

Avoiding Legal Pitfalls: Identification and Provision of Services to Students with Executive Functioning Deficits

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Agenda

- ◆ What is Executive Functioning?
- ◆ Identification of Students with Executive Functioning Deficits
 - ◆ Disabilities under the IDEA
 - ◆ Evaluation of Students pursuant to IDEA
 - ◆ Eligibility of Students under IDEA
- ◆ Provision of Services to Students with Executive Functioning Deficits
 - ◆ IEP Goals
 - ◆ IEP Services & Accommodations
 - ◆ Behavior Intervention Plans & Assistive Technology

Disclaimer: The information in this handout and presentation is for the purpose of providing general information and is not intended to provide legal advice or substitute for the legal advice of counsel.

What is Executive Functioning?



What is Executive Functioning?

- ◆ It depends on who you ask.
- ◆ However, most psychologists seem to agree that it includes skills related to cognitive flexibility and self-regulation, such as inhibition, attention, emotional control, initiation, working memory, planning/organizing, and self-monitoring skills.


What is Executive Functioning?

- ◆ Typically in special education litigation, an expert witness in the field will opine to the judge the meaning of the term "executive functioning."

Identification of Students with Executive Functioning Deficits



Disabilities under the
IDEA



Suspecting a Disability under
IDEA

- ◆ Districts have an affirmative obligation to timely evaluate any student within their jurisdiction suspected of having a disability under IDEA. 34 CFR 300.111(a)(1)(i).
- ◆ Regardless of whether a parent (or teacher) makes a referral for special education.
- ◆ Failure to timely evaluate can result in a child find violation.

Suspecting a Disability under
IDEA

- ◆ Failing to evaluate a student suspected of a disability can result in a denial of FAPE and can entitle parents to remedies of compensatory education and/or private school tuition reimbursement.
- ◆ Such remedies are assessed from the point in time the district should have suspected a disability. *T.B. v. Prince George's County Bd. of Educ.*, 72 IDELR 171 (4th Cir. 2018); *Lakin v. Birmingham Pub. Schs.*, 39 IDELR 152 (6th Cir. 2003).

Executive Functioning Deficit... Disability under IDEA?

- ◆ The IDEA identifies 13 different disability categories:

Autism	Other Health Impairment
Deaf-Blindness	Specific Learning Disability
Deafness	Speech or Language Impairment
Emotional Disturbance	Traumatic Brain Injury
Hearing Impairment	Visual Impairment
Intellectual Disability	
Multiple Disabilities	34 CFR 300.8(c).
Orthopedic Impairment	

Executive Functioning Deficit... Disability under IDEA?

- ◆ An executive functioning deficit/impairment/disorder, in and of itself, is NOT a disability under the IDEA.
- ◆ In fact, executive functioning disorder is not a disability listed in the DSM-V.
- ◆ However, executive functioning issues may be present with some disabilities under the IDEA.

Parent Referrals

- ◆ When a parent requests an evaluation...
 - ◆ If the district suspects a disability-
 - ◆ The district must proceed with an initial evaluation.
 - ◆ If the district does not suspect a disability-
 - ◆ Provide the parent with their procedural safeguards.
 - ◆ Provide prior written notice refusing to evaluate and explaining why the district does not suspect a disability.

Pre-referral Interventions & RTI

- ◆ Nothing in the IDEA prevents a district from implementing pre-referral general education interventions or RTI interventions prior to evaluating a student for a disability.
- ◆ However...

Pre-referral Interventions & RTI

- ◆ A district cannot unnecessarily delay an evaluation for special education due to an RTI model. Letter to Brekken, 56 IDELR 80 (OSEP 2010).
 - ◆ If the district suspects a disability, the district must evaluate. Memorandum to State Directors of Special Educ., 116 LRP 21359 (OSEP Apr. 29, 2016).
- ◆ A parent can request an evaluation during the RTI process.
 - ◆ If the district suspects a disability, the district must evaluate.
- ◆ A district cannot deny or delay an evaluation for a private school student just because the student had not participated in an RTI model at the private school. Letter to Zirkel, 56 IDLER 140 (OSEP 2011).

Pre-referral Interventions & RTI

- ◆ The IDEA requires that a district “promptly” request parental consent for an evaluation “[i]f, prior to a referral, a child has not made *adequate progress* after an *appropriate period of time* when provided instruction.” 34 CFR 300.309(c) (emphasis added).
 - ◆ IDEA does not define “adequate progress” or “an appropriate period of time.”
 - ◆ Instead these decisions have been left to the states and local districts. 71 Fed. Reg. 46,658 (2006).

Pre-referral Interventions & RTI

- ◆ The Dept. of Ed. indicated that it would typically not be considered acceptable for a district to “wait several months to conduct an evaluation or to seek parental consent for an evaluation if the public agency suspects the child to be a child with a disability.” Questions and Answers on Response to Intervention (RTI) and Early Intervening Servs. (EIS), 47 IDELR 196 (OSERS 2007).

Case Law: Pre-referral Interventions & RTI

- ◆ **El Paso Indep. Sch. Dist. v. Richard R., 50 IDELR 256 (W.D. Tex. 2008), aff'd in part, rev'd in part, 53 IDELR 175 (5th Cir. 2009).**
 - ◆ A district violated its child find duties when it repeatedly provided a student with ADHD with interventions recommended by its pre-referral intervention team instead of referring the child for an IDEA evaluation.
 - ◆ The interventions, including Section 504 accommodations and tutoring, did not improve the student's performance.
 - ◆ The Court stated it was baffled that the team would keep recommending the same interventions that had not previously helped the student achieve passing achievement scores.

Case Law: Suspecting a Disability under IDEA

- ◆ **Oakland Unified Sch. Dist. v. N.S., 66 IDELR 221 (N.D. Cal. 2015).**
 - ◆ The court held that the school district violated the IDEA by ignoring signs that the student suffered from an emotional disturbance and required special education services.
 - ◆ The court cited the boy's suicidal statements, and his “clinically significant” difficulties with anxiety, attention, and social skills as indicators that the student should have been evaluated by the district.
 - ◆ The court rejected the district's argument that the boy's behaviors (which included drug use, association with a negative peer group, chronic truancy, lack of effort/motivation at school, and flat affect) were caused by his matriculation to high school and peer pressure.

Case Law: Suspecting a Disability under IDEA

- ◆ Independent Sch. Dist. No. 413, Marshall v. H.M.J., 66 IDELR 41 (D. Minn. 2015).
- ◆ A school district violated the IDEA's "child find" requirements when it ignored evidence that an 8-year-old girl's chronic truancy could be caused by her medical conditions.
- ◆ The child had missed an average of 35 days per school year, and teachers had noted problems with anxiety and attention.
- ◆ Moreover, the parent had provided a neuropsychological report citing a connection between the child's anxiety and her inability to attend school.

Evaluation of Students pursuant to IDEA



Addressing Areas of Suspected Disability & Need

- ◆ A district has an obligation to evaluate a student in all areas related to the suspected disability, including if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communication status, and motor abilities.
- ◆ The evaluation must be 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. 34 C.F.R. 300.304(c)(4, 6).

Addressing Areas of Suspected Disability & Need

- ◆ So, do you have to evaluate a student's executive functioning skills?
 - ◆ Is it related to the student's suspected disability?
 - ◆ Are there concerns with the student's executive functioning skills that might need to be identified to determine the child's special education and related service needs (even if not related to the disability)?

Addressing Areas of Suspected Disability & Need

- ◆ The IDEA focuses on identifying a student's individual needs, not on clinical labels.
- ◆ Thus, there is no requirement in the IDEA to evaluate a student using an assessment measure purported to measure "executive functioning."
- ◆ In fact, many common assessment measures (formal and informal) already address executive functioning needs, such as working memory skills, attention to tasks, emotional control, and organizational skills.

Case Law: Addressing Areas of Suspected Disabilities

- ◆ **E.M. v. Pajaro Valley Unified Sch. Dist., 63 IDELR 211 (9th Cir. 2014).**
 - ◆ A student who fails to meet eligibility criteria in one IDEA category may qualify under another category, such as OHI.
 - ◆ The 9th Circuit held that it could not tell if Congress intended to limit OHI to disabilities that did not fall within any other category.
 - ◆ Nevertheless, the court affirmed the school district's decision that a student diagnosed with central auditory processing disorder did not qualify for IDEA eligibility, as there was no evidence that he had limited strength, vitality, or alertness, or a chronic/acute health problem.

Case Law: Evaluating Executive Functioning

- ◆ **E.P. v. Howard County Public Sch. System, No. ELH-15-3725, 2017 WL 3608180 (D.Md. Aug. 21, 2017).**
 - ◆ The parents of a child with a disability were not entitled to an IEE at public expense because the district filed due process and proved that their evaluation was appropriate.
 - ◆ The student was found to be not eligible for special education services even though he had a disability of OHI because it did not impact his education.
 - ◆ In addition to other alleged deficiencies, the parents claimed that the district's evaluation failed to include a clinical interview or self-report needed to provide information regarding the student's executive functioning skills
 - ◆ The school psychologist testified that she obtained input and ratings scales (BASC-2, BRIEF) from the parent and teachers which provided information regarding ADHD related behaviors, social-emotional issues, and executive functioning skills.

Practical Tips

- ◆ The use of a variety of assessment tools to address a student's executive functioning needs will support the team's final evaluation results and recommendations. For example...
 - Parent, teacher, and student interviews
 - Standardized rating forms that assess behaviors and skills associated with executive functioning skills
 - Classroom observations
 - Individual subtests from standardized assessments
 - Informal checklists (e.g., prevocational skills)
 - Self-report inventories

Eligibility of Students under IDEA



In Need of Special Education & Related Services

- The IDEA requires that a student “need special education and related services” to meet the second prong of eligibility for a disability under IDEA. 20 USC 1412(a)(3)(A).
- A team must consider information from a variety of sources when making an eligibility determination. 34 CFR 300.306(c)(1).
- A student’s educational performance includes more than just academic progress. E.g., G. “J.” D. v. Wissahickon Sch. Dist., 56 IDELR 294 (E.D. Pa. 2012).

In Need of Special Education & Related Services

- The First and Seventh Circuit Court of Appeals have held that a student is in need of special education and related services if the student requires those services in order to receive an educational benefit. Marshall Joint Sch. Dist. No. 2 v. C.D., 54 IDELR 307 (7th Cir. 2010); Mr. I. v. Maine Sch. Admin. Dist. No. 55, 47 IDELR 121 (1st Cir. 2007).

Case Law: In need of special education and related services

- **Q.W. v. Board of Educ. of Fayette County, Ky., 66 IDELR 212 (6th Cir. 2015, unpublished).**
 - The court upheld the school district’s determination that an elementary school student with autism no longer was “in need of” special education and related services.
 - Importantly, the court held that eligibility for special education was limited to a student’s school-based performance and behavior, and was not meant to consider a student’s performance and behavior at home.

Case Law: In need of special education and related services

- ◆ **Durbrow v. Cobb County Sch. Dist., 72 IDELR 1 (11th Cir. 2018).**
 - ◆ A twelve-grader with ADHD was not in need of special education and related services when his ADHD did not impede his academic performance during the first three-years of high school in a high-achieving academic magnet school.
 - ◆ The court held that the student's neglect of his studies (failure to complete homework or take advantage of his 504 accommodations) was the reason for his poor performance, not a disability under the IDEA.


Case Law: In need of special education and related service

- ◆ **L.J. v. Pittsburg Unified Sch. Dist., 117 LRP 6572 (9th Cir. 2017).**
 - ◆ A district could not justify that a fourth grade student with OHI, SLD, and ED did not require special education services by classifying his supports and services as general education interventions.
 - ◆ Although the student was making satisfactory progress with the district's supports and interventions, the Court held that the services were specially designed instruction, not general education interventions.
 - ◆ The Court pointed out that the mental health services, 1:1 behavioral aide, and accommodations (such as the ability to leave the classroom at will) were not interventions available to the student's nondisabled peers.
 - ◆ Furthermore, the student's psychiatric hospitalizations and suicide attempts interfered with his school attendance.

Provision of Services to Students with Executive Functioning Deficits



IEP Goals



Addressing Executive Functioning Needs through IEP Goals

- ◆ So, do you have to write IEP goals to address a student's executive functioning skills?
 - ◆ Does the student have a deficit in executive functioning?
 - ◆ Does the student require special education and/or related services in an area of executive functioning to receive FAPE?
- ◆ There is no requirement under the IDEA to label the goal as an "executive functioning" goal.
 - ◆ In fact, a more specific label, such as organization or attention to task, may be more appropriate/measurable.

Case Law: IEP Goals

- ◆ **Benjamin A. v. Unionville-Chadds Ford Sch. Dist., No. 16-2545, 2017 WL 3482089 (E.D. Penn. Aug. 14, 2017).**
 - ◆ Parents claimed that the district's IEP was deficient because it lacked annual measurable goals in executive functioning.
 - ◆ However, the court held that the district provided FAPE (no procedural or substantive violation).
 - ◆ Because executive functioning is a broad category/global category, it is understandable that the district would address the student's executive functioning skills in more specific categories.

(cont.)

Case Law: IEP Goals

- ◆ **Benjamin A. v. Unionville-Chadds Ford Sch. Dist., No. 16-2545, 2017 WL 3482089 (E.D. Penn. Aug. 14, 2017), cont.**
- ◆ For example, the district included a goal related to task initiation and addressing avoidance behaviors.
- ◆ The IEP goals for reading and writing addressed issues with organizing his thoughts and executing his assignments.

Case Law: IEP Goals

- ◆ **Z.B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018).**
- ◆ The parents of a child with ADHD challenged the substantive adequacy of a district's IEP because the IEP failed to include executive functioning goals.
- ◆ Failure to include executive functioning goals did not deny FAPE because the team addressed the child's executive functioning deficits through other concerns in the IEP.
 - ◆ Organizational Goals
 - ◆ Services designed to assist with organizational skills including coaching the child to use techniques such as highlighting, underlining, story-mapping, and self-questioning
 - ◆ Extra time to implement organizational strategies in class

Case Law: IEP Goals

- ◆ **Jack J. v. Coatesville Area Sch. Dist., No. 17-cv-3793, 2017 WL 3397552 (E.D. Penn. July 12, 2018).**
- ◆ A district prevailed on an appeal of a due process complaint claiming that the district violated FAPE.
- ◆ The parent claimed the district's IEP failed to address the student's executive functioning needs.
- ◆ The district's use of measurable a organizational goal and behavioral goal to address the student's attention skills adequately addressed the student's executive functioning skills.

Case Law: IEP Goals

◆ **Parker C. v. West Chester Area Sch. Dist., No. 16-4836, 2017 WL 2888573 (E.D. Penn. July 6, 2017).**

- ◆ A district prevailed on an appeal of a due process complaint claiming that the district violated FAPE.
- ◆ The parent claimed the district's IEPs lacked goals to address the child's executive functioning deficits.
- ◆ The court held that the IEPs contained goals for task initiation, task completion, following directions, organizational goals, addressing off-task behaviors, and social skills goals, which targeted the child's executive functioning skills.
- ◆ "For an elementary school child, goals in task initiation, completion and attention fall within the umbrella of 'executive functioning.'"

IEP Services & Accommodations



Addressing Executive Functioning Needs through IEP Goals

- ◆ So, do you have to provide special education services and/or accommodations to address a student's executive functioning skills?
 - ◆ Did you write a goal for a deficit in executive functioning?
 - ◆ Does the student require special education and/or related services in an area of executive functioning to receive FAPE?
- ◆ There is no requirement under the IDEA to label the special education services or accommodations as an "executive functioning" services.

Case Law: IEP Services

- ◆ **Benjamin A. v. Unionville-Chadds Ford Sch. Dist., No. 16-2545, 2017 WL 3482089 (E.D. Penn. Aug. 14, 2017).**
 - ◆ Parents claimed that the district's IEP was deficient because it lacked direct instruction in executive functioning skills, instead providing instruction "ad hoc and unsystematic."
 - ◆ However, the Court held that the student received FAPE, as it provided substantial instruction in the area of executive functioning throughout the student's 4th and 5th grade school years, and he made progress in his areas of need.
 - ◆ For example, the student was provided with daily personal attention and assistance to address his needs in the areas of executive functioning including assistance with task completion.

Case Law: IEP Services & Accommodations

- ◆ **Jack J. v. Coatesville Area Sch. Dist., No. 17-cv-3793, 2017 WL 3397552 (E.D. Penn. July 12, 2018), cont.**
 - ◆ A district prevailed on an appeal of a due process complaint claiming that the district violated FAPE.
 - ◆ The parent claimed the district's IEP failed to address the student's executive functioning needs.
 - ◆ The district adequately addressed the student's executive functioning skills through direction instruction in organizational strategies, daily checks with the special education teacher, parent notification of upcoming assignments, teacher-made study guides, the use of multi-step directions, and frequent verbal cues to remain on task and engaged.

Case Law: IEP Services and Accommodations

- ◆ **Parker C. v. West Chester Area Sch. Dist., No. 16-4836, 2017 WL 2888573 (E.D. Penn. July 6, 2017), cont.**
 - ◆ A district prevailed on an appeal of a due process complaint claiming that the district violated FAPE.
 - ◆ The parent claimed the district's IEPs failed to provide direct instruction to address the child's executive functioning deficits.
 - ◆ The court held that a district is not required to employ direct instruction (could be addressed through other special services/strategies); however, the district did provide instruction on task organizational strategies, use of a checklist system to help with classroom routines, nonverbal prompting, accommodations for processing speed and organization, and direct social skills instruction.

Practical Tips

- ◆ Don't be thrown off by a parent's use of the term "executive functioning skills."
- ◆ School districts address "executive functioning" types of needs all the time. For example...
 - Chunking assignments
 - Breaking assignments into smaller parts
 - Use of checklists for task completion
 - Use of video or peer modeling
 - Use of time management strategies

Behavior Intervention Plans & Assistive Technology



Addressing Executive Functioning Needs through a Behavior Intervention Plan

- ◆ So, do you have to address a student's executive functioning deficits through a behavior intervention plan?
 - ◆ It depends...
 - ◆ Does the student's executive functioning skills amount to behaviors that impede the student's learning or the learning of others despite being addressed through IEP goals, accommodations, and special education services?

Functional Behavior Assessments

- ◆ The IDEA does not require school districts to conduct an FBA and BIP for a student unless there is a disciplinary "change of placement" exceeding 10 school days.
- ◆ 34 C.F.R. 300.530(d)(1)(i)
- ◆ The IDEA does not define FBA or specify the content of an FBA.

Functional Behavior Assessments

- ◆ However, a district is required to assess the student (1) in all areas related to the suspected disability and (2) to identify all of the child's special education and related services needs. 34 CFR 300.304(c)(4, 6).
- ◆ "If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted." 71 Fed. Reg. 46,721 (2006).

Functional Behavior Assessment

- ◆ The IEP team must consider the child's need for "positive behavior interventions and supports" if the child's behavior "impedes his learning or that of others." 34 C.F.R. 300.324(a)(2)(i).
- ◆ This does not require the IEP team to conduct an FBA. 71 Fed. Reg. 46,683 (2006).
- ◆ However, if other supports (e.g., accommodations, specially designed instruction) are not successful, it would be wise for the IEP team to consider the need for an FBA.

Case Law: Functional Behavior Assessments

- ◆ **Cobb County Sch. Dist. v. D.B., 66 IDELR 134 (N.D. Ga. 2015).**
 - ◆ A behavior specialist's failure to collect data on the consequences of a 5-year-old child's aggressive behavior at school invalidated her recommendations.
 - ◆ The behavior specialist collected data on the antecedents and behavior, but failed to collect data on the consequences of the child's behavior. (She did the A-B, but not the C).
 - ◆ Therefore, the court ruled that the FBA developed was insufficient, failed to properly identify the child's needs, and could not be used to develop an appropriate IEP or behavior plan.

Addressing Executive Functioning Needs through the Provision of AT

- ◆ So, do you have to to address a student's executive functioning deficits through the provision of assistive technology?
 - ◆ It depends...
 - ◆ Because of the student's executive functioning deficits, does the student need assistive technology in order to receive FAPE?

Assistive Technology Evaluation

- ◆ The IEP team must consider whether the student needs assistive technology (AT) in order to receive FAPE. 34 CFR 300.324; Letter to Anonymous, 24 IDELR 854 (OSEP 1996).
- ◆ According to OSEP, when warranted by the suspected disability, the IEP team must consider whether a student's functional capabilities may be increased, maintained, or improved by the use of AT. Letter to Fisher, 23 IDELR 565 (OSEP 1995).

Practical Tips

- ◆ Again, school districts can address “executive functioning” types of needs through the use of assistive technology when needed. For example...
- Use of auditory and/or visual alerts to transition
- Use of digital graphic organizers to allow students to type, draw, or dictate their work
- Use of electronic calendars/agendas
- Use of apps to create step-by-step guides for sequencing tasks
- Use of electronic visual timers

Thank you!

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