"Child Find": The Lore v. The Law

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GENERAL

1. The IDEA specifically spells out the modern meaning of child find (i.e., after the original requirement providing access for excluded students with disabilities collectively).

Not so. The IDEA legislation[1] *and regulations*[2] *only indirectly and incompletely set forth the modern meaning of child find. Instead, a long line of case law has established this individualized meaning.*

2. The modern, individualized meaning of child find is limited to the obligation to evaluate a child upon reasonable suspicion of eligibility.

Not quite. The limitation to evaluation, as separate from eligibility, is technically correct, but the courts have added a second, related obligation—to initiate the evaluation process within a reasonable period of time.[3]

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[1] 20 U.S.C. § 1412(a)(3)(A) (requiring states to identify, locate, and evaluate children with disabilities, including those who are homeless or wards of the state); *id*. § 1412(a)(10)(A) (providing specificity for child find of parentally placed private school children).

[2] 34 C.F.R. § 300.111 (adding migrant children and "[c]hildren who are suspected of being a child [eligible], even though they are advancing from grade to grade"; *id*. §§ 300.131–300.134 (paralleling statutory specifics for parentally placed private school children) and 300.140 (providing exception from non-jurisdiction of hearing officer process).

[3] See, e.g., El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918 (W.D. Tex. 2008); New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394 (S.D.N.Y. 2004). For OSEP support, see, e.g., Letter to Weinberg, 55 IDELR ¶250 (OSEP 2009).

REASONABLE SUSPICION:

3. For the first, reasonable-suspicion obligation, an absolute red flag is a written request from the parent to evaluate the child.

No. If the district has no reason to suspect that the child is eligible, the district may decline to conduct the evaluation provided that it gives the parents written notice that includes the basis for the refusal and notification of their procedural safeguards.[4] *(However, in such circumstances, the child is entitled to the IDEA protections against disciplinary changes in placement.*[5]*)*

4. Aside from a parent's formal referral without the district's requisite response, the strongest "red flag" in terms of the courts' review of reasonable suspicion child find claims is low or declining grades.

No, this factor alone, or even in combination with others, without other connected evidence that would raise a reasonable suspicion of not only 1) the criteria for one or more IDEA classifications, but also 2) the resulting need for special education, more often than not does not suffice, particularly when district personnel provide alternate reasons for such performance.[6] *Instead, the most potent factor in this case law is therapeutic hospitalization.*[7]

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[4] 71 Fed. Reg. 46,636 (Aug. 14, 2006) (OSEP commentary accompanying the latest IDEA regulations); Letter to Anonymous, 20 IDELR 998 (OSEP 1998). *But cf.* **J.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014)** ("The education agency's obligations upon a parent's initiation of a request for evaluation do not depend on whether agency employees would themselves have thought a referral for evaluation to be warranted").

[5] 34 C.F.R. § 300.534(b)(2) (2012).

[6] *Compare* P.J. v. Eagle-Union Cmty. Sch. Corp., 202 F.3d 274 (7th Cir. 1999); **Jefferson Cnty. Bd. of Educ. v. Lolita S., 977 F. Supp. 2d 1091 (N.D. Ala. 2013)**; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. 2011); Strock v. Indep. Sch. Dist. No. 281, 49 IDELR ¶ 273 (D. Minn. 2008); Reid v. Dist. of Columbia, 310 F. Supp. 2d 137 (D.D.C 2004), *rev'd on other grounds,* 401 F.3d 516 (D.C. Cir. 2005); Hoffman v. E. Troy Sch. Dist., 38 F. Supp. 2d 750 (E.D. Wis. 1999), with El Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R., 567 F. Supp. 2d 918 (W.D. Tex. 2008); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

[7] *Compare* Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375 (E.D. Pa. 2012); Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. M., 53 IDELR ¶ 8 (D. Conn. 2009); Integrated Design & Elec. Acad. v. McKinley, 570 Supp. 2d 28 (D.D.C. 2008); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Heather D. v. Northampton Area Sch. Dist., 511 F. Supp. 2d 549 (E.D. Pa. 2007), *with* Munir v. Pottsville Area Sch. Dist., 59 IDELR ¶ 35 (E.D. Pa. 2012), *aff'd on other grounds,* 723 F.3d 423 (3d Cir. 2013).

REASONABLE SUSPICION (CONT.):

5. The use of response to intervention (RTI) or other such intervention leads to district vulnerability to losing litigation based on child find.[8]

Quite the contrary, in the majority of cases, the use of interventions—whether formally part of an RTI process or, much more often, part of either an earlier school-based systematic process or simply a classroom teacher's individual efforts—has counted in favor a court's conclusion against a reasonable-suspicion child find violation.[9]

6. Providing the student with a 504 plan is also likely to lead to losing child find litigation.

In the vast majority of court decisions to date, the districts' implementation of a Section 504 eligibility process, usually with the non-rigorous result of a 504 plan, has not been a major contributing factor to the judicial outcome of the case.[10] *The limited exception may be within the context of a disciplinary change in placement to the extent that in a recent unpublished decision the court interpreted the 504 eligibility meeting as triggering protection when a "teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the . . . other supervisory personnel of the agency."*[11]

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[8] See, e.g., David W. Walker & David Daves, *Response to Intervention and the Courts: Litigation-Based Guidanc*e, 21 J. DISABILITY POLICY STUD. 40 (2010).

[9] *Compare* Demarcus L. v. Bd. of Educ., 63 IDELR ¶ 13 (N.D. Ill. 2014) (RTI); D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012); A.P. v. Woodstock Bd. of Educ., 370 F. App'x 202 (2d Cir. 2010); Bd. of Educ. of Fayette Cnty. v. L.M., 478 F.3d 307 (6th Cir. 2007); E.J. v. San Carlos Elementary Sch. Dist., 803 F. Supp. 2d 1024 (N.D. Cal. 2011); Jackson v. Nw. Local Sch. Dist. 55 IDELR ¶ 71 (S.D. Ohio 2010), *adopted*, 55 IDELR ¶ 104 (S.D. Ohio. 2010), *with* Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125 (E.D. Pa. 2013); Hupp v. Switzerland Sch. Dist., 912 F. Supp. 2d 572 (S.D. Ohio 2012); El Paso Indep. Sch. Dist. v. Richard R. *ex rel*. R.R., 567 F. Supp. 2d 918 (W.D. Tex. 2008); Colvin v. Lowndes Cnty. Sch. Dist., 114 F. Supp. 2d 504 (N.D. Miss. 1999).

[10] See, e.g., D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887 (5th Cir 2012); Scarsdale Union Free Sch. Dist. v. R.C., 60 IDELR ¶ 195 (S.D.N.Y. 2013); Munir v. Pottsville Area Sch. Dist., 59 IDELR ¶ 35 (E.D. Pa. 2012), *aff'd on other grounds*, 723 F.3d 423 (3d Cir. 2013); Strock v. Indep. Sch. Dist., 49 IDELR ¶ 273 (D. Minn. 2008).

[11] Anaheim Union High Sch. Dist. v. J.E., 61 IDELR ¶ 107 (E.D. Cal. 2013).

7. The reasonable-suspicion meaning of child find applies to disciplinary changes in placement, i.e., the "deemed to know" child protection.

This conclusion is not clearly settled. A recent unpublished court decision suggests an affirmative answer, but in the most recent IDEA amendments, Congress—while keeping the parent- and personnel-triggering protections—eliminated the one where "the behavior or performance of the child demonstrates the need for such services."[12]

8. For courts, in determining reasonable suspicion, the opinions of outside experts, such as physicians, psychologists, and professors generally has more weight than those of teachers and other school personnel.

In general, courts give more credence to the school personnel because the controlling criterion is expertise in the key issue (which often is the need for special education) and familiarity with the child in the school context.[13] The outside experts often fall short based on these criteria.[14]

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[12] 20 U.S.C. § 1415(k)(5)(B) (2012). For a more comprehensive comparison of the changes in the 2004 IDEA amendments and the 2006 IDEA regulations, see Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 EDUC. L. REP. 445 (2007).

[13] See, e.g., Richard S. v. Wissahickon Sch. Dist., 334 F. App'x 508 (3d Cir. 2009); J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. 2011); E.J. v. San Carlos Elementary Sch. Dist., 803 F. Supp. 2d 1024 (N.D. Cal. 2011); Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873 (N.D. Ill. 2003); Hoffman v. E. Troy Sch. Dist., 38 F. Supp. 2d 750 (E.D. Wis. 1999).

[14] See, e.g., Demarcus L. v. Bd. of Educ., 63 IDELR ¶ 13 (N.D. Ill. 2014); Daniel P. v. Downingtown Area Sch. Dist., 57 IDELR ¶ 224 (E.D. Pa. 2011).

REASONABLE PERIOD:

9. Once the district has the requisite reasonable suspicion, the reasonable period to request parental consent for the evaluation is approximately 1–2 weeks.

No. The reasonable period varies considerably depending on the particular circumstances of the case, but a 1–2 week period is stricter than the courts find to be fatal.[15]

10. Even if the district exceeds the reasonable period standard, it is a *per se*, i.e., automatic substantive violation of the IDEA.

No, the courts consider the violation to be procedural, thus in some cases—depending on the circumstances—amounting to harmless error.[16]

[15] See, e.g., Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2011) (2.6 years until completion of evaluation); D.A. v. Houston Indep. Sch. Dist., 716 F. Supp. 2d 603 (N.D. Tex. 2009), *aff'd on other grounds*, 629 F.3d 450 (5th Cir. 2010) (2 months until initiating evaluation); Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. M., 53 IDELR ¶ 8 (D. Conn. 2009) (almost 7 months until initiating evaluation); El Paso Indep. Sch. Dist. v. Richard R. *ex rel*. R.R., 567 F. Supp. 2d 918 (W.D. Tex. 2008) (13 months until initiating evaluation).

[16] See, e.g., P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009) (student would have remained in private school); Horen v. Bd. of Educ., 63 IDELR ¶ __ (N.D. Ohio 2013) (parents refused to participate in the entire process); Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2011) (parents refused consent); E.M. v. Pajaro Valley Unified Sch. Dist., 53 IDELR ¶ 41 (N.D. Cal. 2008) (court upheld district's resulting determination that student was not eligible).

MISCELLANEOUS:

11. If the court concludes that the district violated its child find obligation, the remedy is limited to an order to evaluate the child.

In some cases, an evaluation order may be the remedy.[17] *However, because the district violated its duty for a timely evaluation and other events have typically transpired before the court's decision, the consequences—depending on subsequent circumstances—may warrant compensatory education*[18] *or even tuition reimbursement.*[19] *Moreover, the court may also award attorneys' fees.*[20]

[17] See, e.g., Scott v. Dist. of Columbia, 45 IDELR ¶ 160 (D.D.C. 2006); Colvin Lowndes Cnty. Sch. Dist., 114 F. Supp. 2d 504 (N.D. Miss. 1999).

[18] See, e.g., Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125 (E.D. Pa. 2013); M.J.C. v. Special Sch. Dist. No. 1, 58 IDELR ¶ 288 (D. Minn. 2012); Long v. Dist. of Columbia, 780 F. Supp. 2d 49 (D.D.C. 2011).

[19] See, e.g., Scarsdale Union Free Sch. Dist., 60 IDELR ¶ 195 (S.D.N.Y. 2013); N.G. v. Dist. of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

[20] See, e.g., Williamson Cnty. Bd. of Educ. v. C.K., 52 IDELR ¶ 288 (M.D. Tenn. 2009).

MISCELLANEOUS (CONT.):

12. If the court concludes not only that the district violated its child find obligation but also that the child was not eligible, the parent is still entitled to compensatory education and/or attorneys' fees.

Not necessarily, depending on the court. In the lead case contrary to this view, the Fifth Circuit ruled that neither compensatory education nor attorneys' fees were available because the violation was a harmless procedural error, reasoning that "[the] IDEA does not penalize school districts for not timely evaluating students who do not need special education."[21]

[21] D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887, 893 (5th Cir 2012). More specifically, the court concluded: "Because D.G. was not 'eligible for IDEA's benefits' during the ninth grade—the 2008–09 school year—he may not recover for the [district's] not evaluating him at that time." *Id*. For cases that are partially relevant, see S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 61 IDELR ¶ 271 (3d Cir. 2013) (rejecting child find claim where parent asserted and district acknowledged misidentification); T.B. v. Bryan Indep. Sch. Dist., 628 F.3d 240 (5th Cir. 2010) (denying attorneys' fees where hearing officer ordered evaluation, including possible child find violation, but evaluation had not yet occurred); D.S. v. Neptune Twp. Bd. of Educ., 264 F. App'x 186 (3d Cir. 2008) (denying attorneys' fees where parent obtained hearing officer decision ordering IEE and evaluation but district ultimately determined child was not eligible under the IDEA); Henry v. Friendship Edison P.C.S., 880 F. Supp. 2d 5 (D.D.C. 2012) (denying attorneys' fees where hearing officer found child find violation and ordered evaluation and denied other requested relief, but either due to lack of consent or other reasons the evaluation had not been implemented); M.A. v. Torrington Bd. of Educ., 980 F. Supp. 2d 245 (D. Conn. 2013), *further proceedings*, 980 F. Supp. 2d 279 (D. Conn. 2014) (denying tuition reimbursement where not eligible under IDEA but granting partial attorneys' fees); Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125 (E.D. Pa. 2013) (dicta that student would not be entitled to compensatory education if determined ineligible under the IDEA). A recent amendment to the special education regulations in the state of Washington, which extends to definition of eligible student for the purpose of providing the requisite procedural safeguards, would not seem to change the substantive effect of this line of case law. WASH. ADMIN. CODE § 392-172A-01035(1)(b).

MISCELLANEOUS (CONT.):

13. For students in private schools, child find only applies to parentally placed (i.e., voluntarily w/o any claim of eligibility or FAPE), not unilaterally placed, students, and this child find obligation is applies only to the district where the private school is located.

No. For parentally placed students, the 2004 amendments of the IDEA imposed a child find obligation for the limited equitable-participation purpose on the district of location.[22] *However, the district of residence continues to have the more general child find obligation to any student in a private school upon parental request for "the purpose of having a program of FAPE made available [by the district] to the child."*[23]

14. Child find does not extend to a) migrant students, b) homeless children, c) preschool children, or d) home-schooled students.

Correct in terms of home-schooled children only.[24] *Child find clearly extends to migrant, homeless, and other school-age children even if not enrolled.*[25] *It also applies to preschool children.*[26]

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[22] 20 U.S.C. § 1412(a)(10)(A)(ii)(II) (2012).

[23] For supporting case law, see, e.g., J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635 (S.D.N.Y. 2011); Dist. of Columbia v. Abramson, 493 F. Supp. 2d 80 (D.D.C. 2007); *cf.* Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057 (D.N.J. 2011) (student with IEP, thus effectively reevaluation). For the latest repetition of OSEP Policy, see Letter to Eig, 52 IDELR ¶ 136 (OSEP 2009).

[24] 34 C.F.R. § 300.300(d)(4) (2012); *see also* Fitzgerald v. Camdenton R-III Sch. Dist., 439 F.3d 773 (8th Cir. 2006); Durkee v. Livonia Cent. Sch. Dist., 487 F. Supp. 2d 313 (W.D.N.Y. 2007).

[25] See *supra* notes 1–2. See, e.g., Hawkins v. Dist. of Columbia 537 F. Supp. 2d 108 (D.D.C. 2008) (ruling that district violated child find for student who was resident of the district but who did not enroll in school).

[26] See, e.g., Metro. Nashville & Davidson Cnty. Sch. Sys. v. Guest, 900 F. Supp. 905 (M.D. Tenn. 1995). The required age range now starts at age 3, whereas at the time of this case, it was optional for each state at the preschool level. The outcome is the same.

MISCELLANEOUS (CONT.):

15. Section 504 does not provide a corresponding individualized obligation of child find.

Quite the contrary, both the regulations and the courts make sufficiently clear that child find applies for the broader definition of disability under Section 504 just as it does for the narrower scope of eligibility under the IDEA. The Section 504 regulations expressly require evaluation for individuals who, by reason of an impairment that substantially limits a major life activity "need or are believed to need special education or related services."[27] *Similarly, the courts have concluded that Section 504 imposes an individualized child find duty upon school districts. For example, citing Third Circuit precedents, a federal district court in Pennsylvania ruled: "In establishing a [Section 504] claim, a plaintiff must demonstrate that the defendants knew or should have known about the disability."*[28]

[27] 34 C.F.R. § 104.35 (2012) (emphasis added). The accompanying procedural safeguards regulation repeats this quoted language. *Id*. § 104.36.

[28] D.G. v. Somerset Hills Sch. Dist., 559 F. Supp. 2d 484, 496 (D.N.J. 2008) (emphasis added) (refusing to dismiss IDEA-alternative § 504 claim for student with depressive disorder). For other examples where courts recognized this duty but decided in favor of the district for an insufficient factual foundation, see B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882 (8th Cir. 2013) (summarily rejecting §504 claim where district' efforts to evaluate the student with behavioral problems under the IDEA did not amount to bad faith or gross misjudgment); G.C. v. Owensboro Pub. Sch., 711 F.3d 623 (6th Cir. 2013) (summarily rejecting sole § 504, i.e., w/o IDEA, child find claim for student with behavioral problems).