

Advocating for Students with “Invisible Disabilities”

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What Do We Mean by “Invisible” Disabilities?

- ❑ Students who have learning differences that adversely affect their education but who face barriers that prevent them from getting the support they need in school.
- ❑ Why? What are the Barriers?

Factors that Mask a Student's Disability

- Good grades or test scores;
- Teachers blame struggles on “lack of motivation,” “laziness,” or “willful refusal;”
- The students are not disruptive;
- Inappropriate evaluation tools underestimate the student's true ability;
- The student or their families overcompensate for the disability with private tutoring and/or spending excessive hours each night on homework;
- The student is gifted, and some educators are not aware that students can be “twice exceptional.”

Examples of “Invisible Disabilities”

- Attention Deficit/Hyperactivity Disorder (ADHD)
- Asperger’s/High-Functioning Autism
- Some forms of Epilepsy
- Mental Health Conditions (i.e. Anxiety, Depression, Reactive Attachment Disorder, OCD, trichotillomania)
- Dyslexia/Dysgraphia
- Gifted students with additional exceptionalities
- Sensory Processing/Integration Disorders
- Auditory and Visual Processing Disorders

Reasons Schools Refuse Services and Accommodations

Misunderstanding the genesis of the problem:

Far too often, educators view the disability as a “**behavior**” in the sense that the child is in control of the problem and can just stop doing it – if he/she wanted to.

- ❑ The child is considered lazy, unmotivated, or rebellious.
- ❑ The child is just “not paying attention.”
- ❑ The child talks back, or is oppositional.
- ❑ The child simply refuses to stay in his/her seat or area.

All of these “behaviors” may well be indicators of an underlying disability.

Reasons Schools Refuse Services and Accommodations (cont.)

Failure to believe in the disability:

Some educators do not believe in Bipolar Disorder or ADHD or other real, medically-documented disorders that can have a significant impact upon a child's education.

- We must prepare our educational professionals better to deal with a diverse student population.
- The public's—including doctors'—understanding of these disabilities is increasing, leading to a rise in the number of children diagnosed with “invisible” disabilities.

Reasons Schools Refuse Services and Accommodations (cont.)

Resistance to perceived fraud:

- ❑ Some parents (and advocates) may attempt to obtain ESE eligibility for improper “non-educational” reasons (i.e. obtaining SSI, improper advantage on high-stakes testing, obtaining McKay/Gardiner scholarships for non-disabled children).
- ❑ However, the school district’s obligation is to focus on one issue: **Does the child have an educational disability?**

Reasons Schools Refuse Services and Accommodations (cont.)

Failure to understand the legal eligibility thresholds:

- ❑ Many educators are woefully ignorant of the legal requirements for eligibility of students with “unidentified disabilities.”
- ❑ This is particularly true where the children are making passing or even good grades.

Reasons Schools Refuse

Services and Accommodations (cont.)

- The law has always included children with “invisible disabilities.” However, in 1997, the IDEA was amended to make it clear that Congress intended to include children whose disability interfered with their interaction with their environment.
- ADHD was specifically mentioned so as to quiet some of the controversy as to whether ADHD and related disorders were eligible for IDEA services.

Solutions to Barriers

Improve procedures for identifying students with disabilities.

- Perform evaluations whenever a student is suspected of having a disability, as required by law;
- Remain faithful to the requirements for the identification of students with disabilities, as provided under the IDEA and Section 504.

Solutions to Barriers (cont.)

- Provide better training to school staff (and private providers) who are engaged in identifying students with disabilities and making eligibility decisions for 504 plans and IEPs.
- Train **all** teachers, including general education teachers since they are the front line to identifying students who are struggling in their classes and ensuring they get referred for evaluation.

IDEA and Sticking Points

- ❑ IDEA (20 USC § 1401(3) (ii): This clause adds, as a condition of eligibility, the concept that not only must a student meet one of the IDEA disability categories, but that student must, “**by reason thereof, need(s) special education and related services** (see statute below).”
- ❑ 20 USC § 1401 - Definitions
 - (3) Child with a disability
 - (A) In general
- ❑ The term “child with a disability” means a child—
 - ❑ (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
 - ❑ (ii) who, by reason thereof, needs special education and related services.

However...

- Education is not just “academics.” It includes areas of human functioning such as: **communication and language, auditory processing, behavior and social/emotional status, ability to attend, organization, physical performance, impulse control.**
- As children pass through our schools, we take on responsibility for their **success**, whether it is in mathematics or in self-organization. We assume the responsibility to provide our students with the knowledge and skills necessary for their **future success and independence**, nothing less.

IDEA: A child must, by reason of his disability, require special education

- For a long time schools have denied eligibility when a child did not meet the numerical requirements for a learning disability. Now they have begun refusing eligibility even where a child might meet the necessary discrepancy between intellectual level and achievement. **Schools argue that the child must “require” special education and will often deny special education services where a child receives a passing grade.** This is growing problem for children with SLD, ADHD, or emotional disabilities.
- It is important for advocates to hold the line on this issue. **It is important to argue that “education” includes more than academic performance. It also includes social, emotional and behavioral progress.** A child may need special education even if the child is successful academically, where the child has social, emotional or behavioral issues.

Academic Success Not Automatic Barrier to ESE Eligibility

- Furthermore, academic success is not only a question of advancing from grade to grade or “doing as well as the others in the class.” Failing grades are not necessary to qualify. 34 C.F.R. § 300.121 (e)
- Schools are regularly advancing students, who cannot read appropriately or perform essential math skills. It is important to insist that student progress be measured using nationally normed evaluations and not subjective teacher measures.

Florida Law Helps Address This Issue

- ❑ F.A.C. 6A-6.0301 52(4)(a) states that beyond evidence of the disability, the criteria for ESE eligibility requires:
- ❑ “evidence of another health impairment that results in **reduced efficiency in schoolwork** and **adversely affects the student’s performance in the educational environment.**”

For example...

- 1. **“Reduced efficiency in school work”** – This does not necessarily mean only academics. Problems with organization and auditory processing delays, for example, will certainly reduce efficiency in school work.

- 2. **“Adversely affects the student’s performance in the education environment”** - This also does not necessarily mean only academics. A student’s performance in the “educational environment” can include the student’s social/emotional, executive functioning, behavioral interactions, as well as a number of other student issues or disorders.

Florida DOE Compliance Manual...

- ❑ The Florida Department of Education, through its Exceptional Student Education Compliance Manual, has attempted to clarify even further the requirement in Rule 6A-6.030152(4) (a).
- ❑ Compliance requires **documented evidence** of a **health impairment** that **adversely affects** the **student's performance** in the **educational environment**.

Recent Federal Guidance (OSEP)

Office of Special Education Programs (OSEP)

- Guidance for “twice-exceptional students”

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/041715osepmemo15-082q2015.pdf>

- The use of a single measure to determine eligibility for special education is prohibited; a variety of factors need to be considered.

Consideration of Non-Academic and Academic Levels of Performance

The guidance reinforces previously stated rules:

- ❑ Letter to Lybarger: OSEP makes it clear that in considering the impact of a disability upon educational performance, **it is essential the determination be made on an individual basis and must include examinations of both non-academic and academic areas.** Furthermore, it notes that **educational performance means more than “academic standards as determined by standardize measures.”**
- ❑ Letter to Fenton: OSEP further clarifies this position with regard to an eligibility determination.

Significance of Lybarger and Fenton

For the first time, we have an opinion stating that those making eligibility decisions must do several things:

- ❑ The decision must be made **on an individual basis**. This is an important point and places school districts, which make sweeping determinations based upon academic performance, in danger of charges of “pre-determination.”
- ❑ When making the eligibility decision, **both “non-academic,” as well as “academic,”** performance must be considered.
- ❑ **Multiple assessment tools and measures** must be used.

Federal Case Law

- *Rowley* (US Supreme Court, 1982) found that a deaf child had received an adequate public education despite that fact that the District refused to provide an individual interpreter.
- The Court noted that the child had not suffered either academically, socially or emotionally.
- This is important because it demonstrates that **the Court considers more than just academics in deciding student needs**. Factors such as social and emotional status are equally important.

Mr. and Mrs. I v. Maine School Administrative District 55 (2006)

- ❑ This case involved a student with Asperger's Syndrome and depressive disorder and speaks clearly to the issues related to "invisible disabilities."
- ❑ The student generally did well academically but she demonstrated the development of social and communication issues in 4th and 5th grade. In the beginning of 6th grade, at the age of 11, she made a serious suicide attempt.
- ❑ Following the suicide attempt the parents asked for services under IDEA. The district refused and instead offered § 504 accommodations.
- ❑ The federal court judge found that "**educational performance**" was defined too narrowly by the school district and that the student's disability negatively impacted her "educational performance." The decision stated, "...the purpose of education is not merely the acquisition of academic knowledge but also **the cultivation of skills and behaviors needed to succeed generally in life.**"

Florida Case Law

- ❑ *In T.D.-F., vs. Manatee County School Board, Case No. 04-0257E (June, 2004) and Manatee County School Board vs. T.D.-F., (Middle District–Florida, September 2005), the Court followed the same logic and come to the same conclusion as the Maine court in *Mr. and Mrs. I.**
- ❑ This case involved a student with ADHD and good grades. However, he was frequently in trouble for his impulsivity, hyperactivity, and lack of focus and attention to task. The hearing officer made it clear that the fact that the child had a Section 504 plan did not prevent the child from having an IEP and he found that the child was a “child with a disability” and eligible for an IEP.
- ❑ The District Court upheld the decision of the Administrative Law Judge.

OSEP Guidance (*Letter to Clark*):

OSEP's *Letter to Clark* (2007) warns against using purely academic criteria or measures for determination of disability. It notes that:

- ❑ [I]n conducting an evaluation, the public agency must use a **variety of assessment tools and strategies** to gather relevant functional, developmental, and academic information. Therefore, IDEA and the regulations clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance.
- ❑ 34 CFR 300.101(c) states that each State must ensure that a free appropriate public education (FAPE) is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

Variety of Assessment Tools and Strategies must be considered...

- While grades are a factor, they cannot be the **sole factor**. Grades by themselves often do not faithfully indicate a child's true academic performance. Very often an academic grade is composed of a lot of different factors (participation, effort, extra credit, etc.) and it is thus not a true indicator of the child's academic performance in that domain.

Variety of Assessment Tools and Strategies must be considered...

- **Response to Intervention (RTI)/Multi-Tiered Systems of Support (MTSS)** has been used frequently lately as a means of delaying identification of students and as a way of preventing students with disabilities from obtaining ESE eligibility (by using only RTI data for the evaluation).
- Families can request a full psycho-educational evaluation be conducted concurrently with the collection of RTI data.
- The 60-day timeline applies to both the RTI and traditional evaluation when handled that way.

Variety of Assessment Tools and Strategies ...(cont.)

□ Standardized Measures valid factor?

Nationally-normed, standardized academic measures are a factor to consider. They may be an indication of a child's true academic levels, although some **caution** is advised, since some children perform poorly on this kind of assessment.

□ FSA, FCAT, PSAT, etc. a valid factor?

Beware.... school districts often use or refuse to use these assessments depending upon what they say about a possible disability. Results of these assessments may be a factor to consider, but they were not designed to identify disabilities, and they must be looked at with great **caution**.

Variety of Assessment Tools and Strategies (cont.)

- **Student work product may be a factor.** Certainly, it could show the student's ability to perform academically and functionally. The key would be found in how scientifically valid the work product sampling has been. We have seen "selective" sampling, which leaves out product that does not show what the teacher wants to show. Such sampling does nothing to develop trust and confidence. The work product examined should not be focused entirely on academic areas, but, depending upon the disability issues, it should also look at areas such as the child's executive functioning skills etc..

Variety of Assessment Tools and Strategies (cont.)

- **Assessment of a student's executive functioning, communication, social, emotional, and behavioral status as a factor.** Where appropriate, the child's gross and fine motor abilities may be a factor, as might hearing and vision. Again, these assessments should be **scientific, data-driven, and varied**. Some of the assessments may be normed checklists, formal assessments, observations (with empirical data), work product, etc.

Variety of Assessment Tools and Strategies (cont.)

- **Parent data, evaluations, and private professional input.** Parent data collection and private psychological, behavioral, and therapeutic evaluations and assessments are often considered something to glance at and then set aside by the school. However, this information needs to be incorporated into the assessment of the child. If there are conflicts between the parent's private information and the school's information, then an effort to reconcile the information is essential. Sometimes getting a neutral third evaluation is necessary.

De Facto Accommodation and Remediation

- In the *Manatee County* case discussed previously, the Judge found that the school was providing the student with a *de facto* IEP. In other words, the school was, in the end, providing the child with his educational needs, but doing so in such a way as to deprive the child of his legal right to an IEP.
- The IDEA affords protections and privileges that can only be provided when the child is brought under the umbrella of the Act through eligibility and the drafting of an IEP. Providing specially-designed instruction and accommodations, without the legal recognition of eligibility and procedural protections, violates the child's rights.

Cutting Edge Case Law

Endrew vs. Douglas County, (US Supreme Ct., March 2017)

- ❑ Facts: The parents argued that their child with autism did not make measurable progress on his IEP goals and that the school failed to address his worsening behavior problems. The parents advocated for a heightened 'meaningful educational benefit' standard.
- ❑ Decision: The Court unanimously rejected the “de minimis” standard for one that “is markedly more demanding than the 'merely more than de minimis' test applied by the 10th Circuit.” Chief Justice Roberts stated that “a student offered an educational program providing ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all.”
- ❑ Effect: The standard is raised for children. However, it is yet to be seen how the standard will be interpreted and implemented.

Cutting Edge Case Law (cont.)

- **L.M and M.M vs. Willingboro Twp. Sch. Dist.,** (US District of New Jersey, 12 June 2017) – Compensatory Education
 - In its analysis the Court cited **Andrew**: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.”
 - The Court upheld the ALJ’s finding that the School District failed to provide the student with FAPE and ordered compensatory education for a period of 3 years.

Florida Considerations: School Choice Options

- ❑ Charter Schools
- ❑ Private Schools
- ❑ Vouchers

“**Caveat Emptor**”...Florida has many school options. Parents must be educated consumers and carefully evaluate how the needs of your child will be addressed? **Beware...**

Some helpful resources

Many of the Case decisions and OSEP letters referenced in our presentation can be found at:

- **Wrightslaw:**

<http://www.wrightslaw.com/law/caselaw>

- **Florida Special Education Law and Advocacy:**

http://flspedlaw.com/IEPs_Good_Grades.html

If you have additional questions about this topic, feel free to contact us:

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