2019 Caselaw Update: SLD vs. Dyslexia, Money Damages, OCR Shift, §504 or IDEA?, Students with Anxiety, One MDR Case

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Legally, What is a Learning Disability?

- **34 C.F.R. §300.8(b)(10)**

  "a disorder in one or more of the basic psychological processes involved in understanding or in using language"

  "including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, **dyslexia**, and developmental aphasia."

  Thus, dyslexia *could* qualify a student as LD

Legally, What is a Learning Disability?

- **The Issue of Dyslexia**

  ***Dear Colleague Letter,* 66 IDELR 188 (OSEP 2015)**

  Use of term is OK in IEPs and evaluations under the IDEA

  At times, it can be helpful to understand the type of LD in order to serve the student

  But, dyslexia does not mean student needs to be evaluated under IDEA, or will qualify under IDEA

USDOE Dyslexia Letters

- Office of Special Education and Rehabilitative Services (OSERS) notes that parent organizations report that some schools seem reluctant to use the terms dyslexia, dysgraphia, and dyscalculia
- OSERS states that dyslexia, dysgraphia, and dyscalculia are conditions that can qualify a child as LD under the IDEA

USDOE Dyslexia Letters

- “Nothing in the IDEA that would prohibit the use of the terms dyslexia, dysgraphia, and dyscalculia in IDEA evaluation, eligibility determinations, or IEP documents.”

- Letter notes that the term dyslexia is included in the IDEA definition of LD (34 CFR §300.8(c)(10)), and that the list of LD conditions is not exhaustive

USDOE Dyslexia Letters

- But, for a child with dyslexia, dysgraphia, or dyscalculia to qualify under IDEA, they must meet the IDEA criteria for LD (i.e., criteria under 34 C.F.R. §300.309)

  Even if student has dyslexia, team has to go through LD evaluation steps and components of §300.309 to determine eligibility as LD

USDOE Dyslexia Letters

- “There could be situations where the child’s parents and the team of qualified professionals responsible for determining whether the child has a SLD would find it helpful to include information about the specific condition…”

USDOE Dyslexia Letters

- **USDOE Reminder on RtI**—Students receiving RtI support who do not respond well to interventions must be referred for IDEA evaluation (but parent requests for IDEA evaluations must not be denied or delayed to complete an RtI program)

  Note—USDOE is pro-RtI, but not to the point that RtI practices would unduly delay or deny IDEA referrals

- If dyslexia, dysgraphia, or dyscalculia is the condition that forms the basis for the determination of LD, “there could be situations where an IEP team could determine that personnel responsible for IEP implementation would need to know about the condition.”

  Example: child has a weakness in decoding skills due to their dyslexia (which in turn could affect a teacher’s choice of methodology)

- School policies cannot prohibit use of the terms dyslexia, dysgraphia, or dyscalculia

Notes—But, diagnoses of these conditions does not equate to LD eligibility under IDEA

Ultimately, the relevant legal question is whether the school's evaluation is sufficient to deliver an accurate understanding of the student's educational needs

- ***Letter to Unnerstall*, 68 IDELR 22 (OSEP 2016)**
- Further clarification of 2015 OSERS dyslexia *Dear Colleague Letter*
- "While IDEA does not prohibit the use of the terms dyslexia, dyscalculia, and dysgraphia, there is no requirement under IDEA that a disability label or 'diagnosis' be given to each student receiving special education and related services…"

- Parents cannot dictate the specific areas that the district must assess, as long as all areas of suspected disability are assessed
- Only if team decides that a specific assessment for dyslexia is needed to ascertain eligibility and educational needs would such assessment be required

- **Questionable Statement?:**

  "We also note that an evaluation for dyslexia could be an evaluation by a *licensed physician* to determine a child's medically related disability that results in the child's need for special education and related services."

  Physician dyslexia evaluation? Medical disability?... Statement raises serious questions: Are physicians qualified to assess for a reading disability?

- **Questionable Statement?:**

  Will parents ask for physician evaluations of dyslexia, or obtain private dyslexia diagnoses from pediatricians?

  Do physicians have the background and training to assess and determine dyslexia?

  When we know dyslexia is a language-based learning disorder, why does OSEP think it's a *medical* disability?...

- **Implications?:**

  Potential increase in parents of LD sp ed students also requesting dyslexia or dysgraphia evaluations

  Potential increase in parents submitting doctors' notes diagnosing dyslexia

  The use of the terms dyslexia, dysgraphia, and dyscalculia would also be proper under §504

- **The issue of Dyslexia vs. LD has caused some confusion in modern caselaw**

  ***W.V. v. Copperas Cove* (W.D.Tex. 2018)**

  Case centers on the intersection of state regular ed dyslexia programs and special education eligibility

  When does a finding of dyslexia under regular ed programs translate to sp ed eligibility?

- ***W.V. v. Copperas Cove ISD*, 119 LRP 762 (W.D.Tex. 2018)**

  4th-grader with articulation problems, came to District as SI under IDEA

  Parent requested LD testing, but District would only agree to dyslexia testing

  Dyslexia assessment (under State law program) found dyslexia, school provided dyslexia services (Wilson Reading System) and accommodations, student made progress

  5 months later, District conducted "FIE" (really a reevaluation)

- ***W.V. v. Copperas Cove ISD*, 119 LRP 762 (W.D.Tex. 2018)**

  FIE found student no longer qualified SI, cross-battery LD testing indicated all cognitive processing areas were average, achievement was average in all areas but reading

  FIE concluded student had dyslexia, but did not qualify as LD under IDEA

  Parents filed request for DPH

  Court—The definition of LD in IDEA includes "dyslexia." 20 U.S.C. §1401(30)(B)

- ***W.V. v. Copperas Cove ISD*, 119 LRP 762 (W.D.Tex. 2018)**

  Thus, District "violated the IDEA by determining it its assessment that W.V. no longer met the eligibility requirements for an SLD and thus was no longer entitled to Special Education or an IEP."

  "W.V. has already been diagnosed with an eligible condition, thus bypassing both the need for additional testing to determine SLD status and the District's discretion in making such a determination."

- ***W.V. v. Copperas Cove ISD*, 119 LRP 762 (W.D.Tex. 2018)**

  But, no harm, no foul, because the District kept the dyslexia services in an IEP, and kept the student eligible, so no relief to the parents

  Questions—How can a determination of dyslexia under a State regular ed dyslexia program allow a district to skip the mandatory SLD evaluation and eligibility requirements of 34 C.F.R. §300.309 ("Determining the Existence of a Specific Learning Disability")?

- ***W.V. v. Copperas Cove ISD*, 119 LRP 762 (W.D.Tex. 2018)**

  Question—Is having dyslexia the same as meeting criteria for SLD under IDEA?

  How can a district not have discretion to conduct SLD testing in compliance with 300.309 in making a determination of SLD? Isn't that required?...

  Case is an example of dyslexia/§504/IDEA/need for sp ed confusion, and unfortunately, only adds to the confusion

- ***W.V. v. Copperas Cove ISD*, 119 LRP 762 (W.D.Tex. 2018)**

  Decision on Appeal—74 IDELR 277 (5th Cir. 2019), unpublished

  D.Ct. failed to consider need for sp ed—that student may be LD does not mean they are eligible

  Decision does not address fundamental confusion…

A Trend to Money Damages Cases

- Money damages are not available in IDEA actions, only educational relief or reimbursement
- But, money damages can be awarded under §504 and ADA, in some circumstances
- Parents are increasingly giving these actions a try, with limited success
- **Contexts**—Student injuries, disability harassment, and serious educational harms

A Trend to Money Damages Cases

- **Available Theories**:

  Baseline 504/ADA claim elements

  Intentional discrimination (for damages)

  Deliberate Indifference

  Bad Faith/Gross Misjudgment

A Trend to Money Damages Cases

- **Available Theories**:

  Bad Faith/Gross Misjudgment—A relatively new claim being developed by 5th Circuit Court (gross departure from professional FAPE standards)

  How close is it to a negligence claim under IDEA or §504 for damages?... A real concern for schools

A Trend to Money Damages Cases

- **Common Context**:

  Disability discrimination claim in the form of lack of, or inappropriate response to, **Disability-Based Harassment**

  For money damages, allegations must go beyond denial of FAPE

- ***Sauzo-Vargas v. Madison Metro. Sch. Dist.*, 74 IDELR 165 (W.D.Wis. 2019)**

  For 18 mos, student with ID had been making statements that she was interested in boys, wanted to kiss them, and wanted to have a baby

  Although staff indicated they would watch her more closely, she was sexually assaulted by another student with ID at school

- ***Sauzo-Vargas v. Madison Metro. Sch. Dist.*, 74 IDELR 165 (W.D.Wis. 2019)**

  Court found that parents could point to no evidence indicating the sexual assault was connected to her disability, other than arguing that a 1-1 aide would have prevented the assault

  “Although one could speculate that Student X saw plaintiff as easy prey due to her cognitive immaturity, speculation won’t stave off summary judgment.”

- ***Sauzo-Vargas v. Madison Metro. Sch. Dist.*, 74 IDELR 165 (W.D.Wis. 2019)**

  Court— "[t]he ADA and Rehabilitation Act are not general protection statutes for vulnerable people with disabilities, they are anti-discrimination statutes."

  Again, the conduct has to bear a relation to the victim's disability

  Is the fact that the assaulter also had ID relevant?...

- ***Bowe v. Eau Claire Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  High-school boy with Asperger's Syndrome alleged that he was severely bullied in middle and high school, and that the school failed to appropriately respond

  Court found the facts to be "disturbing" and "shameful," as the student was called horrible names ("gay," "queer," "fag," "douche bag," and "shit stain')

  A bag of feces was left at his home, which was also egged

- ***Bowe v. Eau Claire Sch. Dist*., 71 IDELR 168 (W.D.Wis. 2018)**

  Administrators investigated every one of nearly 30 bullying reports made by the student's parents, and responded with mostly counseling, suspension, and in some cases, referral to law enforcement

  Responses actually ended the bullying from some students, but "it appears that Conor was bullied by many different students"

- ***Bowe v. Eau Claire Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Investigations also found that Conor admitted he sometimes was the aggressor, also using foul language

  Principal had school liaison monitor Conor in the halls to check on whether he was being bullied

  Also, Principal helped the parents identify the culprits of the feces and egging incidents, although off school grounds

- ***Bowe v. Eau Claire Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Court found that the deliberate indifference standard applied (i.e., a clearly unreasonable response in light of the circumstances)

  Parents argument was mostly based on the fact that the schools' responses did not fully stop the harassment

  Court found some responses worked, and that the high standard could not be met

- ***Bowe v. Eau Claire Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Court granted summary judgment to the school

  Note—Court focuses only on the reasonableness of responses to the bullying, not whether it was related to disability

  How was the conduct plausibly disability-based? Was it gender-based? Just plain bullying?...

Changes to the OCR Approach

- Region VII OCR Letters from late 2018 on apply new statements of Legal Standards
- **Overall**—More emphasis on proof of violation, new treatment in complaints were the evidence is conflicting
- **Practical Effect**—More findings of insufficient evidence of §504 violation

Changes to the OCR Approach

- “As a preliminary matter, a finding that a recipient has violated one of the laws that OCR enforces must be supported by a preponderance of the evidence (i.e., sufficient evidence that it is more likely than not that unlawful discrimination occurred). Where there is a significant conflict in the evidence and OCR is unable to resolve that conflict, for example, due to the lack of corroborating witness statements or additional evidence, OCR generally must conclude that there is insufficient evidence to establish a violation of the law.”

Changes to the OCR Approach

- **Note**—An emphasis on applying the preponderance standard means that if the parties' statements are in conflict, OCR will now find that there is insufficient evidence of violation

  Rather than an approach where OCR gauges the credibility of parties' statements and evidence

- **FAPE Complaints (Implementation)**

  “Compliance with this provision is generally determined by assessing whether a district has implemented a student's Section 504 plan, also known as an ‘individualized education program,’ or ‘IEP.’”

  Note—Confusing that OCR states that §504 plans are “also known as” IEPs (more precisely, provision of an IEP complies with requirement for §504 plan)

- **FAPE Complaints (Implementation)**

Elements for Implementation Claim:

1. Whether school conducted **proper §504 evaluation and eligibility determination**,
2. Whether student's **needs were individually determined by a proper §504 committee**,
3. Whether **§504 plan provisions have been implemented**, and "if they have not been provided, OCR will determine the district's reason for failing to do so and the **impact of the failure**."

- **FAPE Complaints (Implementation)**

  Note—In past implementation complaints, if there was any failure to implement §504 plan accommodations, then there would likely be a finding of violation, even if students passed their classes

  Now, if there is a failure to implement the §504 plan, OCR is to determine the "impact" of the implementation lapse (ostensibly, no finding of denial of FAPE if the lapse did not result in poor grades or some denial of opportunity)

- ***Klein ISD (TX)*, 119 LRP 20779 (OCR 2018)**

  Parents alleged that a math teacher failed to implement their child's §504 plan

  Co-math teacher had stated she did not know the student had a §504 plan

  Main math teacher indicated he would instruct the co-teacher, and that the mods were implemented

  Co-teacher implemented oral administration and small-group testing

- ***Klein ISD (TX)*, 119 LRP 20779 (OCR 2018)**

  When parents insisted that the mods were not implemented, OCR found "a significant conflict in the evidence."

  Thus, insufficient evidence to find a violation

    Note—This finding took place even after the parent reported problems with mods and the student was placed in a different math class, after which there were no more problems

- ***Plano ISD (TX)*, 119 LRP 20767 (OCR 2018)**

  Student with asthma, allergies, and migraines alleged failure to implement extra time, parent contacts on missed assignments, copies of calendars and rubrics, and others

  OCR found parents were not always provided copies of calendars and rubrics for each class, but they were available online

- ***Plano ISD (TX)*, 119 LRP 20767 (OCR 2018)**

  OCR noted that the student made As and Bs in the classes where the mod was not implemented consistently

  "OCR determined that the de minimis failure to email the calendars and rubrics to the Student's parents had no negative impact on the Student's educational opportunity."

- ***Plano ISD (TX)*, 119 LRP 20767 (OCR 2018)**

  Note—Compare to older cases where OCR applied a standard where the mod had to be implemented "as written" or there would be a finding of violation, even if the student passed their classes

  See, e.g., *Leon County (FL) Sch. Dist.*, 68 IDELR 111 (OCR 2015)(OCR found violation where student who was reluctant to go to alternate location for tests or have teachers check his agenda, and teachers did not push the issue, with no mention of the student's grades, since the mods were not implemented "as written")

- ***Prosper ISD (TX)*, 119 LRP 19433 (OCR 2018)**

  Student alleged failure to implement teacher check-ins, reduced work, extra time

  §504 plan did not specify schedule for teacher checks, but AP teacher checked with student monthly

  OCR noted parent did not submit examples of unreduced work

  Teacher used “discretion” in determining when the student needed extra time

- ***Prosper ISD (TX)*, 119 LRP 19433 (OCR 2018)**

  OCR determined there was insufficient evidence of non-compliance

  Note—OCR appears to be exhibiting a more relaxed approach to implementation, allowing for some teacher discretion if specified on the §504 plan

- ***Alief ISD (TX)*, 119 LRP 33577 (OCR 2018)**

  Student with ODD, ADHD, and OCD alleged failure to implement BIP and social skills instruction

  Counselor was assigned to provide social skills instruction, but she did not provide it, as the student did not want to go with her, so behavior specialist provided some
  "social skills resources"

- ***Alief ISD (TX)*, 119 LRP 33577 (OCR 2018)**

  Staff also indicated that the District would have "developed the Student's BIP separately" from the §504 meeting

  Note on composition of §504 committee—Staff told OCR "at least one" of the committee members was knowledgeable about the Student, the data, and the placement options, and all members knew about at least one of those items, so no violation

- ***Alief ISD (TX)*, 119 LRP 33577 (OCR 2018)**

  OCR found no violation, as the "communication breakdowns" did not constitute a denial of FAPE

§504 or IDEA?

- A key aspect of understanding §504 is knowing how to distinguish need for special education from need for §504 service
- Since the needs of a §504 student might change over time to require special education, gauging the timeliness of the transition from one law to the other can cause disputes and court cases…

- ***Pocono Mountain Sch. Dist. v. T.D.*, 72 IDELR 186 (M.D.Pa. 2018)**

  After a girl touched a 3rd-graders private parts on various occasions, he began having behavior and social issues and was evaluated for sp ed (did not qualify)

  After continued problems, parents had student evaluated and diagnosed with Anxiety Disorder

  A further District sp ed eval again found student was not IDEA-eligible, but that he indeed had Anxiety Disorder, for which he got a 504 plan

- ***Pocono Mountain Sch. Dist. v. T.D.*, 72 IDELR 186 (M.D.Pa. 2018)**

  The Court finds "similar standards between IDEA and Section 504"

  It also finds that the HO erred in awarding tution reimbursement under §504, as it required a finding of "deliberate indifference" (finding reimbursement to be akin to damages)

  But, it noted that although the student maintained good grades, his behavior was problematic (altercations, defiance, disciplinary referrals)

- ***Pocono Mountain Sch. Dist. v. T.D.*, 72 IDELR 186 (M.D.Pa. 2018)**

  As Court reviews HO's finding that student did not require special education services, Court incorrectly asserts the student could need *related services* (IDEA regs make clear a student cannot qualify under IDEA if they only need related services—34 C.F.R. §300.8)

  Court confusingly finds that student "is equally entitled to FAPE under IDEA as well as Section 504"

- ***Pocono Mountain Sch. Dist. v. T.D.*, 72 IDELR 186 (M.D.Pa. 2018)**

  Then, the Court awards tuition reimbursement, since it is available upon a mere finding of denial of FAPE under IDEA (even though "deliberate indifference" would have been necessary for that remedy under §504)

  Note—The real question the Court should have focused on is whether the terms of the §504 plan would have been reasonably calculated to address the student's behaviors

  And, the Court does not address exactly what special education the student would have needed

- ***Pocono Mountain Sch. Dist. v. T.D.*, 72 IDELR 186 (M.D.Pa. 2018)**

  Note—Lastly, if the student needs special education and is entitled to a FAPE under IDEA, does that not moot the need for §504 FAPE and services?

  Of course, the student would be entitled to §504 nondiscrimination protections as an IDEA student

  Case shows how the IDEA vs. §504 question can confuse anybody…

- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

  8th grader with anxiety and OCD had problems with homework and oral presentations

  School provided §504 plan that allowed student to provide alternate work if he did not want to make a class presentation, extra time for homework, and some teacher assistance with homework)

  He was then found to have encouraged a fight in the cafeteria, for which he was arrested and gien probation

- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

  Within 10 weeks after the 504 plan was implemented, staff felt it was not fully meeting student's needs, and they offered the parents a sp ed evaluation

  Instead, the parents placed the student in an out-of-state wilderness program, after which they placed him in a Utah residential facility

  Parents sued for failure to provide FAPE under §504 and child-find failure under IDEA

- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

  Court applied the more lenient FAPE standard used in federal courts, requiring only that the school "reasonably accommodate the needs of the handicapped child to as to ensure meaningful participation in educational activities and meaningful access to educational benefits."

  Court found that the §504 plan mods reasonably addressed the student's anxiety-related problems and improved his attendance (anxiety appeared to manifest

- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

  It rejected the parents' arguments that the §504 evaluation regulations incorporated the IDEA evaluation requirements

  "IDEA, facially, mandates a more sweeping, thorough, and precise evaluation than §504 does"

  The Court found that, at its time, the §504 plan was appropriate ("the District's duty under §504 was to mitigate the impact of H.D.'s disability, not to erase it")

- ***H.D. v. Kennett Cons. Sch. Dist.*, 119 LRP 38755 (E.D.Pa. 2019)**

  Note—Crucially, the District was wise to offer a sp ed evaluation at the first signs that the §504 plan might not be meeting the student's needs

  But, Court found that at the time it was written, the §504 plan reasonably addressed the student's problems with anxiety over homework and class presentations, which the parents themselves cited as the main issues

- ***N.S. v. Randolph Bd. of Educ.*, 119 LRP 387700 (D.N.J. 2019)**

  In another case involving a student with alleged anxiety, a student excelled academically and had no attendance problems from 6th to 10th grade

  He had a §504 plan based on a diagnosis of generalized anxiety disorder, but was unwilling to attend school or work in home instruction

  His teachers saw no signs of anxiety at school, and he only stopped attending when he reached the end of compulsory attendance age

- ***N.S. v. Randolph Bd. of Educ.*, 119 LRP 387700 (D.N.J. 2019)**

  The Court thus found that his anxiety was not the cause of his failure to attend school

  Thus, his anxiety did not require special ed, and there was no IDEA child-find violation

  Parents' request for residential placement was denied ("there is evidence that plaintiffs decided to place him at Waypoint prior to the District's eligibility meeting to reduce stress and chaos in the home")

Manifestation Determination

- Fundamental IDEA protection for students with disabilities (20 U.S.C. §1415(k)(1)(E); 34 C.F.R. §300.530(e))
- Protects IDEA students from long-term disciplinary removals under local codes of conduct when applied in a manner that discriminates on the basis of disability

  First identified by federal courts (see, e.g., *Doe v. Koger*, 551 IDELR 515 (N.D.Ind. 1979); *S-1 v. Turlington*, 552 IDELR 267 (5th Cir. 1981); *Kaelin v. Grubbs*, 554 IDELR 115 (6th Cir. 1982))

Manifestation Determination

- The federal court cases were then incorporated into USDOE guidance documents establishing MDR requirement prior to disciplinary changes in placement
- MDR then written into IDEA in the 1997 reauthorization (with a more student-lenient formulation)
- In 2004 reauthorization, a more school-oriented reformulation, which is the present standard

Manifestation Determination

- 2004 standard of causal, direct, or substantial link was meant to reduce MDR litigation, but cases persist…

Boutelle v. Board of Educ. of Las Cruces Pub. Schs., 74 IDELR 130 (D.N.M. 2019)

Middle-schooler with ADHD threw rocks and hit two students, which triggered a long-term disciplinary removal recommendation

IEP team conducted MDR and determined act was not related to ADHD

Parent argued behavior was impulsive, and due to ADHD and Tourette's Syndrome

Court rejects argument, noting that before throwing a rock at a second student, he asked "do you think I can hit him with a

Boutelle v. Board of Educ. of Las Cruces Pub. Schs., 74 IDELR 130 (D.N.M. 2019)

Court felt the statement "certainly seems to suggest intentional conduct, rather than some sort of involuntary, complex motor tic, as suggested by Plaintiff.

Lesson—Impulsivity arguments are often raised in MDR disputes, but the facts need to support them

Often, however, there is evidence the behavior required organization, steps, thinking, and time, all of which are

Boutelle v. Board of Educ. of Las Cruces Pub. Schs., 74 IDELR 130 (D.N.M. 2019)

For other cases rejecting impulsivity argument on the facts, see e.g., *Z. H. v. Lewisville ISD*, 65 IDELR 106 (E.D.Tex. 2015)(development of "shooting list" over time); *Los Angeles USD*, 111 LRP 60703 (SEA California 2011)(sale of Adderall not impulsive); *Fitzgerald v. Fairfax County Sch. Bd*., 50 IDELR 165 (E.D.Va. 2008)(paint-ball shooting of buses not impulsive, required planning); *Medford Public Schs*., 110 LRP 31566 (SEA Massachusetts 2010)(break-in of car using prepared alibi and disguise not impulsive).

But, see *In re: Student with a Disability*, 52 IDELR 239 (SEA West Virginia 2009) for a situation where

Recent Caselaw on Students with Anxiety

- **A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D.Pa. 2015)**

  17-year-old with Generalized Anxiety Disorder, social phobia, separation anxiety disorder

  Diagnosed, and received services, since 3rd grade (school advised parents to have him evaluated in response to absences)

  After various parent inquiries, District implemented a §504 plan after an IDEA evaluation concluded that his good academic

Recent Caselaw on Students with Anxiety

- **A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D.Pa. 2015)**

  Student attended other agency programs for a few years, but returned to the District

  In 8th grade, the student's emotional status deteriorated significantly, absences began to accumulate, disruptive behaviors emerged, and failing grades began

  District offered a §504 plan, but the absences continued

- **A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D.Pa. 2015)**

  District initiated a compulsory attendance legal action against the student

  The District proposed a psychiatric evaluation; parent agreed, but also asked for an IDEA eval

  The psychiatric evaluation confirmed the diagnoses of anxiety, but added ODD, and recommended IDEA eligibility as ED

  District did not revise the §504 plan, but initiated an IDEA initial eval

- **A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D.Pa. 2015)**

  After the student was about to fail several classes, the parents placed him in the District's online program (but District did not implement the §504 plan at the program)

  An agreed-to independent eval found the student to be eligible under IDEA as ED

  In his now 9th grade, the student received an IEP

  But, the parents requested a DP hearing, alleging untimely identification

- **A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D.Pa. 2015)**

  The HO found that the District violated child-find, since there were ample reasons to suspect disability and need for services as of the 7th grade

  The Court agreed there was a child-find violation, as the school did not evaluate the student within a reasonable time after suspicion of eligibility

  "Because the District engaged in 'an unnecessary two-step process in conducting its evaluation,' it deprived A.W. of 'needed

- **A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D.Pa. 2015)**

  The Court remanded case to HO to determine award of compensatory services

  (In a later decision, the Court affirmed an award of 949 hours of comp ed, more than an hour-for-hour award, including for absences, which it found directly related of unaddressed anxiety—*see* 65 IDELR 247)

  Lessons? Students with anxiety may exhibit attendance problems as symptoms and signs of disability, thus raising a child-find issue

- **A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D.Pa. 2015)**

  Lessons? Even if capable of performing on grade-level, a student whose anxiety prevents regular attendance may be in need of sp ed services

  Treating absences as a truancy matter, when there are indications of disability that may manifest with attendance problems, adds to the child-find risk

  Starting with §504 requires close monitoring of student performance, since problems despite §504 plans can trigger IDEA child-find

  Why was §504 plan not implemented in

- ***School Dist. of Pittsburgh v. C.M.C.*(W.D.Pa. 2016)**

  Teen with Asperger's and anxiety had fear of school after an altercation

  District proposed a mostly VP

  Court found student was not a good candidate for a VP, as she was obsessed with computers and the internet

  And, the VP offered no social interaction

- ***School Dist. of Pittsburgh v. C.M.C.*(W.D.Pa. 2016)**

  Notes—The case highlights how a child's anxiety about school can lead parents to alternative placement options, such as online programs and homebound

  Thoughts on such programs for students with anxiety?...

  How can we deal with homebound requests for such students, supported by Dr's recommendations?

- **E.S. v. Smith, 72 IDELR 184 (D.Md. 2018)**

  Middle-schooler started on a §504 plan after diagnoses of Generalized Anxiety Disorder, ADHD, ODD, Mood Dysregulation, and mild Autism spectrum disorder

  Fairly quickly, school evaluated student under IDEA and found him eligible as ED and OHI

  Student performed well academically, but required emotional and behavioral supports

  Behaviors included aggression, crafting objects into “weapons” for intimidation, threats, and inappropriate language

- **E.S. v. Smith, 72 IDELR 184 (D.Md. 2018)**

  After a suspension due to aggression toward another student and failure to follow adult directions, school recommended a behavior program at another campus

  Wanting a more therapeutic program with no mainstreaming, the parents disagreed with the placement proposal, and gave notice of private placement (to seek reimbursement)

  Court—Although parents alleged student had too many problems in hallways when nondisabled students were present, the evidence did not indicated that was the case

- **E.S. v. Smith, 72 IDELR 184 (D.Md. 2018)**

  In any event, at the District's proposed placement, para-educators were constantly present in the halls to intervene

  The program also would offer the emotional and behavior supports needed

  Ultimately, parents failed to prove that the lack of a "therapeutic" component meant the student could not benefit from the District's program

- **E.S. v. Smith, 72 IDELR 184 (D.Md. 2018)**

  Note—The Court never addresses the LRE issue, although the parents are proposing a placement more restrictive than required by the student's needs

  Why would we want to isolate a student with anxiety from nondisabled students in the educational program? Is not LRE a factor in determining entitlement to reimbursement for a private placement?...

- **S.C. v. Oxford Area Sch. Dist., 73 IDELR 90 (3rd Cir. 2018)**

  In 3rd grade, student was diagnosed with LDs, but no behavior problems

  In 8th grade, reevaluation found LDs, but problems arose in classroom (tired, unfocused, inattentive, easily distracted)

  Accommodations were added to IEP to address focus and on-task behavior

  In 9th grade, student missed over a hundred class periods, failed Algebra and four other classes, but took summer school and was promoted

- **S.C. v. Oxford Area Sch. Dist., 73 IDELR 90 (3rd Cir. 2018)**

  In 10th grade, student did better, attended more, and had a 2.04 GPA

  In 11th grade, progress was mixed, school recommended taking away electronics during class, but mother refused

  Parent brought Dr's note indicating student was "anxious" about his English class

  At parent's request, school planned to transition student to a cyber school, and added emotional support classroom services

- **S.C. v. Oxford Area Sch. Dist., 73 IDELR 90 (3rd Cir. 2018)**

  In the middle of his Senior year, parent sued, alleging denial of FAPE because school ignored his anxiety issues

  Court disagreed, finding that with the school's IEP services, student's attendance and performance improved

  Student was on grade level despite missing class

  "There was no reason to think that these measures were inadequate or that S.C.'s behavior signified anxiety"

- **S.C. v. Oxford Area Sch. Dist., 73 IDELR 90 (3rd Cir. 2018)**

  Notes—Here, Court dismisses anxiety as the reason for the student's absences and difficulties. Is the dispositive factor a lack of a formal anxiety diagnosis?

  (The Court in the *A.W. v. Middletown* case easily found that all the student's absences were the direct result of the anxiety).

  Obviously, a key distinguishing feature is that this student improved and passed his classes at grade level…

- **Independent Sch. Dist. No. 283 v. E.M.D.H., 74 IDELR 19 (D.Minn. 2019)**

  Student did well in elementary, but had occasional behavioral “meltdowns”

  Student was eventually diagnoses with Generalized Anxiety Disorder, school phobia, OCD, ADHD, Panic Disorder

  In middle school, student was in gifted and talented classes, earning A’s and B’s, but absences increased

  Before 9th grade started, she told parents she was afraid to go to school

- **Independent Sch. Dist. No. 283 v. E.M.D.H., 74 IDELR 19 (D.Minn. 2019)**

  She missed 18 days of school by February, and stopped coming to school in March

  Parents placed her in a treatment program

  In 9th grade, she started school but attendance became irregular and she went back to treatment

  Although school discussed a sp ed referral, it did not initiate one, instead creating a §504 program for her 10th grade year

  School disenrolled her due to poor

- **Independent Sch. Dist. No. 283 v. E.M.D.H., 74 IDELR 19 (D.Minn. 2019)**

  After yet another therapeutic placement, the school evaluated the student for sp ed, but found her ineligible and not in need for sp ed services, as they did not believe her condition "adversely affected educational performance."

  Court found the student eligible, since her "mental health issues—her several diagnoses as of May 2017—appear to have directly impacted her attendance at school."

  There was no evidence of other causes for

- **Independent Sch. Dist. No. 283 v. E.M.D.H., 74 IDELR 19 (D.Minn. 2019)**

  Although the student excelled on standardized tests, “her absenteeism inhibited her progress in the general curriculum.”

  The school’s efforts to assist the student informally, and meet with the parents, were not sufficient to satisfy child-find, and were in fact an indicator that sp ed evaluation was warranted

  (see *Rose Tree Media Sch. Dist. v. M.J.*, 74 IDELR 15 (E.D.Pa. 2019) for another case where school failed to recognize that anxiety was

- **C.H. v. BOE Saugerties Cent. Sch. Dist., 74 IDELR 221 (2nd Cir. 2019)**

  7th-grader in sp ed due to anxiety disorder and autism had attendance problems, leading parents to place him in a private school

  They argued that his attendance improved at the private school, and thus reimbursement was warranted

  Court disagreed, noting that under *Burlington*, a parent must prove that the private school program is appropriate, but here, it provided no specially designed instruction

- **C.H. v. BOE Saugerties Cent. Sch. Dist., 74 IDELR 221 (2nd Cir. 2019)**

  In fact, the school permitted students to "opt out" of reading aloud or other assignments

  For a private school to be appropriate for reimbursement purposes, it must provide individualized services that address the student's disability

  Evidence of progress in private school was anecdotal—no test scores, grades, written reports to support the claim

- **Doe v. Cape Elizabeth Sch. Dept., 74 IDELR 95 (D.Maine 2019)**

  9th grade student performed well at school in honors classes

  At home, however, there was much conflict in the family, parents reported outbursts, threats to run away, calls to the police

  During this period, student was almost never absent and kept good grades, with no inappropriate behavior at school

  In 10th grade, problems at home intensified

- **Doe v. Cape Elizabeth Sch. Dept., 74 IDELR 95 (D.Maine 2019)**

  Parents wanted her placed out of the home, although clinicians determined she did not need placement or hospitalization

  Student received a diagnosis of Generalized Anxiety Disorder, attributed to family conflict

  School staff did not refer her to sp ed, as there were no problems at school in any area

  Before 11th grade, student's parents separated, and during that year, she struggled to attend school

- **Doe v. Cape Elizabeth Sch. Dept., 74 IDELR 95 (D.Maine 2019)**

  Finally, the parents notified the school they would be placing her in a Utah residential facility, and that they would be seeking reimbursement from the school

  In absentia, the school held an IEP meeting and qualified the student under the OHI category (since a contracted-for evaluation in Utah found zero aberrant behavior in the residential facility)

  The Court rejected the parents' claim of violation of child-find

- **Doe v. Cape Elizabeth Sch. Dept., 74 IDELR 95 (D.Maine 2019)**

  It held that the student's behaviors and performance prior to the §504 referral did not warrant a sp ed evaluation

  Court agreed with HO's statement that "it is not unusual in a situation like this for a school department to see whether Section 504 accommodations were helpful to the Student before considering a special education referral, and a diagnosis of GAD does not automatically mean a student requires special education to succeed in school."

- **Doe v. Cape Elizabeth Sch. Dept., 74 IDELR 95 (D.Maine 2019)**

  Lessons—Here, since the problems centered solely in the home initially, the situation did not trigger child-find

  As problems increased, §504 was a reasonable option, as the difficulties were not severe, and might be addressed with accommodations

  When the §504 plan did not succeed, school moved reasonably quickly to a sp ed evaluation

  Note—School was smart to contract with a Utah evaluator to conduct the

- **Doe v. Cape Elizabeth Sch. Dept., 74 IDELR 95 (D.Maine 2019)**

  Related Case—See *G.D. v. West Chester Area Sch. Dist*., 70 IDELR 180 (E.D.Pa. 2017) for a case where the Court held that most of a gifted student's anxiety-related problems took place in the home, and that his difficulties could be addressed by a §504 plan.

- **Key Anxiety-Related "Stress Points"**

  Child-find—Deciding on §504 or IDEA referral

  §504 plans—Sp ed must communicate with §504 regarding student performance, attendance issues

  Attendance—Schools must acknowledge that anxiety can manifest with attendance problems, which are a behavior that must be addressed programatically

  Counseling services and classroom accommodations are key

  Homebound or virtual program options do not really *address* anxiety