities of concentrated poverty often lack important resources, both financial and social, that are needed for academic success. Although much research shows that access to skilled, effective teachers is an important determinant of student performance, low-income students are often less likely than higher-income students to be taught by skilled teachers.

All disabled children must be educated in the least restrictive environment appropriate to their individual needs. This means that children with disabilities must be educated, to the maximum extent appropriate, in regular classes with their age appropriate, nondisabled peers, with appropriate supplementary aids and services, in the school they would attend if not disabled.

Under Federal civil rights laws, which prohibit discrimination on the basis of disability, it would be impermissible for school officials to make decisions about social promotion and grade retention solely on the basis of the category of the student's disability.

For students who continue to be unsuccessful in meeting standards, repeating a grade still is not an effective strategy. Students in this situation need other alternatives that help them develop the skills they need to achieve. The commitment to ending social promotion must extend to providing all students with every chance to meet high expectations. No student should be allowed to fall through the cracks.

Reasons Students Drop Out of High School
Dislike of school, often because school is boring and irrelevant to student needs;
Low academic achievement and poor grades;
Retention (particularly being held back more than once);
Poverty, including the need or desire to work full time;
A sense that teachers and administrators do not care about students;
and
Inability to feel comfortable in a large, depersonalized school setting.

****

Most of the booklet is devoted to *strategies* schools & communities may want to consider. Pursuant to other discussions, it never ceases to amaze me that despite the vast array of effective strategies documented in the literature, schools still seem to leap most happily on the latest bandwagons with nothing more than a salesman's testimonial to back them.

The complete document can be downloaded from the Internet at
http://www.ed.gov/pubs/socialpromotion/

The report is also available by calling 1-877-4ED-PUBS

There are a number of articles on the Internet, most not particularly parent friendly, just a few of them being:
http://www.edletter.org/past/issues/1999-jf/retention.shtml
http://wwwcsteep.bc.edu/ctestweb/retention/retention.html
http://www.csos.jhu.edu/crespar/Reports/report33chapt5.htm
http://www.edweek.org/ew/vol-17/03mccoy.h17
http://www.teachermagazine.org/ew/vol-17/20kinder.h17

Guy

LD Eligibility

There are fifty states and about fifty different operational definitions of SLD. In fact, only a slight majority actually have adopted the federal formal definition in Section 300.7

Although research says the current discrepancy definition in federal law probably isn't worth a bucket of warm spit, the problem is that it's the law. Facts will only confuse you, so I suggest you don't read too much (just joking, I think.)

While I advise you to look at your state regulations, I also advise you to look at the federal formal definition in Section 300.7 and operational definition at Section 300.541 (and 542 and 543 while you're at it.) You can find them all while you're at it.

I then suggest you read the "Yes, Virginia, There is a Discrepancy Clause" article by John, Ron, and me at: http://alpha.fdu.edu/psychology/learning_diabilities.htm (There are a lot of other interesting links on that page, and they're all worth at least skimming.) In any event, please, please, please remember that the article is meant to be thought provoking--so read critically!!! It is highly unlikely that what you read therein will be determinative in a court of law, so the responsibility for justifying your determination that the kid has a severe discrepancy will be yours alone. (None of us, I'm fairly certain, is volunteering to testify in your behalf.)

You can't use a single procedure, the regulations say, or a single formula, OSEP has said, to exclude OR include a child in special education. I won't belabor the point, but the recent spate of listserv messages on the WJ III should serve to reinforce our skepticism about test scores--we should, therefore, legally, morally, and ethically be looking at all our evaluation data before making an SLD eligibility decision. One thing that may not show up in our testing, for example, is fluency (available on the WJ III, but not required in reading if you're just testing in the cluster areas--not a complaint, just an observation)--a kid might do very well on an untimed achievement test, but if it takes four hours for that kid to get through the achievement battery, but he's sinking like a rock on timed criterion referenced and end of grade tests, you

probably should be looking at your classroom data as being a bit more representative of the child's performance than the standardized score. Other factors you should be considering include but are not limited to Matthew Effect (Mark Penalty) on IQ tests (rich get richer, poor get poorer), the possible effects of processing deficits on BOTH the IQ and achievement measures (e.g., Math Calculation on the WJ III and Arithmetic on the WISC III, and the level of parent support (especially when you're thinking of not qualify the kid just because he's getting passing grades. BIG mistake.)

Guy

P.S. In a court, you will be held to the federal standard regardless of what your state regs say. You can find neat little handouts by clicking on:

http://www.ideapractices.org/regs/TOC.htm#TOC

and clicking on the number of the regulation you want and then, when the next page comes up, clicking on the little magnifying glass next to the printed regulation. That will get you the regulation plus dicta from Attachment 1--usually very helpful, although in this case, pretty much a waste of time.

"Can sped funds be used for regular education kids?"

As most of us are not charged with the administration of special educational funds, if you're like me, you haven't kept up on all the administrative rules regulating their use. Ten years ago, the issue would have been crystal clear: No. Using special education funds for regular education children was forbidden both at the state and federal level. There were some good reasons for that. In my system, like many systems, we're over our caps. We don't get enough money to adequately serve all the children who are identified. Children who are not in special education may not be claimed for headcount and generate no funds. When we provide them services, we dissipate our resources even further. I thought that was a pretty good rationale for being strict. But apparently I was wrong.

In 1997, Congress loosened the rules, although not to such an extent that every Tom, Dick, and Harriette can be served willy nilly in a special education classroom. The purpose of the rule change in Section 300.234 was to help ensure that sped kids were integrated into regular education, NOT to allow districts to move regular education children into a special education setting. Section 300.234 gives administrators flexibility in setting up unified programs ("An LEA may use funds received under Part B of the Act for any fiscal year to carry out a school-wide program under section 1114 of the Elementary and Secondary Education Act of 1965, except that the amount used in any school program may not exceed-(1) (i) The amount received by the LEA under Part B for that fiscal year; divided by (ii) The number of children with disabilities in the jurisdiction of the LEA; and multiplied by (2) The number of children with disabilities participating in the school wide program.")

OSERS, naturally, disagrees with my comment above, saying explicitly in Attachment 1, "It should be pointed out that the use of funds under Part B of the Act in accordance with §300.234 is beneficial to children with disabilities, and, contrary to informal concerns that have been raised, the use of the Part B funds in school wide programs does not deplete resources for children with disabilities. Rather, it helps to ensure effective inclusion of those children into the regular education environment with nondisabled children." Right. And Congress isn't dipping into social security to help balance the budget.

There would be, as some posters have noted, an additional danger in putting regular education kids into special education classrooms without due process, because as the Supreme Court noted in Rowley, FAPE is (paraphrasing) non trivial educational benefit provided to a disabled child in accordance with the rules. Break the rules (i.e., put a kid in a more restrictive setting like a resource room without evaluation or parental consent) and you're not providing FAPE. Failure to provide FAPE can be fatal in litigation over residential fees if a parent alleges you knew the kid had a disability (after all, you placed him in a resource room) and didn't serve him appropriately. That's also written into the regulations at 300.234--disabled kids are entitled to all their rights, and when we talk about giving disabled kids FAPE, we're always talking about procedural rights, not just educational benefit.

The waters get muddier, however. The following is being interpreted to mean that if a special education teacher is participating in an inclusion model, and she is teaching some special education children in a regular classroom, it's okay if she works with some other kids too--as long as the identified child is getting the services in his or her IEP.

"§300.235 Permissive use of funds.

> (a) General. Subject to paragraph (b) of this section, funds provided to an LEA under Part B of the Act may be used for the following activities:
>
> (1) Services and aids that also benefit nondisabled children. For the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services.
>
> (2) Integrated and coordinated services system. To develop and implement a fully integrated and coordinated services system in accordance with §300.244."

OSERS' interpretation says in part:

"Although §300.235 makes clear that Part B does not prohibit benefit to nondisabled children, it does not permit Part B funds to be expended in a regular class except for special education and related services and supplementary aids and services to a child

with a disability in accordance with the child's IEP. If special education and related services are being provided to meet the requirements of the IEP for a child with a disability, this provision permits other children to benefit, and in such circumstances no time and effort records are required under Federal law, thus reducing unnecessary paperwork. This provision does not in any way diminish an SEA or other public agency's responsibilities under Part B to ensure that FAPE is made available to each eligible child with a disability."

http://www.ideapractices.org/searchregs/300subpartB/Bsec300.235.htm

I think the original problem posted here reflected the placement of a regular education child in a special educational setting without due process, and I believe based on the above that that is still forbidden, just as it was prior to IDEA 97. Given the rule changes, however, I'd be more cautious about jumping to conclusions than I would have been, say, in 1991. Grey areas emerge. Miss Tucker teaches inclusion math. She's got some regular education kids in the same group as her sped kids in the regular classroom setting. However, at test time, she pulls her sped kids out of the regular classroom to her resource room. Can the regular education kids who are taking the same math from her legally leave too? I think not. But I wouldn't bet the farm on my being right--nor would I personally file a complaint over it.

Guy

"What is a Specific Learning Disability?"

Put delicately, the question is, "What is a Specific Learning Disability?" Put less delicately, the real question is, "Who do you want to include, and who do you want to keep out?" Any decision on criteria affects who will and who will not be served.

Generally, OSERS/OSEP beg off when asked to provide some sort of comprehensible standards, saying that each decision must be based on a comprehensive assessment of each individual child. (e.g, "LEAs must ensure that FAPE is available to any child with a disability who needs special education and related services, even though the child is advancing from grade to grade; and (5) that the determination that a child who is advancing from grade to grade is eligible under this part must be made on an individual basis by the group within the LEA responsible for making eligibility determinations." Final Regulations.)

Before invoking our state's version of the Learning Disabilities Discrepancy Alternative (LDDA), however, we need to have standards in place. If we develop a rationale for placing a child as SLD with, say, only a ten point discrepancy between FSIQ and achievement, we can count on a flurry of phone calls from teachers asking (in NC), "Johnny didn't have a fifteen point discrepancy, but he had a eleven point discrepancy. Is that enough for us to use the LDDA?" We can't say Yes to one child and No to another child with the same scores without some clear cut standards and expect to survive in the dog eat dog of special education. We can't, in the current state of things, impose a policy more burdensome than the federal criteria, but we still have to have guidelines to follow--a rationale for deciding who gets in and who you keep out.

Some interesting points were raised on the Listserv, and I hope that NASP is going to assume a role in the upcoming debate over what constitutes a Specific Learning Disability. Someone suggested a straight severe deficit (as opposed to discrepancy) model, for example, which, while inconsistent with current federal criteria, has a widespread appeal. "A child with an 85 standard score on an age appropriate individually administered test shall be eligible for consideration if she or he is not mentally disabled. Children whose deficits are due to cultural, environmental, and/or economic reasons (e.g., being bilingual) shall be excluded." That would of course exclude all those bright (above average) children currently being served with 115 IQs plus and achievement scores in the nineties. That would be fine if we could be assured that they weren't "really" disabled, but there are a substantial number of children who can partially compensate for their dyslexia on untimed, individually administered, tests but who, when forced to read and respond within time limits, utterly fail on End of Grade assessments. (And if they aren't labeled, they don't get modifications.) Still, it is a model worth considering and one that will be considered, I believe, though I hope it will not be adopted without substantial modification.

Someone else suggested that if the educational system was at fault, then the child should be excluded. If a child has not received what we would generally regard as an adequate education, e.g., a child who had missed sixty days and attended five different schools in the preceding year, I would agree. If, however, we're talking about children whose education was based on

inappropriate pedagogical techniques, e.g., a child with poor phonics awareness who was taught using whole language, then I would disagree. Reportedly current research is showing that most children we currently label as dyslexic or LD/reading could be helped if intervention were provided based on their individual needs early enough. For that reason, I'd probably have to argue that no child should be excluded because of inappropriate teaching--else we'd have hardly anyone in the LD program. However, if adopted, it would open the door to some amusing conversations. "Well, Mrs. Smith, the team has considered your children's lamentable lack of progress, and I can tell you (tee hee) that it isn't his fault. We have (chortle) an amazingly poor teaching staff. So since Johnny's poor scores are our fault, not his, that means he's not eligible and we have no obligations under spedlaw to serve him (guffaw, guffaw.)

There is a growing body of research, mostly in the area of reading, which I have not had time to internalize, suggesting that children who have learning disabilities have consistent perceptual processing deficits that are consistent from the time they enter school to the time they graduate. While different children will evidence these symptoms in varying degrees (and a few will have a learning disability resulting from an uncommon pattern of deficits), my hunch (and that's all it is) is that we will see a turn-around in OSEP's attitude regarding the testing of perceptual processing deficits. Currently, it is their view that formal testing is not required. However, I think with appropriate testing early in kindergarten we could identify those factors likely to result in a learning disability and begin intervention, whether through sped or through regular education, that would prevent many of the problems we see. In my experience, it isn't that the teams find some loophole after four or five years by which to get kids identified; it is that it takes most kids until fourth or fifth grade before their discrepancies are severe enough to meet state criteria. They're the same kids we tested in kindergarten and first grade, and they have the exact same problems. They just hadn't failed severely enough to qualify. As I understand it, and I'm not an expert in this field so I'm relying on experts, by the time we do get them, it's too late. Whatever we're doing for those kids once they enter our system, it doesn't seem to work.

I expect a blurring of sped and regular education as high stakes testing gains a foothold, which may be one of the positive benefits (one of the few) in these programs. In the past, teachers could say, "Oh, how awful, that poor child fell through the cracks. The system failed him." In recent years, we're seeing an increase in referrals, but the placement rate is dropping--our latest stats showed about two thirds of kids referred were not qualifying. Two thirds of the children teachers said were not making progress in the regular classroom are getting no assistance whatsoever from us. In the past, teachers could waggle their fingers piously, blame us, and leave the kids languishing as bench warmers. Not so today. If those kids do not progress, their school averages will drop, school prestige will be lost, and it will be bonus money out of their pockets. Regular education has also rather suddenly discovered it has some ownership in our identified children, as federal and state mandates require their inclusion in statewide testing.

I do not expect the discrepancy model to survive the next reauthorization. By that time, I may well be retired. Still, I'll be cheering from the sidelines. It does sometimes annoy me, however, that I have apparently spent the greater part of my life applying principles with no more intrinsic merit than a medicine man's dance in an aboriginal society.

Guy

Standards Question

-- Original Message -----

Ron et. al. This becomes a spitting contest. By that I mean, I have the ability to hit the spitoon, but this week I could only get part way there. The guys (team) in the saloon state: "There is a significant discrepancy between your ability to hit the spitoon and you actually achieving the mark. You are spitting disabled!" Now another guy comes in who everyone knows cannot hit the spitoon and he spits just as far as the first guy, and the team says: "He is not trying hard enough, but there is no significant discrepancy between ability and achievement.. He is no spitting disabled."

Yes, I know the example is gross, but consider for a moment: the team decides one kid has a disability and another does not, yet the numbers between ability and achievement are the same. Trust me, parents find out what happens and compare scores. "You let that kid in, how come my kid can't get service? You are discriminating and I am going to file for due process!"

-------REPLY

The school district better arrive at a standard by which they will allow what we call an override in Ohio or the district is going to have a lot of trouble. Then it becomes a whole lot worse than a spitting contest!

You are beginning to understand the problem OSERS has saddled us with. OSERS would not provide us with meaningful criteria. OSEP refuses to let us enforce meaningful criteria. Oh, we can provide all the criteria we want. One standard deviation. 1.5 SD. 2.0 SD. They're all legal--as long as the SEA says (as Wisconsin said) "These are just guidelines. It's up to the team to decide." If the team decides solely based upon an arbitrary formula, the state is not going to defend them, and due process hearing officers are probably not going to uphold them. They MUST consider ALL the information available. Let me be clear. I've always been a number four on the Kohlberg scale. This is not my professional recommendation. It is what OSERS and due process hearing officers are requiring. Parents can't come in with a single subtest off the WJ-R that's severely discrepant (while the composite score is not) and make the claim solely upon that one test score (and an "expert" opinion) that their kid has a severe discrepancy. At least not with any certainty that they will prevail in due process. They like us would also need to show that the preponderance of the information (grades, end of grade test results, teacher reports, etc.) supported that interpretation. I wouldn't want to bet the farm on it, but that is why the schools always have one small advantage. School administrators are always gambling with the public's money. Many parents, however, are literally betting their family farm.

Teachers have always played the part of jailhouse lawyers, looking not to use the law to get crooks out, but to get kids in. Asking them to play the part of an impartial professional would be a little like having asked Johnny Cochrane to objectively assess the evidence to determine his client's innocence before taking on Job's case. But that's what OSERS and OSEP appear to be doing. They have put the foxes in charge of the hen house.

I'm on a statewide task force reviewing North Carolina's LD criteria. We sit there arguing over the most arcane details, spending hours trying to work out a professionally acceptable/defensible formula. All the while, however, gnawing at the back of our minds, is the knowledge that no matter how perfect our methodology might be for determining how many angels can stand on the head of a pin, the teachers will always have two options. If they don't like the answer, they can (1) adopt another formula or (2) get a larger pin. Ron, John, and I did not create this insanity. We're just deliverers of the message. And we all know what happens to the messengers . . .

Guy

Lifetime Insurance Benefit

Had a Manifestation Determination in which the school recommended Mental Health and AODA (Alcohol & Other Drug Abuse) Assessments. School has offered to pay for any costs beyond what insurance would cover. I remember something about not reducing lifetime insurance benefits, etc.? Anyone know more?

-----REPLY

The school may ask parents to allow them to use their insurance coverage for health related evaluations needed to determine a child's eligibility or present needs and strengths, but only if they are given their rights, including the right to refuse.

Medicaid coverage, however, is totally free and if a child has a Medicaid card, the system is not required under the Regulations to pay for an evaluation that is available under that federal program.

Of course, what you are asking for is scripture, and I would refer you to the federal regulations. The key word is "require." Asking is okay, but I'd recommend that you also document that you gave them their rights when making that request. That's not just me talking; that's also OSERS dicta from Attachment 1. Two relevant sections are excerpted below, but the entirety of the regulation (which covers a lot more ground than health evaluations) is linked below.

Excerpt from Intro to Final Regs:

> **(3) Proposed Sec. 300.142(e) has been added to make clear that a public agency may use a child's public insurance to provide or pay for services required under Part B, with certain limitations. The public agency (A) may not require parents to sign up for public insurance in order for the child to receive FAPE, (B) may not require parents to incur out-of-pocket expenses in order to file the claim for services under Part B, and (C) may not use the child's benefits under a public insurance program if that use would decrease available lifetime coverage or any other insured benefit, result in the family paying for services that would have been covered by the public insurance and are required for the child outside of the time the child is in school, increase premiums or lead to discontinuation of services or risk loss of eligibility for home and community-based waivers due to aggregate health-related expenditures.**

Excerpt from Attachment 1

> **"In light of the concerns of numerous commenters that the use of private insurance always involves a current or future financial cost to the parents, and the Department's experience in administering Part B, the regulations regarding use of private insurance should be revised. As numerous commenters have indicated, parents who permit use of their private**

insurance often experience unanticipated financial consequences. These parents often act without full knowledge of the future impact of their decision. Public agencies should be permitted to access a parent's private insurance proceeds only if the parent provides informed consent to use."

And the link: http://www.ideapractices.org/searchregs/300subpartB/Bsec300.142.htm

Guy

Statewide Testing (ITBS) and Classroom Grades

If you are dealing with an attorney, you need an attorney. The Listserv is not the best place to get legal advice. If the parents are represented, you are in an adversarial process, and you need representation.

Being promoted or retained is not in and of itself grounds for legal action. However, the parents would have a cause for legal action if your system had failed to provide FAPE, that is, an educational program that provided or that promised to provide something less than meaningful benefit.

Retention is not described as an effective intervention by either my state department of public instruction or by the federal department of education. The legal question is, therefore, not going to be whether you should have promoted or retained the child; it will almost certainly be whether or not you provided sound educational interventions that were effective. In Rowley, the Supreme Court said that if a child is passing from one grade to the next, that would FAPE for some disabled children. The parent attorney will attack the promotions, not because he thinks the child should have been retained, but because he will need to discredit that as evidence of the child's having made appropriate progress under past IEPs.

So what you really need to do first is to look at your own data. Then you need to take a very close look at the child's past IEPs and his present IEP to be sure there are no fatal flaws, e.g., an IEP that does not have measureable objectives. If there are, FIX THEM.

If the parents are concerned about the effectiveness of the child's program (and they appear to be), I'd suggest reconvening the IEP Team. There is nothing to prevent you from meeting with the parents and their attorney to gather information and explore concerns beforehand; but I do not recommend that you attempt resolution outside of the IEP Team context.

Parenthetically, the parents cannot recoup attorney fees within the context of the IEP process.

"Legal action" presumably means due process; I do not believe any court would hear their complaints until they had exhausted administrative remedies first. Before going to due process, they have an obligation to tell you what they want first, whether it be compensatory education, residential services, self contained classroom, accommodations/modifications, or whatever--assuming, of course, that you've given them the latest updated copy of their rights under IDEA 97. (Make sure they have gotten their rights!)

First percentile. I really would not try to explain that away, personally. I'd look to see how what suggestions I might make to improve the individualized education program (e.g., providing more testing accommodations?) so that the child's scores next time would be a bit better!!!

Guy

(c) Parent notice to the public agency.

(1) General. The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to provide notice (which must remain confidential) to the public agency in a request for a hearing under paragraph (a)(1) of this section.

(2) Content of parent notice. The notice required in paragraph

(c)(1) of this section must include--

(i) The name of the child;

(ii) The address of the residence of the child;

(iii) The name of the school the child is attending;

(iv) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the parents at the time.

[[Page 12451]]

(3) Model form to assist parents. Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required in paragraphs (c)(1) and (2) of this section.

(4) Right to due process hearing. A public agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in paragraphs (c)(1) and (2) of this section.

Students grading other student's papers?

I'm fascinated by this whole topic.

In 1993, FPCO (The Family Policy Compliance Office), a division of ED (United States Dept. of Education) apparently issued a letter saying that they thought it was okay for teachers to engage in that practice. (I certainly would never have issued such a letter!) Well, some parents took Owasso school district all the way to the tenth circuit, and the 10th circuit last summer said that having kids grade papers, while not a violation of their civil rights (no Section 1983 violation), did violate FERPA. FPCO be darned. The case was not, of course, binding within the 4th Circuit (my circuit) but could have been considered persuasive by our court. (Or it might not. One never knows about the 4th. They don't seem as liberal as the 10th in expanding parent rights. God Bless the 4th Circuit.)

The Supreme Court signaled an interest in the case last April. http://www.edweek.org/ew/ew_printstory.cfm?slug=26scotus.h20.

It has always been my feeling that it is better to let other people pay expensive lawyers to get seemingly easy questions answered. In the meantime, one or more of the following might make for an interesting topic of discussion in your own districts. However, EVERYTHING IN THE FOLLOWING IS NOW SUBJECT TO CHANGE.

http://www.ink.org/public/kasb/falvo.htm don't let other students grade papers; grading based on student participation not prohibited.

http://www.utea.org/docs/news/stories/9-6-00.htm Educators should not be misled to think that passing tests back and forth for the purpose of correcting the paper and then "suggesting" a possible score will avoid the Falvo result

http://www.dea.org/tools%20for%20members/FERPA.htm#3 Lots of questions and answers on Falvo from a group in Utah , many of which are probably wrong. But we won't know which ones are right and which ones are wrong until the fat lady sings (or at least all those old people dressed up in black dresses have their say.)

Guy

Reference: 10th Circuit decision in Falvo v. Owasso

http://www.kscourts.org/ca10/cases/2000/07/99-5130.htm

Suspension

There has not been a step one, step two publication that I am aware of. The Special Educator included a table the same month that the Final Regs came out, but even it is complicated. The law is difficult to comprehend because it is not logical. You should not even take what I have written below as gospel, because I am admittedly confused by it. I would therefore recommend you personally review the Q and A on discipline at the beginning of the regulations, CFR Section 300.121 (d) which addresses a child's right to FAPE when disciplined, and then Sections 300.519 through 300.529. I have included Section 300.519 here, but only because I think it is funnier than Jules' jokes.

Off the top of my head, here goes.

Was the child suspended for more than ten days consecutive? If the answer is Yes, presumably the IEP Team would need to convene within ten business days after making the decision to remove the child for more than ten days to do an FBA and BIP and ten school days after the decision to do a Manifestation Determination because eleven days consecutive is a change of placement. If the team determined that the IEP was not appropriate, if it was not being implemented, if the disability significantly reduced the child's ability to control his behavior, or his ability to understand the consequences, then it would be a manifestation of the handicap. (Only ONE of those would have to be true.) (Actually, I don't really see the ten business days requirement if it was a change of placement after ten days consecutive for a BIP and FBA, but it is only logical--always a shaky foundation for inferring anything-- that 11 day cumulative rule for BIPs and FBAs would still apply.)

Eleven days consecutive are automatically a change of placement. Eleven days cumulative only trigger the right to have an FBA and BIP. They MAY trigger a manifestation hearing if a change of placement, as defined in Section 300.519, has occurred.

Anyway, if the child had been suspended for more than ten days cumulative, the team would need to meet to complete a BIP and an FBA within ten business days, or review and revise the BIP as needed if one was already in place. The teacher and principal would presumably consult and decide whether there had been a change of placement. (The part about this law that is absolutely bonkers is that the much quoted definition of "change of placement" is pure gibberish.) If they decide that there was a change of placement, then the IEP Team must be convened within ten school days to do a manifestation hearing. If not, the principal and teacher need to decide whether the child needs some supporting services in order to meet the objectives of his or her IEP and to appropriately progress in the regular curriculum. (I'm paraphrasing. But what "appropriately" means has always been a mystery.)

Of course, my feeling has always been that if the kid needs services to meet his IEP goals and to progress in the regular classroom during the suspension, I'd rather not be making that decision all by myself. It's perfectly legal to do so in this context, but it seems to leave the principal (the Regulations actually say "school personnel" and special education teacher, so a sharp principal could get out of that, too) and sped teacher twisting slowly in the wind all by themselves if the parent appeals. I'd just as soon call it a change of placement and get everybody involved, but that's just me.

Anyway, if you decide that it is change of placement, then the IEP team would revisit the IEP as part of the Manifestation Hearing. I don't

think there's actually any timeline for implementing changes in the IEP, but if you don't implement them, and the kid gets suspended again, failure to implement IEP would make a darned good defense for the behavior being a manifestation of the disability.

As a sidenote, be sure you read the section on giving records to law enforcement carefully; the law does not override FERPA requirements with regard to parental consent before you give them to the police. (Attachment 1 makes that abundantly clear, but who has time to read Appendix 1?)

Sec. 300.519 Change of placement for disciplinary removals.

> **For purposes of removals of a child with a disability from the child's current educational placement under Secs. 300.520-300.529, a change of placement occurs if-- (a) The removal is for more than 10 consecutive school days; or**
>
> **(b) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.**

(If anybody asks what a change of placement is, you just need to have this memorized. Then, when they ask you want that means, just repeat it again. Eventually, they'll get the joke, too.)

Matthew Effect?

The Matthew Effect was cited in a case by Peter Wright, Brody v. Dare, which can be accessed on his website. The Matthew effect is explained in brief by Peter at: http://www.wrightslaw.com/advoc/nwltr/1998/nl_98_1102.html

I list that first, because "Matthew Effect" is not just a esoteric concept; it can have real implications for determining a child's eligibility as having a Specific Learning Disability when there is evidence of reading and/or IQ scores having decreased over time.

As Peter notes, the author of that concept was Keith Stanovich.

The Matthew Effect is cited in a number of Internet references, e.g.:

"Consequently a Matthew Effect (Stanovich,1986), in which children with reading problems show cumulative deficits over time because lack of access to the orthography influences development, not only of academic skills, but also of processing ability. This is one reason why age-standardized IQ scores in children with learning disabilities drop over time the effect of which is often to cure the learning disabilities by labeling the child a slow-learner, and making the child ineligible for services. p 47 Fletcher, J.M., Francis, D.J., Rourke, B.P., Shaywitz, S.E., & Shaywitz, B.A. (1993). Classification of learning disabilities. Relation to other childhood disorders. In G.R. Lyon, D.B. Gray, J F. Kavanagh, & N A. Krasnegor (Eds.), Better understanding of learning disabilities: New views from research and their implications for education and public policies.(P.153-170). Baltimore: Brooks." http://my.voyager.net/~tutor/more1.htm

Being a "slow learner," of course, is not particularly relevant, unless the IQ fell more than the reading scores so no severe discrepancy existed--whether a child has a high or low IQ is irrelevant in the federal definition. But if the child plateaued more on the IQ test (in which of course he'd received no formal instruction) less than in reading (where presumably he was being taught the skills he needed to do well on the reading test), deciphering the real meaning of those scores becomes substantially more difficult within the context of eligibility determinations.

Another Matthew Effect description can be found at:

http://www.emersondickman.org/ReadRoom/Articles/DysWhatReal.htm

"Matthew Effect:

Stanovich has coined the phrase "Matthew Effect" to describe the phenomenon that a single unmediated deficit can have a significant impact on the development of skills that are not deficient. The phrase comes from the Gospel according to Matthew where it is inferred that "the rich get richer and the poor get poorer."

There have, in addition, been a number of empirical studies of the correlation between IQ and reading achievement. The results of these studies converge on the conclusion that IQ is only weakly and nonspecifically related to achievement in the early grades. To these findings, however, I must add a sobering afterward. Whereas IQ and general cognitive skills seem not to have much bearing on early reading achievement, early reading failures seem to result in a progressive diminution in IQ scores and general cognitive skills. In the words of Keith Stanovich, who has developed this argument with scholarship and force:

Slow reading acquisition has cognitive, behavioral, and motivational consequences that slow the development of other cognitive skills and inhibit performance on many academic tasks. In short, as reading develops, other cognitive processes linked to it track the level of reading skill. Knowledge bases that are in reciprocal relationships with reading are also inhibited from further development. The longer this developmental sequence is allowed to continue, the more generalized the deficits will become, seeping into more and more areas of cognition and behavior. Or to put it more simply -- and sadly -- in the words of a tearful nine-year-old, already falling frustratingly behind his peers in reading progress, "Reading affects everything you do." (Adams, 1990, pp. 59-60)."

OSERS says that "no one formula" can be used to determine eligibility for a child. So we're caught between a rock and a hard place. OSERS says we may not use one formula for determining SLD eligibility. And if there is a question as to the validity of our test scores (are they more reflective of the child's ability or of the processing deficit?), we are left without any objective standards--because while we can look to the state standards for guidance, they cannot be determinative. The federal criteria, however, remains unchanged, because we still must (under federal regulations) make a case for there being a severe discrepancy between achievement and intelligence (all undefined by law.) As I see it, the person who will "win" in any due process suit will probably be the one with glibbest tongue. (There is some evidence for that in case law, but not conclusive.) Fortunately, we don't have many of these lawsuits. Unfortunately, when we do have them, they are almost always expensive, and almost always over high stakes (e.g., tuition reimbursement or compensatory education.) I wish I knew what it all meant . . . but I'm relying on John Willis and Ron Dumont to provide those answers.

Guy

> **Matthew, xxv, 29:**
>
> **'Unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath'.**

Telling student results

----- Original Message -----

I have to take issue with you on this point. I think that letting the parents tell the kid would be courting disaster. Parents have very selective hearing/reading and, despite the fact that they nod their heads knowingly, they often don't really understand what's being said to them. To depend on them to provide an unbiased, intelligible recounting of the facts would be pure folly.

-----REPLY

"Letting parents tell the kid?" How do you propose to stop them? And if we can't accurately communicate with the parents, what makes us think we're doing any better with their children?

Because, as Carl suggests in another e-mail, we are better trained in psychometrics?

Personally, as a parent, I would prefer that my child not know her exact IQ score. I think I should at least have some say in that.

In any event, it isn't the facts, it is the interpretation of their educational implications that are mostly issue. Although we are all qualified to make those interpretations, the right to draw final conclusions belongs to the team--not to us alone, and not to the parent alone.

We all work within different models. Some of us test twenty-five children a year and have on-going relationships with the children we work with. Some of us test 190 children a year, see a child once, and move on. It would be "folly" for any of us to assume that children, hearing our words of wisdom, will instantly understand what we are saying to them, instantly and accurately comprehending the short and long term implications of our findings. In my much younger days, for a week or two I played with Tarot cards as a projective tool in counseling. After a child went home and told his mother he was fated to be bad, the cards had said so, I realized what I was communicating was not what the child was hearing. Then I could go back and fix the error (and give up using Tarot cards as a professional tool!) In my current situation, I do not have the luxury of repeated contacts. Parents may not understand everything, but what they do convey will be within the context of a loving on-going relationship.

I do not now what the rest of you are telling children, but I suspect you are all telling them something different. The debates on this Listserv are testimony to the fact that we do not all agree on what constitutes a learning disability or emotional disability, much less on what to do about them. Most of us would generally agree on the criteria for mental retardation, but I know I shy away from the "R" word in parent conferences, because parents visibly shut down when they hear it, which is why I usually save it until the end. (My state uses "mental disability," which I much prefer, but parents need to know about SSA and web resources, which do use the "R" word.) I can not imagine being the one to break that news to a child. ["Gee, Johnny, these test results mean you're retarded. Let me give you a ten-minute explanation

of what that means . . . Well, it's been swell. Have a nice day."] I believe and hope (but cannot be absolutely certain from these e-mails) that none of us would do something like that. Certainly not if we weren't going to be around the next day to help pick up the pieces.

----- Snippet from Original Message -----

I believe this student, by law, receives an invitation to the team meeting and > when he attends it may be more difficult for him if he hasn't spoken with > you first....

--------REPLY

Paraphrasing, IDEA 97 says that children should be members of the IEP Team when appropriate; and that they must be invited whenever transition is being discussed (but do not have to come, although their preferences must be considered). I know of no federal requirement that any child at any age be a part of the entire IEP process, although in some states, if a child turns 18, s/he assumes the rights of the parent. That exception aside, whether a child participates in non-transitional discussion should be decided on a case by case basis. We usually ask the parent(s) their preferences with respect to older children's participation, I think.

I appear to be in a distinct minority of one with respect to discussing test results with kids. When they ask me, I tell them that I will not know the results until after I have had an opportunity to score the test, and I tell them that I will be mailing a summary of the results to their parents. I tell them that they can ask them. Also, I really do like to recheck my work for errors, and I like to reflect, before I pontificate on the educational implications of my test data. I generally do not have on-going contact with the children I test, so I do not have opportunities subsequent to the testing session to revisit the issue.

Also, the final conclusions about our interpretations of the educational implications of our test results are only arrived at within the context of the team process. What the test results really mean with respect to the most important issues of eligibility, placement, and service delivery will not be determined until the team has disposed of what we have proposed. Teams do not always end up doing what I think they should be doing. So--insofar as any specific child is concerned--I really do not know what the instructional implications are going to be for him or her until the fat lady sings.

Just parenthetically, I was taught in pre IDEA 97 days that the client was the child's parent, not the child. Of course, it is a fundamental fact of law that the right to FAPE in the LRE belongs to the child, not the parent, so the issue is certainly debatable. But generally the latter fact only becomes painfully relevant when the parents decide that what they asked you to do before was wrong, and they now want you to pay for their mistake. Putting it in perspective, kids don't sue schools. Parents do.

Excerpt from CFR 300.344 (IEP Team)

> **(A) GENERAL. THE PUBLIC AGENCY SHALL ENSURE THAT THE IEP TEAM FOR**
>
> **EACH CHILD WITH A DISABILITY INCLUDES--**

(7) If appropriate, the child.

(b) Transition services participants. (1) Under paragraph (a)(7) of this section, the public agency shall invite a student with a disability of any age to attend his or her IEP meeting if a purpose of the meeting will be the consideration of--

(i) The student's transition services needs under Sec. 300.347(b)(1);

(ii) The needed transition services for the student under Sec. 300.347(b)(2); or

(iii) Both.

(2) If the student does not attend the IEP meeting, the public agency shall [[Page 12441]] take other steps to ensure that the student's preferences and interests are considered.

If a custodian runs a child down with his riding lawn mower, we would probably be liable for his medical treatment.

We are not responsible for any medical procedure that can only be performed by a medical doctor except for diagnostic and evaluative services. For example, if we diagnose a child as ADHD and suggest the parents contact a physician to see if a medical treatment might be beneficial, we would not be responsible for the treatment. If on the other hand we referred the child to a physician to see if he had ADHD, then we would be responsible for the evaluation. (CFR 300.24).

http://www.ideapractices.org/searchregs/300subpartA/Asec300.24.htm

We are responsible for evaluations if they are needed to establish eligibility. We are responsible for any medical services that can be performed by a nurse or paraprofessional if they are needed for the child to receive FAPE.

The latter issue was pretty well settled by Cedar Rapids v. Garret (1999). For some smaller school districts, the Supreme Court ruling could have devastating consequences absent state support.

http://supct.law.cornell.edu/supct/html/96-1793.ZO.html

The court summarized the issue thusly: 4 "The primary difference between Garret's situation and that of other students is his dependency on his ventilator for life support."

Although the district and parents disagreed as to the level of training required, neither party argued that the services had to be provided by a physician.

In concluding, the court said that cost was not an issue in this case, saying, "This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools."

The decision as to whether a child needs a related service in order to receive FAPE is one that must be made by an IEP team. Strictly speaking, whatever we write is not binding upon the school system if the IEP team disagrees with our recommendation. However, what we write may create a climate wherein saying "No" becomes more difficult.

With respect to the specific recommendation for psychiatric services, psychiatric services are by definition services provided by a medical doctor. More usually the concern for liability arises for non medical services (e.g., counseling.) According to the Final Regulations, our responsibilities as psychologists in providing related could include the following (but the list is not under the regulation exhaustive):

Psychological services includes-

Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(Parenthetically, because it is not an issue here, item vi was not intended to restrict the development of positive behavioral interventions to psychologists; in Attachment 1, OSERS says, "The standards for personnel who assist in the development of positive behavioral interventions will vary depending on the requirements of the State. Including the development of positive behavioral interventions in the descriptions of potential activities under social work services in schools and psychological services provide examples of the types of personnel who assist in this activity. These examples of personnel who may assist in this activity are not intended to imply either that school psychologists and social workers are automatically qualified to perform these duties or to prohibit other qualified personnel from serving in this role, consistent with State requirements.") .

If I suspect a medical problem, but I do not suspect it is disabling, I'll consult with the school nurse and ask her to make a determination as to the most appropriate course of action with the parents after screening the child.

Guy

Oral Expression or Speech Impaired?

I do not have scriptural references to support the opinions I am about to share; so take them with more than a grain of salt.

The criteria, of course, differ for SLD and SLI. In NC, a child has to be 1.5 standard deviations below the mean to qualify as SLI in language. Although many speech pathologists are still requiring a discrepancy as well, the presence of a discrepancy is neither required by the state guidelines nor has it been endorsed by ASHA as a criterion for identifying children. IDEA does not require it, either.

For SLD, in NC there would of course have to be a severe discrepancy between ability and achievement (as everywhere), but the child could have standard language scores of less than one standard deviation below the mean and still qualify for consideration as SLD if the FSIQ was high enough. (Been there, done that.)

The input the state Learning Disabilities Work Group received from speech-language pathologists (SLPs) in the state (all informal) is that they would not recommend we classify children as SLD in oral or expressive language based solely upon a Woodcock Johnson score. It is not that they do not want us to give those tests, quite the contrary. They would like for the school psychologists to SCREEN for those disorders, referring to them if there appeared to be a severe (or moderate to severe) discrepancy for further evaluation..

That specific view has not, to my knowledge, been endorsed by any group other than SLPs. My own very personal view is that God did not put me on earth to do screenings for SLPs, and if the referral form (in NC, the DEC 1) or Focus of Concern (completed during our prereferral process) suggests that expressive or receptive language is concern, we might just as well refer to the SLPs directly. Leave me out of it, if you don't mind.

But let me give you a state's response regarding the provision of services in its 1999 Q and A. You cannot assume, unfortunately, that this is correct either; Q and A's do not carry the force of law, and they won't give you much solace if challenged by an attorney.

"Question # 26.
Q. Which professional, the speech-language pathologist or the learning disabilities teacher, serves the student with a discrepancy between ability and achievement in the areas of oral expression and listening comprehension?

A. The majority of characteristic behaviors for either classification are quite similar in nature and performance (e.g., receptive language problems in perceiving speech sounds, understanding words, understanding language structure, and following directions; or expressive language problems in articulating speech sounds, formulating words and sentences, word fining, language pragmatics). A student with an appropriately diagnosed learning disability in oral expression and/or listening comprehension, and with an appropriately diagnosed language impairment (disorder), may be classified as either a specific learning disabled student or a speech-language impaired student and served in either category. Whichever classification and service is most appropriate for the student

should be the classification and services chosen, keeping in mind that a student may not have two primary disabilities. [Actually, our revised IEP forms do allow teams to identify more than one disability. GM] Students may not be classified as speech-language impaired unless appropriate diagnostics have been performed by a speech-language pathologist which include an assessment of speech . . . and language . . . Students may not be classified as LD unless they have been evaluated by a team which includes a person knowledgeable in learning disabilities and demonstrates a significant discrepancy between ability and achievement. A student who is identified in the area of speech-language must receive services from a speech-language pathologist, and a student identified in the area of learning disabilities must receive services from an LD teacher. Services from a speech-language pathologist may be provided in the LD student requires speech as a related service." p. 7

A very limited and extremely informal survey of SLPs by a leading speech language pathologist yielded an interesting if not startling finding, that being that the SLPs he polled would prefer for their kids to be labeled as SLD than SLI "because they can get more services." We have always said that once a kid gets the ticket of admission, it's kind of like going to Carowinds (an amusement park in South Carolina.) Except instead of getting to go on every ride he wants, he only get the rides (or services) he needs. But there is a mindset among some that if you're SLD in oral expression, that means the team could give you reading or math services as well as language therapy as a related service. However, if you were just SLI, they presume the only service you would be getting would be language therapy.

The following excerpt from the 1999 state Q and A seems unequivocal. But read it carefully. It says it's not best practice to give a kid services he doesn't need. Well, duh! Nothing in the following says that the team may not authorize such services if, after reviewing all the evidence, it determines that it would be in the best interest of the child, and that the child had a reasonable expectation of benefiting from the service. Johnny has an 85 IQ, 70 standard scores in reading, 78 standard scores in math. Who is to decide whether he needs services in math or could benefit from them? (Hint: The answer begins with IEP . . .) Of course, again remember that the following Q and A does not carry the force of law (and I am not just saying that . . . these Q and A's vary substantially in their quality.)

"**Question # 4 (IEP Section)**
Can a student who qualifies for specific learning disabilities (LD) placement with a fifteen point discrepancy in either mathematics, reading or language be served in a resource class for all three areas?
A. It is not good practice to place LD students in areas in which they do not demonstrate needs which require special education. Although not addressed by regulations, such practices may not serve the best interests of disabled students, and it is questionable as to whether the children could benefit from such services. Documented strengths and needs serve to determine appropriate special education. However, a fifteen point discrepancy is not the only indicator of need. It must be reflected in the documentation that the student has a processing disorder that causes him to manifest difficulties in those areas in which he is receiving special education." p. 12

I hope this answers your question at least in part; I frankly do not put a lot of confidence in the Q and As, finding more often than not that they raise more questions than they actually answer. But I think that's about the best guidance I can put my hands on at the moment!

Guy

Vision therapy as a related service

This is a perplexing problem. It is aggravated by high stakes testing, a phenomenon that appears likely to be a nationwide pandemic, given Congressional legislation mandating accountability measures. Our teachers are going crazy trying to eke out those extra parts of a point for every child. Although final figures have not been released, it is rumored that a school of excellence in our county, with 95% of its kids scoring above the 38th percentile [based on 1993 norms], missed getting its bonus money by one eighth of a point this year (based on growth, not absolute achievement--they're still a "School of Excellence!") We already have about six hundred kids getting modifications and accommodations on end of grade (EOG) tests, which are administered in grades three through eight. Teachers as recently as last year in some of our schools were putting kids on 504 Plans because their parents, teachers, and social worker "regarded" the child as being ADHD--without a shred of proof to back it up. I think we have stopped those civil rights violations. However, developmental optometry evaluations are from regular education's perspective a virgin gold mine. It isn't about addressing kids' needs, mind you--it is about addressing THEIR needs.

I believe developmental optometrists have lost all claim to credibility, given their wildly exaggerated claims for their therapy, but their interventions reportedly have some medical validity in certain types of cases. Furthermore, despite the ophthalmologists and pediatricians statements, when some states (CA) specifically list vision therapy as a related service, when some school systems on the Internet specifically offer it as a related service, and when some respected universities (e.g., the State University of New York at Stoney Brook) are offering graduate level courses in the topic, a parental claim in this area cannot be dismissed out of hand. Under 504, we are obliged to individually consider each case, and, if we do not agree to the parents' request, we have to tell them both of our decision and our reasons. While I'd like to say, "We're rejecting your claim because developmental optometrists are unethical quacks," I know, were I to do so, I would be challenged, possibly successfully, because I had not considered the individual child. Clearly, safer ground is to assess each claim on its individual merits.

In the particular case that aroused my concern, the optometrist said that the child had some vision deficiencies, recommended glasses for reading, and vision therapy. Although I think his boilerplate said it "could" affect reading, he did no educational assessments, identified no syndrome, did not claim that the child was disabled, and made no recommendations about the child's schooling in his report. It was the parents who brought us the evaluation, claiming that their child needed testing modifications. The school copied the "deficiencies" as being the disability and made the mods. The kid transferred to another school and the 504 Plan did not follow. The child got all A's and B's, aced the EOGs, but the parents were ticked that no one knew about the Plan. The new school now wants to make Mom happy, reinstate the 504 Plan, and get the mods for next year. We're discussing it.

What teachers don't seem to understand is that EOG modifications can only be requested if the school is making them year around. They're obliged to make the modifications in their daily testing. Most teachers seem to view this as an irritating technicality that is impossible to implement. They assume if they can't do it, they can't be held accountable for it. Worse, nobody seems to realize that 504 burdens are equivalent to IDEA burdens. That means, once the team has agreed the child has a disability, and once it has said there is a nexus between the disability and the child's failure (in my state) to receive a full and fair opportunity to reach his maximum potential (a no-no), the kid is entitled to whatever mods, accommodations, related services, and special education he needs to receive FAPE. Related service is what particularly concerned me--because once they've said there is a nexus, there doesn't seem from my perspective any grounds for refusing a parental request

for vision therapy, should one be made. Whereas my non special educational colleagues seem to view developmental optometry as the goose about to lay a golden egg, I on the other hand believe that this bluebird of paradise is about to relieve itself all over our collective heads.

It is a mess. In this particular case, I have advised them to ask, "What is the disability?" (Or, "Where's the beef?") Then I've asked them to find out if the kid received vision therapy. If the child did, and the vision deficiencies were "cured," then there would be no basis for an existing disability. (Sutton v. United Airlines, 1999. If the "disability" can be mitigated, then it's not a disability any more.) If the child still has vision deficiencies and a nameable disability, then I suggested they would have to show it was interfering with a major life function, that is, learning. A's and B's? Aced the EOG test with no mods? Well, maybe if Mom and Dad had been providing professional tutoring every Saturday and worked with the kid three hours one to one every night, we could still consider the possibility of a disability. Otherwise, probably not. Still, even if there was evidence of an educational disability (based on our data), I would recommend that they refer the student for a thorough evaluation in order to rule out other problems as being more likely causes before assuming that vision deficiencies were causal.

I am trying to think through this, because I thought it was potentially a big deal. But the paucity of responses thus far is beginning to convince me that I've just been paranoid. But another "take" could be that they just do not appreciate the complexity and seriousness of the legal situation. I wish I knew which was which.

Thank you for your thoughtful answer. My overly lengthy response helped me think through my needs; I hope it has had some entertainment value for you.

Guy

Is written consent needed to do an FBA?

The answer, I think, is "It depends." The law does not define what should go into a Functional Behavioral Assessment (FBA)

What the Final Regulations do state is, "when first removing a child for more than 10 school days in a school year, or commencing a removal that constitutes a change of placement, the LEA must within 10 business days, convene an IEP meeting. If the agency had not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the child the purpose of the IEP meeting is to develop an assessment plan. As soon as practicable after completion of the plan, the LEA must then convene an IEP meeting to develop appropriate behavioral interventions to address the child's behavior."

Generally, the "assessment plan" that must be completed within ten days of the 11th day of suspension (assuming one had not been done previously) is regarded as some sort of outline that establishes who, what, and when things will be done. (i.e., assigns responsibility and establishes timelines.) We treat that the same as an early reevaluation. Nothing that I've read prevents the IEP team from conducting its review and developing an FBA/BIP at that first IEP team meeting, but it is not REQUIRED that the team do so.

If the assessment plan consists of a review of existing documentation, no written consent from the parents would be required. Section 300.505 says "(3) Parental consent is not required before--(i) Reviewing existing data as part of an evaluation or a reevaluation"

While we sometimes do classroom observations as part of the process of developing an FBA/BIP, we have treated those as being part of the existing data review.

Sec. 300.533 Determination of needed evaluation data.

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under Part B of the Act, a group that includes the individuals described in Sec. 300.344, and other qualified professionals, as appropriate, shall--
(1) Review existing evaluation data on the child, including--
(i) Evaluations and information provided by the parents of the child;
(ii) Current classroom-based assessments and observations; and
(iii) Observations by teachers and related services providers

In my experience, an FBA can usually be completed based on a review of existing data as defined above. However, nothing prohibits the

team from determining as part of its assessment plan that "additional data" are needed.

If the team determines that additional data (e.g., behavioral scales) are needed, then we would ask prior written consent prior to completing them. (In the federal regulations, "evaluation" is defined as "procedures used in accordance with Secs. 300.530-300.536 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs") Similarly, if as part of the FBA you decide other assessments were needed to see if other related services were needed (the kid beat up children who made fun of his lisp, and you wanted to see if speech therapy would help), or if the parent had brought in their own evaluations and you wanted your own data so they wouldn't hold all the ace cards, prior written consent would be needed.

Guy

10 day suspension rule

Did IDEA 97 make any changes in the 10 day suspension rule? Specifically, can you suspend more than 10 days cumulative for sped students? How does a manifest determination play a part? Any resources would be helpful.

---------REPLY

There's no simple way to answer this question.

IDEA '97 was ambiguous, but clearly was intended to implement the Honig Standard.

The draft regulations said you had to provide FAPE for the child after ten cumulative days.

The Final regulations said you only were required to provide FAPE after ten consecutive days, but they did not mean what they seemed to mean.

If the child is suspended for more than ten days cumulative, they team must meet to complete and FBA and BIP. They only have to provide FAPE if the change resulted in a change of placement. A "change of placement" as defined within the disciplinary context is pure bureaucratic gibberish, e.g., the series of suspensions constitute a pattern, although some court decisions have suggested that in making that determination, we should also be looking for some substantial impact on the child's learning.

Anyway, the regs still says that the sped teacher and some administrator have to meet and decide what services the kid needs in order to receive FAPE (meet his IEP objectives and progress in the general curriculum) after the tenth day. If the kid is sinking like a rock because he's in so much trouble (out so much), then it's their responsibility to get him the services he needs (even though they claim there was no pattern amounting to a change of placement.)

I re-read the above and it sounds totally insane to me, but I think what happened is that OSERS gave us a simple rule to follow in 1997, Congress complained, so they went after their objectives using a round about route that just ended up confusing everyone. The kid still has rights, but you have to really read the fine print to figure that out.

I'd like to say I have this memorized, but I have to go back and look at my chart to be sure of the timelines.

There is a Q and A on discipline built into the Final Regulations. There is no real short cut to reading it. For just that section, go to: http://www.ed.gov/offices/OSERS/IDEA/regs.html Scroll down to Discipline Q & As and click on the link.

Also see: http://www.ed.gov/offices/OSERS/OSEP/factsheets.html on FBA, BIP, and PBIS. (An FBA and BIP are required if the kid is suspended; PBIS is what is required if the child has behavioral problems interfering with his educational progress in the IEP.) Heck, I can't even keep up with the acronyms any more.

Guy

Parental Permission and the BASC

Q: Can a teacher have the BASC (or Conners, etc.) done on a student (teacher rating only) with no parental permission? In fact the parent had no idea there was a social/behavior problem, and this is an involved parent.

A: The BASC is an evaluation.

If you suspect a child has a disability, you must have written consent before doing an evaluation--and give the parents their rights.

If you obtain an evaluation before written consent is obtained (theoretically possible if you did not suspect a disability at the time you administered it), you may not then turn around and use the evaluation for placement purposes.

Suppose (theoretically) you did not suspect a disability and had a BASC completed (Why you would do that if you didn't suspect a disability eludes me, but I know I have a limited imagination.) You then decide after reviewing the BASC that you do suspect a disability. After you obtained written parental consent, you would, at least my state so opines, have to give the teacher another BASC to complete (because you couldn't use the one you obtained in the prereferral process) for the team to consider.

I do not recommend making teachers do double duty. However, I believe AGS might endorse using it twice, once in the prereferral process, and again after the child had been referred, to see whether the teacher's ratings were consistent over time. Mark Daniels would offer a more authoritative opinion as to AGS's position, of course. I don't see much point, personally, in doubling AGS's profits by rating the same scale on the same child twice, but I've heard Connors say that he'd recommend having two CTRS R:L ratings from the same teacher on kids being assessed for ADHD because on average teachers tended to rate children lower the second time they filled out the protocol. He opined the second rating would generally be more accurate.

Whether or not BASC stays part of the child's record would, I would hope, be at least partially dependent upon what the parents wanted done with the data (see below). However, the child's record is not a particular place--whatever information you have on the kid that contains personally identifiable information, no matter where it is stored, is already part of the “record." FERPA defines records thusly: "'Education records' (a) The term means those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution." So the only way it wouldn't be a part of the child's record is if it was destroyed or if

somebody took it home with him and hid it. (I don't know why someone would do that, but I've spent the last thirty years or so trying to figure people out, and I've about given up.)

http://www.ed.gov/offices/OM/fpco/ferparegs.html

http://web.indstate.edu/soe/iseas/edtl-rec3.html

Also, as "Roob" suggested, and as AGS says, "Users are expected to have had formal training in the administration, scoring, and interpretation of behavior rating scales and self-report personality scales. Clerical staff, with appropriate training, may administer and score various BASC components, but interpreting and applying the results require a graduate level of education **in psychology**." Psychology, NOT social work.

http://www.agsnet.com/assessments/technical/basc.asp#2

Guy

Federal Regulations:

§300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

FERPA

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

504 and IDEA '97

There are a number of differences between 504 and IDEA '97, and I don't think I can summarize them adequately in one short paragraph. However, Section 504 DOES place the same burdens on a school system as IDEA '97 without, as the writer below notes, the funding. The main difference is that a disabled child is entitled to classification under Section 504 if accommodations, modifications, or sped are needed to provide FAPE. Under IDEA '97, the child is entitled to classification ONLY if he or she needs sped to receive FAPE. Think of 504 as a BIG circle and IDEA as a smaller circle inside it. The thing is, just because a kid is entitled to services under 504 doesn't mean you can use IDEA funds (state or federal) to pay for them. OCR's position has always been that a system would have to be awfully uncreative not to find some way of classifying a 504 kid under IDEA if s/he needed sped.

The following article is posted on LDONLINE and on Wrightslaw:

http://www.ldonline.org/ld_indepth/legal_legislative/edlaw504.html

It has been very helpful to me. In most mini treatises on 504, I have found a small amount of potentially dangerous error, but not in this one.

Oddly, at least to me, OCR was crystal clear on that prior to 1998, but in 1998 they revised their handout on public schools to emphasize 504 children's right to placement in the LRE. But when they say, "Disabled students may be placed in a separate class or facility only if they cannot be educated satisfactorily in the regular educational setting with the use of supplementary aids and services," they DON'T say "but only if the kid is reclassified as eligible under IDEA." They're talking exclusively about children's rights under Title II and Section 504.

http://www.ed.gov/offices/OCR/docs/placpub.html

You can't exempt 504 kids or IDEA kids from district-wide testing. Period. If the test is not appropriate, alternative testing or assessments must be provided. OSEP addressed this issue in August, 2000:

http://www.dssc.org/frc/AssessmentQ&A.html

A more family friendly version was republished in January, 2001,

http://www.dssc.org/frc/fed/OSEP01-06.FFAssessment.doc

in a downloadable Word document. (An html version is also available from Oregon 's DPI at:

http://www.ode.state.or.us/sped/fedpapers/assessment.htm

In North Carolina , those assessments are dictated by the state. However, as others have pointed, being ESL doesn't make you handicapped under Section 504 or IDEA.

However, federal guidelines including some general dicta on testing ESL children can be found in OCR's pamphlet from 1991:

http://www.ed.gov/offices/OCR/docs/lau1991.html

Most states have similar policies to NC. I'd recommend a search of NY's SED website. Or, you could start with

http://www.emsc.nysed.gov/ciai/biling/pub/memo010499.html

The NC guidelines are a direct result of a complaint resolution with OCR. They're not sensible, at least to me, but they are apparently legal.

Guy

Permission to Evaluate

As noted below, the requirements for an initial evaluation and a reevaluation are differently defined in the federal regulations. North Carolina's Consent for Testing has not changed in any substantive manner in at least four years. The DEC 2 (Consent for Testing) was reported reviewed in the original package sent to OSERS for their review and was found consistent with the federal requirements. (I cannot attest to that of my own personal knowledge, it's just what I was told.) You can download the form at:

http://www.dpi.state.nc.us/ec/dec2.pdf Acrobat Reader is required.

Nowhere in the federal or my state regulations is it required that parents agree upon the specific test to be given; the type of evaluation (e.g., "intellectual evaluation") is generally specified.

Guy

IDEA vs 504

Let me see if I can put this in very simple terms without distorting the law (almost an impossibility. You can't understand the laws without doing at least a little background reading.)

Anyway, think of it this way. ADA/504 and IDEA provide the exact same rights to disabled children--that is, the right to FAPE in the LRE. The kid is entitled to everything he needs. That's why when most experienced spedlaw lawyers sue, they do so under all three statutes. (ADA/504 are also generally equivalent in their requirements educationally, which is why OCR enforces them together.)

Anyway, if a disabled child needs sped, the school must provide it. But it can only use IDEA funds for IDEA identified children. So--if you say a 504 child needs sped, you have to provide it, but you can't use federal or state special education funds to provide that service. I don't think providing sped under 504 is a widespread phenomenon, but it has been adjudicated. Back in the late eighties or early nineties, Gaston Cty, I am told, didn't think ADHD kids qualified under OHI or any other category in the EHA. (That's not because they were stupid, it's because our DPI said they weren't.) The judge reportedly threw up his hands, saying, "I don't really know if he does or doesn't, but I do know he qualifies under Section 504. Pay for it out of local funds." That was before OSEP had weighed in, saying ADHD kids WERE entitled to services under IDEA. (I don't have a citation for the Gaston case, but I don't think the story is apocryphal.)

So--if you've got a 504 kid who needs sped, the most reasonable course of action is to find some way to qualify him under IDEA '97 so you can use federal funds to provide the service. Of course, you don't need to rely upon me for that interpretation. I know I wouldn't. There are a couple of excellent resources on the Internet. I especially like

http://www.ed.gov/offices/OCR/docs/placpub.html in which OCR says in part:

"Section 504 and Title II of the ADA prohibit the discriminatory assignment of disabled

students to segregated classes or facilities. These laws apply to elementary and secondary as well as postsecondary schools. In elementary and secondary schools, disabled students may be assigned to separate facilities or courses of special education only when this placement is necessary to provide equal educational opportunity to them. Any separate facilities, and the services provided in separate facilities must be comparable to other facilities and services." Note that the right for separate facilities or courses is not dependent upon the child being classified under IDEA '97, only that it is "necessary to provide equal opportunity."

I also have previously provided this link: http://www.ldonline.org/ld_indepth/legal_legislative/edlaw504.html , a snippet of which follows:

> "For a brief period following enactment of IDEA (then the Education of All Handicapped Children Act), the state of New Mexico did not seek funds under the statute, thereby avoiding its detailed reporting and procedural requirements. However, after a lawsuit by advocacy groups alleging that the State's education programs failed to comply with Section 504, the State concluded that since its service obligations under Section 504 were essentially identical to those under IDEA, there seemed little point to not seeking IDEA funding."

The LRE Mandate under both Section 504 AND IDEA is to educate each qualified handicapped person with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. Although some think that the mandate is even stronger under Section 504, I don't concur; both laws are equally explicit and equally binding.

A school systems does not have to develop a separate 504 Plan for a student with an IEP. OCR has written (see above), "The Individuals with Disabilities Education Act (IDEA) requires schools to develop, according to specific standards, an individualized education program (IEP) for each eligible student with disabilities. An IEP that meets the requirements of the IDEA also fulfills the requirements of Section 504 and Title II of the ADA for an appropriate education for a disabled student."

Although I don't see anything in the law that prohibits a school from doubling its paperwork and doubling its fun, the fact that you can do something stupid doesn't mean you should. Of course, a parent of a disabled child may decline special educational services available for IDEA '97, opting instead for a 504 Plan that only includes

accommodations, modifications, and maybe related services. But it's my understanding that same parent can't come back and then demand the same sped services under 504 that would have been available under IDEA. (Nothing, however, would prevent her from coming back and demanding compensatory services under IDEA if the school capitulated too easily; the right to FAPE belongs to the kid, not the parent. Rocks and hard places . . . some days there is no way to win.)

The Council of Educators for Special Disabilities (CESD) has opined at: http://www.504idea.org/504_placement.html

> "Question 3: Since 504 also applies to IDEA (special education) students, does that mean that a 504 committee has to meet to provide services in addition to the ARD Committee (or IDEA IEP/Multidisciplinary Team)?
>
> NO. While 504 provides nondiscrimination protection to IDEA students, the responsibility for the child's free appropriate public education comes from IDEA. It is that ARD Committee (IEP Team, etc.) that determines the educational services for the child. OCR has concluded that when a child qualifies under the IDEA, the District satisfies the provisions of Section 504 as to that child by developing and implementing an IEP under IDEA. Letter to McKethan, 25 IDELR 295, 296 (OCR 1996). Of course, the anti- discrimination protection provided by 504 does not necessitate 504 Committee action, but instead, is accomplished through awareness and training of district personnel.
>
> Question 4: Can a parent demand that 504 provide services rather than IDEA for his/her IDEA-eligible child?
>
> NO. On occasion, a parent of an IDEA-eligible students may desire all that IDEA has to offer (special education and related services) but demand that the District provide those services under Section 504 so that the child is not in special education. OCR has rejected this demand, finding that when a child qualifies under the IDEA, the District satisfies the provisions of 504 as to that child by developing and implementing an IEP under IDEA. Therefore, when parents reject that IEP developed under IDEA, they "would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed IDEA requirements." Letter to McKethan, 25 IDELR 295, 296 (OCR 1996). Similar findings have been made in a Texas Section 504 Hearing (Errol B. v. Houston ISD, Hearing

Officer Ann Vevier Lockwood, October 26, 1995), and by a federal district court. "The Court believes that the only students likely to be entitled to special education under Section 504 are the same students also entitled to special education under the IDEA." Lyons v. Smith, 20 IDELR 164, 167 fn. 11 (D.C.D.C. 1993)(emphasis added)."

In any event, that's what they say, and I don't disagree.

Private and Parochial School IEPs

Assuming that the placement did not have to do with a dispute over FAPE, parentally placed children in private schools with disabilities have limited rights under IDEA 97. Parents of privately placed children would have the same right as public school children's parents to take a district to due process over issues revolving around the evaluation (assessment) or identification of their child. Districts are required to meaningfully consult with private schools about their children's needs in developing a service plan for privately placed children in their district, but they are not required (under federal law) to spend more than the federal allotment for those children. Therefore, parents would not have the right to file a due process suit over an alleged failure to receive FAPE because IDEA 97 specifically says that individual children have no such right. However, parents WOULD have the right to file a complaint with the respective SEA if they believed the evidence showed that there had been no meaningful consultation with private schools. Hence, also, the reason for calling the plan provided an ISP rather than an IEP--because "ISP" is the terminology adopted under the federal regulations. My personal assumption is that after having met with private school representatives, the LEA would be well advised to develop a plan for spending the federal money, but I have not seen any specific format for that. It's just my inference that in order to show that it had meaningfully consulted, a district should be able to show the results of that consultation. Additionally, since teams are not required to give a child every service he needs, only those needed services which are offered, I infer (perhaps mistakenly!) that there should be some guidelines for them to work from. In any event, ISP teams do not have the same power given to IEP Teams.

These are actually pretty complex issues, and I would recommend that anyone who has to deal with these issues review the OSEP Q and A on private school children posted below.

Note, additionally, that state laws may expand the rights under the federal statutes. There's a Pennsylvania case posted on Wrightslaw that expands the rights of parentally placed private school children in that state. Additionally, OSEP says that home schooled children in a state are only entitled to those services if the state specifically gives them the same rights as private school children. The answer to that question may or may not be an easy one to obtain from your SEA.

A summary of the law can be found at:

http://www.ed.gov/offices/OSERS/IDEA/Brief-10.html

OSEP's explanation (consisting of a memorandum plus 45 Q and A's) of that summary seems to go on forever, and it can be found at:
http://www.edlaw.net/service/private-school-obligations.html

Guy

Myth or Reality? 504 Liability

Recently, some staff members with whom I work have begun to balk at signing 504 Accommodation Plans. They have heard that when their name is on a 504 Plan they can be held personally liable if the plan fails or is not followed. Is there any truth or case law to support this? Has any parent been able to collect damages from a teacher or other school employee because he or she did not ensure that a 504 Plan was implemented and followed? Is this notion a myth or a legend?

-------REPLY

Mostly a myth. There's the infamous Doe v. Withers case, where poor Mr. Withers made the mistake of ignoring a kid's modifications. It wasn't the fact that he had or had not signed off. It was the fact that he had been told to make the mods and did not, the fact that the kid failed, and the fact that he didn't get to participate in sports as a result. That's what got the parents really ticked. Most legal experts seem to agree that the case was aberrant. Had he appealed, he probably could have prevailed, but it would have cost him more in legal fees to take it to a higher court than he would have saved in actual and punitive damages (amounting, as I recall, to $15,000 total.) Wrightslaw has the case on its website, but I think it's there mostly to frighten first year teachers. There has not been a decision like that one since.

http://www.wrightslaw.com/law/caselaw/case_Doe_Withers_Juryorder.html

The 504 Plan is a contract between the school system and the parent, and as such is legally enforceable whether a teacher "agrees" or not. State and federal laws require implementation, and most teacher contracts require teachers to abide by state and federal laws. So if the 504 Plan is approved, the teacher is informed, and the principal (as he or she would be obliged to do) directs compliance, failure to comply could result in disciplinary action. In fact, the teacher could be fired if s/he intentionally denied the child his civil rights (and some advocacy groups advocate for parents to pursue that course of action). That's the real window of vulnerability, and it has nothing to do with signing or not signing. The school system's window of liability would probably be limited to compensatory damages, but it's not quite that simple either (some circuits have left open the door to punitive damages, but thus far I haven't seen anyone drive through it yet. The standard is pretty high in order to establish malicious intent.) Parents could also allege that their child was being discriminated against and file a complaint against the system through OCR. Those investigations are always incredibly time consuming, and given their druthers, most administrators I know would rather take decisive action up front in order to avoid the long and drawn out process of reaching a complaint resolution later on with the feds. OCR can enforce compliance through the threat of withholding all federal funds if they're crossed, so it's not just the possibility of personal inconvenience that should encourage administrators to take decisive action against recalcitrant teachers.

(Although there is emerging caselaw opening windows of liability for teachers, all of the cases I have seen involve emotional damages resulting from gross abuse, e.g., forcing a child to eat oatmeal mixed with his own vomit because he threw it up intentionally. Or driving a child with an anxiety disorder to the brink of suicide by publicly ridiculing her for her disability in front of her classmates.)

The same holds for IEP modifications and accommodations. It is incumbent upon the school system to show that the teacher participated, not that the teacher agreed. A teacher signature would document that participation. It is not a federal requirement, however, if the IEP documents that participation in another way, e.g., someone writes "Mr. Withers participated in the meeting but refused to sign because he disagreed. (Signed) Mr. Irate Principal." (In my state, our state forms simply say that the participants "should" sign an IEP.)

While I'd log participation and notify the principal in the situation you describe, telling teachers that their refusal to sign will not limit their liability in any significant way should settle the issue. In fact, refusal to sign could actually expand their window of liability. Were I a parent attorney in a circuit court where punitive damages have not been disallowed, I'd cite their refusal as evidence of a preformed, premeditated, and malicious intent to deprive my client of his or her civil rights. I'd probably lose, but I'd have fun with it. Of course, I'm not an attorney. I'm a lovable school psychologist.

Guy

When 504 students are up for their 3 year review, generally what kind of evaluation do most of you conduct? Do you treat these cases like CSE re-evals with updated testing and a report? I know the cases are individually based, but I am curious to see if most of you write reports, complete updated academic and/or cognitive testing, etc.

-------REPLY

They have the same entitlements as a child under IDEA '97 to a comprehensive evaluation.

"Before placing disabled students in any educational program, schools must evaluate carefully each student's skills and special needs. Federal requirements provide standards for proper evaluations and placement procedures.

The tests and evaluation materials that are used must be chosen to assess specific areas of the student's needs. For example, a student may not be assigned to special education classes only on the basis of intelligence tests. When a student with impaired sensory, manual, or speaking skills is evaluated, the test results must accurately reflect what the test is supposed to measure and not the student's impaired skills except where those skills are what is being measured. Only trained people may administer the tests or evaluation materials.

Placement decisions must be made by a team that includes people who know about the student and understand the meaning of the evaluation information. The placement team must consider a variety of documented information for each student. The information must come from several sources, including the results of aptitude and achievement tests, teacher recommendations, reports on the student's physical condition, social or cultural background, and adaptive behavior."

http://www.ed.gov/offices/OCR/docs/placpub.html

Furthermore a previous history of services in sped does not in and of itself provide an automatic entitlement. The child has to have a disability, not just a history of one.

"Current versus Historical or Perceived Disabilities: Different Eligibility. The first prong of the definition of "handicapped person" focuses on current disabilities. The second and third prongs cover persons with a history of a disability or persons who are perceived as having a disability. The second and third prongs create a very different type of ¤504 eligibility. While a "record of" an impairment or being "regarded as having" an impairment by the recipient give rise to anti_discrimination protection under ¤504, these two prongs do not trigger the school district's obligation to provide a free appropriate public education or FAPE. "Logically, since the student [qualifying under prong two or three] is not, in fact, mentally or physically handicapped, there can be no need for special education and related aids and services." OCR Senior Staff Memo, 19 IDELR 894 (OCR 1992) [bracketed material added by author]. Put more bluntly: "Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were." Id. Consequently, the District has no duty to refer, evaluate, or place students who qualify under prongs two and three.

The only duty as to these students is to not discriminate against them on the basis of the history of an impairment or the perception that the child is impaired."

Actually, I couldn't have put that better myself.

http://www.504idea.org/504overview.html

Under Section 504, a reevaluation must be completed before any change of placement. While it need not be as detailed as under the procedural requirements for IDEA '97, if you meet the burden of those requirements, you will also meet the requirements of Section 504. (Re-testing is not required under either statute, but IDEA '97 does not require an evaluation before a change of placement, only before exiting a child for any reason other than getting a diploma.)

Or, in the words of OCR, "The performance and skill levels of disabled students frequently vary, and students, accordingly, must be allowed to change from assigned classes and programs. However, a school may not make a significant change in a disabled student's placement without a reevaluation. Schools must conduct periodic reevaluations of all disabled students."

http://www.ed.gov/offices/OCR/docs/placpub.html (again.)

The placement team must also be aware of different options for placing the student so that the student is placed appropriately. See section on Educational Setting, below.

Guy

Destruction of Protocols--Reactions

I was hoping to get by with my short answer. Firing the attorney seemed succinct.

Not all protocols are created equal--that is, not all protocols contain personally identifiable information, so not all are academic records. For example, OSEP has said, "Documents such as test instruments and interpretive materials that do not contain the student's name are not considered to be 'directly related' to the student. Accordingly, these documents would not fall under the FERPA definition of 'education records' " standard of educational record (that is, there is personally identifiable information on the form.)

http://web.indstate.edu/soe/iseas/edtl-rec3.html

Most individual test protocols, however, seem to meet the standard in a FPCO statement alluded to by another writer:

"[T]est instruments or question booklets containing information that identify a particular student, whether or not the actual name of the student appears on the booklet, constitute 'education records' subject to the FERPA requirements. Therefore, in cases where an answer sheet is directly related to the student and is separate from the question booklet not directly related to a student, only the answer sheet would be considered an education record under FERPA. In cases where a question booklet that includes both the questions and the student's responses, the question booklet is an education record subject to FERPA"

http://www.fetaweb.com/04/ferpa.rooker.ltr.protocols.htm

Federal IDEA '98 regulations address the destruction of records in the following section, which I've also printed out in its entirety:

http://www.ideapractices.org/law/regulations/searchregs/300subpartE/Esec

300.573

Subpart E-Procedural Safeguards

Confidentiality of Information

§300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(a)(8), 1417(c))

With respect to educational records, most districts I believe follow the advice given in the notes that followed in Attachment 1, which reads in part, "In instances in which an agency intends to destroy personally-identifiable information that is no longer needed to provide educational services to the child (such as after the child has graduated from, or otherwise leaves the agency's program), and informs parents of that determination, the parents may want to exercise their right to access to those records and request copies of the records they will need to acquire post-school benefits in the future."

There are a lot of reasons why a parent attorney would want to have a copy of the test protocol, but presumably, since we are all advocates for children, if we made some mistakes, we'd appreciate someone catching them so we could correct them. If I were looking at a protocol on behalf of a child, I'd want to be sure the DOB was right, CA correctly calculated, raw scores added up correctly, basals and ceilings properly observed, the right table used to score it, and the age appropriate sections (e.g., the right Coding page) given--just for starters, anyway. Routinely destroying records (legal niceties above aside) could create the impression that we're covering up a multitude of sins. At the very least, it puts us at a disadvantage if a parent requests

an IEE. And that's the very least.

With the Enron experience so close upon us, anybody who routinely shreds records is going to be suspect, and . . . this is not just me . . . credibility is extremely important in determining which testimony a hearing officer will value the most. Even on appeal, in matters of determining relative credibility, deference is given to the original hearing officer. We lost a hearing about ten years back that should have been a slam dunk, but the hearing officer just didn't believe us (We were telling the truth, too!) In this case, even if the law did not protect the records (and you can read it just as well as I), common sense should tell you that mass shredding destroys more than paper--reputations are imperiled, too.

Guy

Grade Equivalents

Every score has a purpose. The problems with g.e.'s have been well documented in this and previous discussions, but it is not that there is something intrinsically evil with g.e.'s, but that they are often misused and easily misinterpreted. Putting g.e.'s in the hands of teachers has been compared to putting an AK-47 in the hands of a child. A fine instrument, easy to use (just pull the trigger), but generally you would want to have some control over where and when it was actually applied.

HOWEVER, that said, g.e's have an attribute that standard scores and percentiles do not. If you use standard scores to document progress, you may easily discern a drop from one testing to the next. In an adversarial situation, the parents will LOVE those scores. Indeed, if you review the background material for Brody v. Dare Cty, an interesting due process lawsuit documented on Wrightslaw, the parents might even convincingly allege (to a due process hearing officer) that a decline in standard scores represents regression. The results, if those scores are accepted as represented, can be catastrophic.

http://www.wrightslaw.com/advoc/articles/ltr_to_stranger_brody.html

http://www.wrightslaw.com/law/caselaw/case_Brody_RO_decision.html

For example, in her "Letter to a Stranger" the parent argued that the following data proved regression:

Regressed: 1.5 years of progress after 3 years of special ed. (2.9 g.e. to 4.4.) Percentile Rank declined 12%

The Hearing Officer ruled for the parents, providing them with tuition reimbursement.

On the other hand, in HISD v. Caius, 2000, the court ruled that the school properly used grade equivalents rather than percentiles to document progress. The school argued for the use of g.e.'s, and it won. The 5th Circuit, in finding that the school system had provided FAPE, wrote "HISD employed the widely utilized and accepted Woodcock Johnson intelligence and achievement test to indicate Caius's academic progress. Caius's test scores showed the following changes from 1993 to 1995: (1) Math scores improved from the 1.7 grade level to 3.1; (2) written language improved from the 1.5 grade level to 1.9; (3) passage comprehension went from 1.7 to 2.2; (4) calculation rose from 1.4 to 3.3; (5) applied problems improved from 2.0 to 3.0; (6) dictation went from 1.6 to 1.8; (7) writing improved from 1.4 to 2.6; (8) word identification, basic reading skills, and letter identification rose from 1.8 to 2.1; and (9) word attack rose from the level of a seven-month kindergarten student to grade level 1.8." It went on to say, "From 1995 to 1996, Caius showed the following improvements: (1) Broad reading increased from 2.1 to 3.3; (2) word identification from 2.1 to 2.8;(3) passage comprehension from 2.2 to 3.9; (4) math from 3.1 to 4.4; (5) calculation from 3.3 to 5.0; (6) applied problems from 3.0 to 3.6; (7) written language from 1.9 to 2.9; (8) dictation from 1.8 to 2.8; (9) writing samples from 2.6 to 3.3; (10) basic reading cluster from 2.1 to 2.8; and (11) proofing from 2.3 to 2.6. Only word attack remained the

same, at the 1.8 grade level." In its decision, the court said, "Caius claimed that a child's percentile scores were the best measure of academic performance, while HISD argued that passing marks and advancement from grade to grade were sufficient indicia to satisfy the IDEA. And on this dispute the district court is correct that a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of educational benefit, but only a child's inability to maintain the same level of academic progress achieved by his non-disabled peers."

http://www.ca5.uscourts.gov/opinions/pub/98/98-20546-CV0.HTM#N_4_

Of course, since in Brody v. Dare, the sped teacher apparently admitted she did not know how or have the skills to teach reading, the issue of percentiles v. grade equivalents probably wouldn't have made any difference. But it could have.

Percentiles and standard scores are best for demonstrating relative weaknesses and strengths. G.E.'s, on the other hand, are most effective when trying to document progress ("educational benefit" that is more than merely trivial.)

Guy

Protocols in school records

Test protocols are the property of the public school system. Test protocols containing personal information on the child will be requested by any knowledgeable attorney for review by the parents' experts. The common errors we have all have made at one time or another can be fertile ground for someone intent upon discrediting the school's position.

See OSEP's interpretation in consultation with the Family Policies Compliance Office (FPCO):

http://web.indstate.edu/soe/iseas/edtl-rec3.html

Nothing in FERPA or special educational regulations specify where the information is to be kept. Practically, you wouldn't want to keep financial records (which are really what sped records are, especially if you have a headcount audit) someplace where some fool could easily them. Also, ethically, test protocols are secure instruments that should only be shared as required by law. So I suspect most of us store them in a place other than the kid's cumulative record.

Federal regulations are specific as to when and under what circumstances information about a child may be destroyed. You may destroy records "when they are no longer needed" and only after first notifying the parent.

http://www.ideapractices.org/searchregs/300subpartE/Esec300.573.htm

Typically, according to the regulations above, that happens after a child has graduated from or left school.

Parents are entitled to inspect the record. But not to copies except under very special circumstances. In a due process suit, however, that's largely moot. The parent attorneys want our protocols to share with their professionals, and there is absolutely nothing in the law, in professional ethics, or in publishers' dicta on the subject that would inhibit or prohibit our sharing hard copies with professionals bound by the same professional ethics that apply to us, as long as the parent has given informed consent, and as long as the protocols are sent directly to the professional (not picked up, say, by the Daddy's secretary.)

But mostly I've just been reinventing the wheel. NASP has a really nice little handout that touches on many of these issues (although not specifically talking about when test protocols may be destroyed or in what file they should be kept):

http://www.nasponline.org/publications/cq297protocols1.html

Guy

High Stakes Testing, Best Practices in Assessment

OCR has published its latest draft of high stakes testing (7/6/00) on its website at:

http://www.ed.gov/offices/OCR/testing/index.html

It is available in both Adobe Acrobat and Word formats.

Anyone concerned with any of the following issues is urged to download this document. Additionally, it is the best reference I know of which is available for districts that are in the process of or who might be in the process of defending themselves against charges of disparate impact or unethical testing practices.

Guy

> "As used in this resource guide, "high-stakes decisions" refer to decisions with important consequences for individual students. Education entities, including state agencies, local education agencies, and individual education institutions, make a variety of decisions affecting individual students during the course of their academic careers, beginning in elementary school and extending through the post-secondary school years. Examples of high-stakes decisions affecting students include: student placement in gifted and talented programs or in programs serving students with limited-English proficiency; determinations of disability and eligibility to receive special education services; student promotion from one grade level to another; graduation from high school and diploma awards; and admissions decisions and scholarship awards."

> "High-stakes decisions in this guide refer to decisions with important consequences for students, such as placement in special programs, promotion, graduation, and admissions decisions."

Is there research on reading the test aloud?

Given the proliferation of litigation over high stakes testing, this question is far from academic.

Tindal and Fuchs did an extensive review of the literature. A summary (not on point) can be found at:

http://www.ihdi.uky.edu/msrrc/PDF/Tindal&Fuchs.PDF

However, if you download the entire document (a bit more time consuming!), the review does specifically address reading aloud on pages 9-10, audio read aloud on page 30, page 46 (read aloud with other modifications), page 49 (audio read aloud not found to be effective), and so on.

In general, reading math problems aloud was found to be one of the most effective modifications (no surprise, but it's nice to have data.)

I would caution, however, that establishing that test modifications have validity does not go very far in establishing that the tests are valid. North Carolina, for example, just "dumped" three SOL (standards of learning) high stakes tests that the Department of Public Instruction apparently did not feel confident that it could defend. For a more general review of literature on the topic of high stakes testing, I recommend you check out the following link to a Rockingham board member's website and save it as a favorite. The man obviously has a mission, but the website is quite comprehensive.

http://home.rica.net/airedale/test_usage_information_links.htm

Guy

IEP participation

Please share the legal advice you receive on including minors in IEP Team meetings. I infer that this meeting was after school hours and that the other children were not pulled from their classes. I assume their parents were okay with their participation. Just as a by the way, the final decisions always rest with the LEA, and (though not raised in your letter) deciding issues by majority vote would never be appropriate, according to the Final Regulations.

This has not been an issue, but it has been a concern for me, when parents, unable to find baby sitters, bring a child's own younger siblings to meetings.

The parents determine whom they shall invite; Part B makes it clear that we determine whom we will invite. If the parent wants to invite other regular education teachers, they could do so, but it would (I would think) then be up to them whether they wanted to come or not.

If I were responding to the parent request that all the child's teachers attend, I think I'd say that in accordance with IDEA 97 regulations, we had invited a regular education teacher to the meeting to represent the regular education staff. I would probably indicate that input for the IEP team meeting had been solicited from the other teachers and assure the parent that we would meet our responsibility to make sure all the child's teachers were aware of any IEP provisions relating to them (see below for regulatory language). I might even say that the parent has the right, of course, to invite whomever she wished, including other teachers. I'd probably leave out the part about the other teachers having the right to decline. (They might want to come. I've had parents invite me to an IEP Team when the school has not included me, and I've gone.)

Guy

Excerpts from Part B

In implementing the requirement for membership of a regular education teacher on the IEP team, the public

agency will determine which teacher or teachers of the child will fulfill that function to ensure participation of at least one regular education teacher in the development, review, and revision of the child's IEP, to the extent appropriate, in accordance with section 614(d)(3)(C) of the Act. (See discussion of Sec. 300.346(d) of these regulations). In addition, it would be highly beneficial to the education of children with disabilities to ensure that those regular education teachers and other service providers of the child who are not members of the child's IEP team are informed about the contents of a child's IEP to ensure that the IEP is appropriately implemented. Whether the child's regular education teacher must be physically present at an IEP meeting, and to what extent that individual must participate in all phases of the IEP process, are matters that must (1) be determined on a case-by-case basis by the public agency, the parents, and other members of the IEP team, and (2) be based on a variety of factors.

***

If the child has more than one regular education teacher, the LEA may designate which teacher or teachers of the child will participate on the IEP team. While all regular education teachers of the child need not attend the child's IEP meeting, their input should be sought, regardless of whether they attend.

Excerpts from Appendix A

23. For a child with a disability being considered for initial provision of special education and related services, which teacher or teachers should attend the IEP meeting? A child's IEP team must include at least one of the child's regular education teachers (if the child is, or may be participating in the regular education environment) and at least one of the child's special education teachers, or, if appropriate, at least one of the child's special education providers (Sec. 300.344(a)(2) and (3)).

****

The public agency must ensure that each regular education teacher, special education teacher, related services provider and other service provider of an eligible child under this part (1) has access to the child's IEP, and (2) is informed of his or her specific responsibilities related to implementing the IEP, and of the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP.

Re-evaluation's

Actually, exiting a child requires a reevaluation because the Final Regulations say exiting a child requires a reevaluation--not because it is a change of placement.

IDEA has never required a reevaluation for a change of placement. It has required Prior Notice. A "reevaluation" was always required because ADA/504 require a reevaluation before a change of placement. Those laws are enforced by the Office for Civil Rights, and the definition of "reevaluation" under those statutes never had the same meaning as under IDEA--a fact that has caused much confusion.

The IDEA 97 Final Regulations say you have to give Prior Notice before exiting a child with a regular diploma because it is a change of placement, but you do not have to reevaluate that child. However, if you give the child something other than a regular diploma, the child's right to continuing services does not change, so there is no change of placement requiring Prior Notice. Since there is no change of placement, ADA/504 would not require reevaluation, either. Change of placement under IDEA always requires Prior Notice.

The only other place I find that the Final Regulations discuss a change of placement is with respect to discipline. The word "reevaluation" does not appear in very extensive the Q and A on Discipline. However, if a child's placement is changed as a result of a suspension or series of suspensions, a Manifestation Determination must be made.

A reevaluation consists not only of reviewing previous evaluations but also current classroom based assessments, teacher observations, and parent reports. If the IEP Team determines that information is sufficient to determine the child's continuing eligibility, present levels of performance, his or her sped needs, and need for additional related services, they need not obtain additional data.

In making a manifestation determination, the team has to review " Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child; (ii) Observations of the child; and (iii) The child's IEP and placement."

The Office for Civil Rights has said that the review conducted for a Manifestation Determination Team meets their requirement s under Section 504 for a reevaluation.

Therefore, while previous testing would ordinarily be reviewed, the team's decision (re exiting) or determination (re manifestation) would of necessity be based upon current data, not old information. "Evaluation" under IDEA 97 means "procedures" as defined by the regulations. While there are extensive requirements regarding the tests we use (300.531), CFR Section 300.532 does not mandate that we use any tests or do any testing as part of a reevaluation procedure, if (paraphrasing) the classroom assessments, parent reports, and teacher observations are sufficient for the team to meet the child's needs.

Guy

Placement Regulations

300.501 says in part,

> "(2) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting."

So it's apparently okay that the sped director and teacher talked, but nothing is ever quite what it seems in spedlaw. IEP determines placement, not the sped director.

While 300.501 carries the force of law, so also does Appendix A. And what Appendix A says is,

> 32. Is it permissible for an agency to have the IEP completed before the IEP meeting begins? No. Agency staff may come to an IEP meeting prepared with evaluation findings and proposed recommendations regarding IEP content, but the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. Parents have the right to bring questions, concerns, and recommendations to an IEP meeting as part of a full discussion, of the child's needs and the services to be provided to meet those needs before the IEP is finalized. Public agencies must ensure that, if agency personnel bring drafts of some or all of the IEP content to the IEP meeting, there is a full discussion with the child's parents, before [[Page 12479]] the child's IEP is finalized, regarding drafted content and the child's needs and the services to be provided to meet those needs.

The LEA representative has immense power tempered only by regulatory injunctions to seek consensus and the power of the paper to exercise due process rights, which include the right to sue, but also encompass everything from a demand for mediation to filing an SEA or OCR complaint. If a parent, for example, were able to convince a judge that the LEA representative made no effort to work toward consensus, denying them their right to participate in the decision making process, that in and of itself could be fatal to the school's efforts. While the following excerpt from Appendix A carries the force of law, I have seen at least one case in Pennsylvania where a court ruled that a system that had always made decisions based upon "majority rule" couldn't just change the ground rules in one case. Nothing is ever a slam dunk, and while I think that decision resulted in some bad law, it doesn't matter what I think. But do bear in mind that I'm a school psychologist, not an attorney, and I take no responsibility if you get into trouble as a result of my advice!

> "The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based upon a majority ``vote.'' If the team cannot reach consensus, the public agency must provide the parents [[Page 12474]] with prior written notice

of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing."

IEP teams have immense power. Most of us may think that our state regulations are carved in stone, but according to OSEP they are not. I do not have internet references, but under the FOIA I received a packet of OSEP letters on the subject dating back to the eighties. Decisions must be made in accordance with federal law, and if you look at federal law, the definitions and criteria are incredibly vague. If your team determines that a child meets the federal criteria, the child is eligible. If an administrator or auditor disagreed, it could not according to OSEP overrule the IEP team, but it could direct that the IEP team be reconvened.

The LEA is defined in federal regulations as the school board. The school superintendent represents the board within the school system, so, at least it seems so to me, the superintendent would have ultimate authority in determining who will serve as LEA representative at an IEP team meeting. Normally, this would not be an issue because in most systems it is assumed that principals have the power, often delegated, to serve as LEA representatives. However, I find nothing in the federal regulations that suggests that the LEA rep has to be the principal or that the principal always gets to decide who the LEA representative is. This could be important in a situation where both a principal and the district special education director are in attendance at an IEP team meeting--and in conflict. If my understandings are correct (the IEP team has ultimate authority over the child's placement, the LEA representative has ultimate authority over the IEP team, and the superintendent has ultimate authority over who will represent the LEA) there is little likelihood that an IEP team would be allowed to run amuck for very long even if it were so inclined.

While the Internet references I do have with internet links aren't exactly on point, they do reflect the principles I've suggested above.

For example, OSEP said in January, 2001, "neither the SEA nor the LEA can limit the authority of the IEP team to select individual accommodations and modifications in administration needed for a child with a disability to participate in State and district-wide assessments of student achievement."

http://www.ode.state.or.us/sped/fedpapers/ieprole.htm

In April, 1996, Wisconsin acknowledged both OSEP policy and affirmed the right of the IEP team to make decisions consistent with federal law even when inconsistent with their own state regulations, saying in part, "If an M-team determines that a child has a significant discrepancy between functional achievement and expected achievement in one or more of the areas listed at 34 CFR 300.541 [federal SLD criteria] and needs special education and related services because of that significant discrepancy, the child may not be excluded from LD eligibility." The reference to federal criteria is particularly significant since OSEP had cut off their federal funds because kids were being denied eligibility under state regulations conflicting with 300.541.

http://www.dpi.state.wi.us/dpi/dlsea/een/4-1-96ld.html

Wisconsin is also trying to regurgitate OSEP dicta when it states, "M-teams in Wisconsin generally recognize that the criteria contained in both the federal regulations and the state rules must guide an evaluation, but do not direct an M-team to make a finding of LD eligibility or ineligibility for a particular child. Both the state and federal criteria are permissive in that they require evaluation teams to consider certain

eligibility criteria, but they do not require an evaluation team to reach a conclusion solely because the child meets or fails to meet those stated criteria. The rules require evaluation teams to consider the criteria and the performance of the child against those criteria, but they also require the evaluation teams to use professional judgment in making individual eligibility determinations."

Federal regs do say that no single procedure may be used to determine eligibility; but I don't quite know what Wisconsin had in mind when it said federal criteria are permissive. I'm certainly not endorsing that particular interpretation!

Another Ethical Question: Typing student reports

The situation isn't all that different from having a secretary or contract person do the typing, except his wife is neither employed by nor under contract with the school system. Many systems employ solely employ contract psychologists. We never ask who types their reports.

FPCO discussed the FERPA requirements with respect to a third party in a letter to Wisconsin regarding Medicaid. (Wisconsin provides a summary elsewhere, but it mainly touches on the conclusions, not the standards FPCO applied--and it's the standards that are at issue here, so I'm sending you the link to FPCO's long answer. It's REALLY long, suggesting to me that they have too much time on their hands.)

http://www.dpi.state.wi.us/dpi/een/b97-4att.html

Within that letter, FPCO says:

> **"In so doing, FERPA recognizes that educational agencies or institutions do not necessarily perform all operations and services on an in-house basis and, in fact, frequently obtain professional, insurance, and other business services in consultation with individuals and organizations outside the institution, such as attorneys, accountants, and collection agents. In short, it is our opinion that FERPA's prior written consent requirement was not intended to and does not prevent institutions from disclosing education records, or personally identifiable information from education records, to outside persons performing professional, business, and related services as part of the operation of the institution. Accordingly, a school district may disclose education records, or personally identifiable information from such records, to a consulting agency without prior written consent if that agency is performing a service for the school district that it would otherwise have to perform for itself."**

The system has contracted with you to perform a service. You've contracted with someone to help you deliver. Does the fact that that person is a volunteer or the fact that the district didn't expect you to contract with someone else to help you out violate the child's FERPA rights? To get an authoritative answer to that question, you'd need to write FPCO. I know what the law says, but honestly I've never been good at interpreting it the way FPCO does. The thing is, I think you've displaced your anxiety.

What you ought to be concerned about is that your state is putting all your reports into a state data base that apparently can be accessed by anyone with a single password, at least within your system. No one knows who can read those reports at the state level. Untold numbers of people have been given the key. One careless employee leaves his key laying around, and a kid or non school employee doesn't even need to touch it. S/he only needs to look at it and remember what it looks like. That's modern technology for you.

From my somewhat jaded perspective, the dike is apparently collapsing all around you, and you're standing there trying to put your finger in a small hole.

You're not alone, I know. Two years, three months, and fifteen days until I can retire.

Guy

IQ and IDEA

I feel a little like a preacher receiving a compliment for a sermon I am not sure I actually gave. I was mostly responding to some suggestions Jerry had made that a definition of a learning disability should include average intelligence and average maturation.

There has been some movement, I see, for dually classifying kids with exclusionary disabilities such as mental retardation and deafness as LD, despite the exclusionary clause. If the team determines that the child is mentally retarded, then it must of course rule out the mental retardation as being primarily responsible for any severe discrepancies it finds.

In my state, with a straight fifteen-point discrepancy, none of the scores you present would have suggested a severe discrepancy existed. MR is like getting an all day ticket to Carowinds; the SLD label is like getting a ticket to just ride the roller coaster. Inasmuch as IDEA 97 precludes the delivery of services on a categorical basis, being labeled MR should not (and in my state does not) preclude a child from receive services in a classroom with learning disabled children if those are the services he or she needs in order to receive FAPE.

The MR label also carries more weight with respect to SSA/SSI services than SLD (which carries none).

I am not saying dual classification of MR/SLD is unlawful, but neither can I find scripture anywhere that would endorse its use in a situation such as you describe.

I personally wouldn't have suggested dual classification, but that's just my personal opinion, not a reflection of OSEP or OSERS positions. I would have suggested giving the kid his MR label, noted his deficiencies in written language, gotten him the extra services from the LD teacher, added the OT as a related service, and given him his Dragon program--all under the one roof. Again, I'm not saying the dual classification was unlawful, if MR was ruled out as the primary cause of the writing problem by the team, but I do think it was nuts. It is not something I would expect to see very often.

And if this kid is differently cognitively gifted, I am differently tall and calorically challenged.

People are always looking for ways to gloss over the truth. Idiot and moron used to be scientific terms with no insulting connotations. Retarded used to be a politically correct substitute for what had become terms of opprobrium. It won't be long before we hear kids chanting, "You're differently gifted, you're differently gifted," with their target going home in tears. Kids learn quickly. Handicapped has fallen into disfavor because of (incorrect) allegations that the derivation comes from "hat in hand." "Disabled" now is touted as being more polite. "Different" and "disabled." The politically incorrect words of the next millennium.

By the way, were you asking me anything in that e-mail? I think I just inflicted some gratuitous and unsolicited opinions upon you. Sorry!

----- Original Message -----

Guy,

What a rabbi or jurist in the World Court you could be! I am glad you chose school psychology.

Ralph Williams has a WISC-III FSIQ of 60. His profile is pretty "flat." He scored 1 (not even remotely close to 2) on Coding and Symbol Search and Destroy. His VMI-4, Bender, and Bicycle made the examiner weep. His WJ-R Visual Matching, Cross Out, and especially Writing Fluency made both Ralph and the examiner weep. This kid cannot operate a pencil.

Adaptive behavior, with the exception of really frightening low written communication, was consistent with his WISC 60.

Ralph's WIAT scores were 76 for Basic Reading, 73 for Reading Comprehension, 77 for Numerical Operations, 71 for Math Reasoning, 76 for Listening Comprehension, and 83 for Oral Expression -- just what you would predict from his WISC-III 60. However, his Spelling was 49 and his Written Expression 64 (the lowest possible standard scores at age 12-2), considerably lower than predicted (79 and 82, respectively). Ralph had to be tested with out-of-level items at the lowest level of the OWLS and scored a 52. His TOWL-3 B story about Tom Corbett, Space Cadet, was unscorable. His "standard" (scaled) scores for the TOWL-3 B Spontaneous tests were all 1s.

Vision and hearing were tested WNL (Within Normal Limits, not We Never Looked). Ralph's parents are both employed full time as school psychologists. Ralph has been receiving academic instruction through a combination of reasonably competent inclusionary and pull-out services. His regular and special education teachers for this year and last year confirm that they have worked with him on writing with (obviously) no success. The psychologist finds no evidence of emotional disturbance. The occupational therapist confirms Ralph's horribly deficient writing and drawing skills but finds only moderately deficient visual perceptual and other visual-motor skills (consistent with his WISC scores).

The evaluation team concludes, correctly in my judgment, that Ralph's primary disability is mental retardation ("differently cognitively gifted" in his home state) and that his secondary disability is a specific learning disability in written expression. More importantly, Ralph's IEP is revised to include a coordinated effort in writing instruction from the LD teacher and the occupational therapist, beginning instruction in "keyboarding," an experiment with Dragon Naturally Speaking so he may be able to learn to dictate to a computer, and temporary accommodations to allow him to dictate writing assignments to a teacher assist, who will transcribe for him.

John

"Guy M. McBride" wrote:

Dear Ron and Jerry, I feel so popular. You both forwarded the same question to me. If the question was, "Can a person with below average IQ be learning disabled," your opinions would be as good as mine; I know trainers in North Carolina graduate schools who are still telling impressionable young things that a child with a "true" learning disability has to have an average IQ. But fortunately, we are not concerned about truth here. In fact, we don't even have to worry about whether it is right or reasonable. We are only concerned about the law. Mental retardation is an exclusionary factor under IDEA 97, but in order to be mentally disabled, you have to have a low IQ AND below average

adaptive behavior skills. We had a case last fall where we had the one but not the other--a child with a 68 FSIQ and average adaptive behavior evaluations from both parents and teachers. His Woodcock Johnson standard scores, however, were 53 or below. (Functional academics was at the first percentile, but nothing else. Very unusual.) Our state definition only says that a child has to have a fifteen point discrepancy and a processing disorder to qualify. The kid obviously had both. Given regression effect, achievement scores will usually be higher than a really low IQ, and when the adaptives are high, the educational scores are even more likely to be higher; this was probably a once in a lifetime case. But we gave the team permission to place the child as SLD, if they determined the child was not mentally retarded, was not excluded by any other factor, and met all the other qualifications. They decided he wasn't and that he did. Neither North Carolina's definition, nor the federal regulations, includes a reference to "average intelligence," our state having decided to pretty much adopt the federal wording verbatim. Absent a clear exclusionary criterion, my view was that we should give the child the benefit of the loophole. In answer to your question, however, the only criterion embraced by IDEA 97 is that there be a severe discrepancy between intelligence and achievement. Children may be excluded if they have low IQ and adaptive behavior scores, but not, OSERs has been saying, because of low (or high) IQ scores alone. I would like to think you two treasure my opinion, but I know that's really not the case; my real skill is producing scripture from OSERS, the courts, or the Internet to support a particular perspective. So, scripture it shall be. There were no changes to the special rules regarding the identification of Specific Learning Disabilities under IDEA 97, other than those regarding parent participation and reevaluation procedures, because OSERS says it is planning to conduct a thorough review of the research in this area over the next several years, probably (I'm just guessing) with an eye to suggesting a substantial change the next time the Act is revisited by Congress. (Of course, they told Wisconsin they were in the process of revising them back in 1995, so we all know what prevaricators they are.) Since there were no changes (other than those relevant to parent involvement and reevaluation procedures), unfortunately there is any really relevant comment either in the regulations themselves or in part B on their application (at least I found none.) But fortunately, that also means their previous opinions still apply. Unfortunately, I do not have a searchable database of OSERS letters. (LRP costs too much.) But fortunately, I have found some snippets here and there on the Internet that are germane. Can a high IQ be used to exclude a child? (Quotation marks denote OSERS response. The rest is LDA commentary, not mine.)

Denial of Eligibility Because of Gifted Intellectual Ability and/or Lack of Failure

The U.S. Department of Education, in a written response to questions from the Learning Disabilities Association of North Carolina, stated that "...each child who is evaluated for a suspected learning disability must be measured against his or her own expected performance, and not against some arbitrary general standard." As required by Part B regulation (34 CFR ¤¤300.540-300.543), the multidisciplinary evaluation team is responsible for determining if a severe discrepancy exists between a student's ability and performance. Under Part B of IDEA and Part B regulations there are no "exclusions based on intelligence level in determining eligibility." In other words, a student cannot be excluded from consideration of eligibility for special education services solely on the basis of a high IQ; no child's IQ can be too high for that child to be considered for eligibility for special education services -- even an intellectually gifted student may be considered for eligibility for special education. For the full essay, see:

http://www.ldanatl.org/bulletins/AC_1_96.shtml

For a more lengthy treatment of this same and related issues, see:

http://www.childpsychologist.com/ld/osep_policy_letter.htm

Can a child be excluded because of a low IQ? The above seems to suggest that is the case, but for further exploration of this specific issue, I turn to Wisconsin's 1995-1996 experiences with OSEP. In August, 1995, OSEP questioned Wisconsin's placement procedures for LD and apparently withheld Wisconsin's federal funds over disagreements that arose over their identification criteria for LD children. The situation was complicated by the fact that Wisconsin had weird regulations (which you may feel free to review). Their rules said that if a kid had an IQ of 90 or above, the team could conclude that the child did not have a cognitive disability. (Duh!) Some people took that to mean that if a child had an 89 IQ, he could NOT be qualified as SLD. The quoted citations below reflects some of the more relevant sections of their 4/1/96 compliance letter to Thomas Hehir, then director of OSEP. While the words are Wisconsin's, they explicitly refer to the "compliance issues" they are addressing as being those cited by OSEP in withholding its funding. This is almost amusing; they stick to their guns, that a child must have average potential, but then . . . well, I'll let you read for yourselves: "If an M-team determines that a child has a significant discrepancy between functional achievement and expected achievement in one or more of the areas listed at 34 CFR 300.541 and needs special education and related services because of that significant discrepancy, the child may not be excluded from LD eligibility because 1) the child's intellectual capacity is below a particular level (unless the child is determined to have a cognitive disability), or 2) the child has a significant discrepancy in only one of the academic or readiness areas identified at 34 CFR 300.541. Further, following our staff development, WDPI will include these two compliance issues in our regular monitoring of LEA's to ensure compliance with federal requirements."

*******"The Wisconsin Department of Public Instruction has always recognized that no child can be denied consideration for eligibility for learning disabilities solely because their measured intelligence falls between 70 and 90." (emphasis theirs)

******* "WDPI's staff development effort will focus on correcting this misapplication of Wisconsin's rule and will direct districts that no child may be excluded from full consideration for LD eligibility because the child's intellectual capacity is below a particular level. "

http://www.dpi.state.wi.us/dpi/dlsea/een/4-1-96ld.html

It's odd. I enjoy this stuff, but the more you think about it, the crazier you get. Ron's intriguing rationales aside, none of this makes a lot sense. The law is atheoretical. What structures we erect are built on quicksand. In another four years or so, we will again have a new version of IDEA. And more than half of what we know today will no longer be true. Something to look forward to.

Guy

Report Revisions

The cite by the original author seemed sufficiently on point, so I saw no reason to comment.

In my county, authority over records is established by board policy. Building records are under the authority of the principal. Central office sped records are under the authority of the special education director. When problems with sped records in either setting arise, however, the principals usually defer to the sped director (at least in part, I suppose, because there's not much point changing the record in one place and not in another.)

The original source for this process of amending student records is of course FERPA. Summarized,

"Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information."

Federal regulations also say that parents may ask that records be amended if they constitute a violation of the child's privacy rights. See 99.21, 22, and 23 for further details, but I have not found a good definition or example of a "violation of a child's privacy rights" other than if the data is not misleading or inaccurate.

http://www.ed.gov/offices/OM/fpco/ferparegs.html

I've always been asked before a report of mine was changed, and I think it makes good sense to involve the psychologist if there's a complaint about the report. (The use of white out is particularly odious to me, but that's because when we've been monitored by the state, their monitors have queried forms besmeared with white out. Questions have

been raised as to their validity, especially if there is a suspicion that the changes were made after the parents signed them. If you're going to change a report, I think it ought to be done professionally--that is, with the page retyped.) But that's just me, mostly, and my opinions aren't likely to carry much weight with an administrator in some other school system. Heck, they don't always carry a lot of weight in my own system.

These complaints are potentially very messy. FPCO has the same power as OSERS and OCR, that is, to cut off your federal funds if you violate children's rights, and the Internet makes it easy for parents to file complaints:

http://www.deltabravo.net/custody/ferpa-complaint.htm

If you were talking about changing IQ scores or interpretive material, that would constitute falsification of a record and not be protected by FERPA. Grades, for example, can only be challenged under FERPA if there was a "ministerial error," that is, the kid got the wrong grade as the result of a book keeping error, not because he felt he didn't deserve it. However, while I'd certainly like to be involved in any discussions regarding the alteration of my report, I would be less likely to object to a change if a parent wanted me to delete statements such as, "The child impressed the examiner as being really, really fat" (even if true) or even "The respondent, the child's grandmother, thought that his biological mother was smoking pot and snorting cocaine during his pregnancy" if Mom said it was a lie. You have to choose your battles.

Guy

Low IQ scores

There is absolutely no basis under the law for discriminating against children with low IQ scores, unless the child is mentally disabled, with respect to classification as SLD.

There is a myth that "true" dyslexic and LD children should have average IQs. The fact is that the research over the past five years or more shows NO relationship between IQ and a learning disability. IQ does not predict academic achievement very well for individual children, and it certainly does not predict outcomes. The achievement ability model enshrined in federal law is believed by most experts to be outdated and some think it is potentially un Constitutional in that it discriminates against children who historically do not do well on IQ tests.

Dyslexic children are at significantly greater risk for suicide, they are significantly less apt to access appropriate health care, and when they do access health care, they are significantly less likely to use the services appropriately according to research conducted by Dr. Frank Wood and others. Our mistakes are killing children. Literally.

So much for the rant, since educators are notoriously hard to convince through appeals to reason.

According to OSEP, states may not establish regulations more restrictive than the federal criteria, although they (the states) may suggest guidelines. That has a lot of implications, not all of them pleasant, for a system trying to establish criteria that won't establish sped rights for every child with a standard score of 85 or below (one proposal being seriously advocated in the private sector).

You may want to defer making "permanent" decisions until August or September, because as I previously noted on the Listserv, OSERS is holding a national conference in August on SLD, at which independently commissioned white papers on a variety of topics are to be discussed. Executive summaries reportedly will be available on their website in early August.

Parenthetically, speech pathologists in my state reportedly prefer children to be labeled SLD rather than SLI if they are dual qualified because of a perception that the SLD label would entitle the child to more services. My state's exceptional children's division in a Q and A has opined that if a child is labeled as Speech Language Impaired (SLI), then he or she must be served by a speech language pathologist, but if s/he is labeled as SLD, then s/he must be served by a licensed sped teacher. I think all that opining is a little questionable, but I've not looked at it lately.

You probably need to review the following references:

Regulatory: http://www.dpi.state.wi.us/dpi/dlsea/een/4-1-96ld.html

Wisconsin tries to get its money back, after schools "misinterpreted" their regulations as prohibiting the classification of children with low

IQs. http://at-advocacy.phillynews.com/osep/osep_ld.html Summary of OSEP's response to a request from the Learning Disabilities Association/North Carolina (LDANC) when parents of bright kids were told their children weren't eligible because they were (a) bright and (b) getting passing grades.

http://at-advocacy.phillynews.com/osep/osep_ld.html Complete text of the Lillie/Felton letter

Research/opinion articles on the Internet: http://www.edexcellence.net/library/special_ed/

Rethinking Sped for a New Century (scroll down to Rethinking Specific Learning Disabilities) or just click on http://www.edexcellence.net/library/special_ed/special_ed_ch12.pdf

http://alpha.fdu.edu/psychology/learning_diabilities.htm

The last is a provocative article that summarizes some current concerns about the problems inherent in classifying kids with SLD under the outdated (archaic) federal criteria now on the books.

There have been a number of cases on SLD, which can in extreme situations leave a district liable for tuition reimbursement if they play a numbers game and forget about the real focus of concern, the individual child. They are not directly on point, in most instances, but nevertheless you may find them relevant in illustrating both some of the concerns addressed above, as well as making the point that these are high stakes issues for school systems.

http://www.wrightslaw.com/law/caselaw/case_carter_4cir.htm This case went to the Supreme Court, but the major educational issues were settled at the Circuit level (although Peter Wright may well disagree with me). I think this circuit decision actually has more to tell us about FAPE in the LRE and what constitutes "reasonable benefit." The school system loses because it tried so hard to please the parents and their advocates (who as I recall didn't want their child in a cross categorical setting) that they ended up offering a program that was pathetically inadequate. Mr. Wright thinks the school system sincerely believed they were offering FAPE, but I don't see how they could have been so delusional, and certainly no court was convinced.

http://www.wrightslaw.com/law/caselaw/case_Brody_RO_decision.html Not one of my favorite cases, but about a dyslexic child in North Carolina . Important mainly because it is so prominently placed on Wrightslaw, it could easily give other parents "ideas" about IDEA. The Matthew Effect gains notoriety.

http://www.law.emory.edu/6circuit/may98/98a0135p.06.html District drags its feet in evaluating child, ultimately loses big time.

http://www.ca5.uscourts.gov/opinions/pub/98/98-20546-CV0.HTM Schools can win when they really make an effort to help kids, even if they fail to achieve perfection.

Guy

RETENTION

Actually, the Gesell screening is a very interesting instrument, but the underlying philosophy (that children who are unready for school should be given the Gift of Time) does not stand up to scrutiny. Giving a young, intelligent, but socially immature child an extra year of preschool experience before kindergarten might be helpful on a case by case basis, although there's no data to show that is the case. Certainly it might give him an edge in sports. But there may be hidden cost.

But institutionalizing the practice for all kids effectively results in a change in the entry dates, because if you hold kids back based on Gesell, most of the kids being held back will be the young fives. What Gesell does when implemented is effectively raise the entry age, allowing a few kids who are mature for their age through its screening process. It's the old "The last car in the train suffers the most damage in accidents, so we're removing the last car from all our trains" conundrum. "What's wrong with that?" Basically, the below average will always be with us; Gesell just changes who the below average will be. In my county, in the late eighties, we experimented with Gesell as a screening for first grade. Gesell results showed, not surprisingly, that 50% of our kids weren't developmentally ready for first grade. The teachers in those schools knew that was nuts, and they knew they didn't have two or three transition classes to fill. But they did know they had one transition class to fill. So they "only" held back 28% of their kids. God have mercy on us all.

I haven't seen a lot of retention data specific to kindergartners, but you might find an article posted at: http://www.teachermagazine.org/ew/vol-17/20kinder.h17 of interest.

Also: http://www.teachermagazine.org/ew/vol-17/07delay.h17 which says in part:

"At age 17, 7 percent of the average-age students in the study exhibited extreme behavioral problems. In comparison, 16 percent of the students who started kindergarten late displayed similar inappropriate conduct, while 31 percent of the students who had failed a grade for academic reasons showed extreme behaviors, the researchers found."

Actually, the words "recoupment" and "regression" don't appear in the body of the regulations at 300.309.

http://www.ideapractices.org/searchregs/300subpartC/Csec300.309.htm

They may appear in your state regulations, but if your IEP team determined that a child needed ESY for another reason (e.g., as compensatory educational service because your sped teacher went bonkers mid year and taught all her dyslexic kids math and her discalculic kids reading) in order to receive FAPE, a regression and recoupment requirement could not be used to justify denying those services.

See: http://www.dpi.state.wi.us/een/com00041.html (Wisconsin complaint wherein the school successfully defended itself by saying it had in fact considered factors other than regression and recoupment)

While regression recoupment is recognized nationwide as one standard based on case law, it cannot be the only standard.

http://www.dese.state.mo.us/divspeced/extschoo.html

The appropriate standard to be applied is if the child needs those services in order to receive FAPE, she or he is entitled to them. While most eligible students will be identified through the application of a regression recoupment formula of one sort or another, it is the exceptions that can really hurt you if you conclude because something is usually the case, it is always the case.

Peter Wright has a number of cases on Wrightslaw wherein ESY was a factor. One he seems to especially like in this area includes the following text:

"Regression, however, is not the only factor that is considered in determining whether extended year services are required to provide the student with an appropriate education. Other factors that are considered include: the amount of time needed for recoupment in the fall, the child's rate of progress, the child's behavioral or physical problems, the availability of alternative resources, the areas of the child's curriculum which need continuous attention, and the child's vocational needs. Johnson v. Independent School District No. 4, 921 F.2d 1022, 1027 (10th Cir. 1990)."

Daniel Lawyer v. Chesterfield, 1993,
http://www.wrightslaw.com/law/caselaw/case_Lawyer_Chesterfield_ESY_autism.html

General rules get you into trouble if you take them as gospel, but one general rule I would suggest is that if the parents of an autistic child want ESY, skip regression/recoupment and go on to the other factors. And then give them the services.

Guy

Retention

The real question is, "How do we retain kids without reducing both staff expectations for the child and the child's expectations for himself?" The answer, of course, is that we do not. False hopes? My God. We tell a parent that their child is reading below grade level, we tell a parent that in order to be promoted he or she has to attend summer school, we tell them that their child is still not at grade level after summer school, we tell them we will be providing them with remedial reading at their level rather than retain them . . . if after all that parents still have "false hopes" that their child might successfully earn a diploma, I say God bless them. But the fact is that more often than not it is when we hold their kids back that we are most likely to lie to parents, giving them the most fanciful expectations. We say that their kid is just immature, we lead them to believe that with an "extra year" or the "gift of time" they will grow out of their problems, and most insidiously and hypocritically we lead them to believe that retention is an appropriate intervention that will meet their child's individual needs when instead we're just throwing the kid back into the very same process that failed him or her the first time. It's not just individual teachers. My own state, North Carolina, still has dicta on its website suggesting that increased retentions will not lead to increased drop outs.

"Based on data from the school systems that have implemented more stringent promotion standards, dropout rates have not increased. In fact, more students reach grade level than ever before and fewer than expected students face such drastic measures as retention or becoming dropouts. Providing at-risk students with additional intervention/acceleration will enable them to meet state accountability standards and should help them be more successful in their work at school."

http://www.ncpublicschools.org/student_promotion/faq.html

What nonsense. What has really happened statewide is summarized in a study done by the Charlotte Observer, aptly subtitled, "How North Carolina Creates More Dropouts." Be not deceived into believing that just because you live in another state this doesn't affect you. The North Carolina model has received much attention both from Democrats and Republicans in Congress and underlies much of what Congress has more recently approved. What has happened here will happen elsewhere.

http://www.charlotte.com/mld/charlotte/news/special_packages/casualties_of_school_reform/2314062.htm

Just as a sample, the article says: """It wasn't as if policy-makers didn't understand the risks,' said Greg Malhoit, former executive director of the N.C. Justice and Community Development Center, which advocates for minorities and the poor. 'Some of the architects of the program freely admitted that it would result in a higher dropout rate, and there was not any discussion of a plan to educate the students who could be forced out of the system.'"

Guy

Do Parents have a right to copy the actual raw data

No, they don't. FERPA allows parents to inspect the protocols if they have any personally identifiable information on them. OSEP has been saying that for at least eight years. Under some circumstances, you would even have to provide them with copies. They have no right to see the test kit. IDEA '97 does not expand FERPA rights. In Attachment 1 following Appendix B, OSERS says, "For example, a test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be a part of his or her "education records." If a child marks a bubble sheet, that's the record. If, however, the child marks in the answer booklet and puts his name on it--then that becomes the educational record, based on federal dicta.

I find no burden to voluntarily offer parents the right to inspect the record. Since I use a personally developed shorthand to record responses, and my handwriting is atrocious, seeing the test protocol would probably be of little benefit to parents, unless they or their advocates were looking for obvious computational errors. My embarrassment over my poor handwriting does not, however, alter their right to review it should they be so inclined. It has been years since anyone asked to see the protocol. If a parent wants to what the test was about, however, I explain in detail the questions (not just the kinds of questions) their child has had difficulty with. I understand the ethical dilemmas, but Congress and the federal regulatory agencies have struck a balance they believe to be appropriate. I just follow orders.

See:

http://web.indstate.edu/soe/iseas/edtl-rec3.html 1993 OSEP interpretation

http://www.ed.gov/offices/OM/fpco/ferparegs.html FERPA regs

http://www.ideapractices.org/searchregs/300subpartE/Esec300.562.htm OSERS, Attachment 1, 1999

Guy

Ritalin Class Action Suit (Or, South Park Comes to Texas)

----- Original Message -----

Listmembers,

Attorneys C. Andrew Waters and Peter Kraus (phone: 214 357-6244) have filed a class action law suit naming three national organizations as defendants 1) Novartis (formerly Ciba Geigy), the manufacturer of Ritalin; 2) CHADD (Children and Adults with Attention Deficit/Hyperactivity Disorder), a parents' organization that is partially funded by drug companies; and 3) the American Psychiatric Association.

If you know anyone who might be interested in joining the plaintiff list, they can get more information by calling the attorneys or by logging on at www.ritalinfraud.com

There is also more information about the suit at www.breggin.com

I invite those of you who believe that ADHD became a nightmare fraught with ridiculous over diagnosis, spurious attempts at medical management of classroom behavior problems, disregard for alternative explanations of symptomatic behavior, etc. to encourage participation in this suit.

-------- REPLY

This is a battle that has been going on for quite awhile. In order to credit the validity of the lawsuit, one must believe or come to believe that the APA, CHADD, and CIBA conspired together to deprive children and their parents of non pharmaceutical alternatives, while endangering the welfare of said children unnecessarily. While I am not a great fan of CHADD's website, there is a great gulf between being critical and being downright paranoid. (CHADD's description of pharmaceutical interventions is limited, and a reader would really have to dig to find out about something called side effects. Does that spell conspiracy? I guess we're going to find out.)

Dr. Breggin has apparently made his own share of money from espousing a counter-mainstream view. There's nothing wrong with making money as Dr. Breggin seems to have done, but it seems a little hypocritical to then imply avarice is at the root of CHADD's involvement, especially when the evidence has not yet shown any individuals within CHADD actually profited from the CIBA-CHADD relationship.

CHADD responded to Dr. Breggin's allegations in a memo dated 4/14/98. Their arguments are still relevant, I suspect:
http://www.chadd.org/news/press04-13-98.htm

I do look forward to the entertainment that this conflict is likely to bring, I was already dreading summer re-runs. Given recent studies purporting to show that ADHD is not (South Park's recent episode to the contrary) being massively over diagnosed, I will be fascinated in seeing what Dr. Breggin has up his sleeve. I appreciate Steve's bringing this to our attention.