AN ADJUDICATIVE CHECKLIST FOR CHILD FIND AND ELIGIBILITY UNDER THE IDEA*

Perry A. Zirkel

Under the Individuals with Disabilities Education Act (IDEA),[1] the two overlapping[2] threshold issues are child find and eligibility.[3] Intended primarily but not exclusively for impartial hearing officers under the IDEA, this checklist provides a snapshot of the current adjudicative criteria and applicable authority for each of these initial components. Similar to the corresponding checklists for the subsequent components of FAPE[4] and remedies,[5] it is organized in flowchart-type sequence. In light of the relatively settled standards and limited litigation in comparison to FAPE and, in cases of denial of FAPE, its remedies, this checklist is relatively short.[6]

* This article is published in *West's Education Law Reporter,* v. 357, pp. 30–31 (2018).

[1] 20 U.S.C. §§ 1400 *et seq*. (20163).

[2] The intersection of these two overlapping components of the IDEA is the required evaluation. For the applicable regulations and case law, see, e.g., Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 297 Ed.Law Rep. 637 (2013).

[3] *E.g.,* Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components,* 38 TEACHER EDUC. & SPECIAL EDUC. 263, 264–69 (2015).

[4] Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE under the IDEA*, 346 Ed.Law Rep. 18 (2017).

[5] Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Two Primary Remedies under the IDEA*, 354 Ed.Law Rep. 637 (2018).

[6] However, the application of these identifiable but imprecise standards is not at all simple or automatic, requiring careful findings and coalescing assessment of the pertinent individual circumstances.

Child Find[7]

1. Did the school district have reasonable suspicion that the child might be eligible under the IDEA?[8]
2. If so, did the district initiate the evaluation of the child within a reasonable period of time?[9]
3. Is a violation of ## 1 or 2 remediable as a denial of FAPE in the absence of eligibility?[10]

[7] For the latest case law specific to the two dimensions of this ongoing affirmative obligation of school districts under the IDEA, see Perry A. Zirkel, *Child Find under the IDEA: An Empirical Analysis of the Judicial Case Law*, 45 COMMUNIQUÉ 4 (May 2017). For prior case law, see, e.g., Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 Ed.Law Rep. 574 (2014).

[8] *E.g.*, Perry A. Zirkel, *The "Red Flags" of Child Find under the IDEA: Separating the Law from the Lore*, 23 EXCEPTIONALITY 192 (2015) (finding that courts typically only find reasonable suspicion upon a combination of various indicators and then in only about one in three cases). For one of the recently controversial indicators, Perry A. Zirkel, *Response to Intervention and Child Find: A Legally Problematic Intersection?,* 84 EXCEPTIONAL CHILD. 368 (2018).

[9] *E.g.,* Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 Ed.Law Rep. 576 (2015) (finding that the prevailing judicial range, depending on the circumstances, is 1–2 months).

[10] *E.g.*, *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 356 Ed.Law Rep. 977 (4th Cir. 2018); *D.G. v. Flour Bluff Indep. Sch. Dist.,* 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012). "Remediable" in this context refers to the major adjudicative remedies under the IDEA. *See supra* note 5. In contrast, it does not extend to voluntary school district action as well as remediation via the IDEA's complaint procedure mechanism. *E.g.*, Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA*, 30 J. SPECIAL EDUC. LEADERSHIP 88 (Sept. 2017).

Eligibility

1. Is the proof preponderant that the child meets the IDEA criteria for one or more of the recognized classifications?[11]
2. If so, is the proof preponderant that the result is an adverse effect on educational performance?[12]
3. If so, is the proof preponderant that the classification results in the need for special education?[13]

[11] Subject to additions in corollary state special education laws, the IDEA specifies ten classifications, such as emotional disturbance (ED), other health impairments (OHI), and specific learning disabilities (SLD), and allows states to add, within ages 3–9, the classification of developmental delay. 20 U.S.C. § 1401(3) (2016). The IDEA regulations add the combined classifications of deaf-blindness multiple disabilities. 34 C.F.R. §§ 300.8(a)(1) (2018). The regulations also, by way of definition, set forth the criteria for each classification. *Id*. § 300.8(c)(1)–(13). For the case law specific to some of the most litigated classifications, see PERRY A. ZIRKEL, THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY (2008); Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability: The Latest Case Law*, 46 COMMUNIQUÉ 14 (May 2018); Perry A. Zirkel, *Checklist for Identifying Students As Eligible under the IDEA Classification of Emotional Disturbance: An Update*, 286 Ed.Law Rep. 7 (2013); *cf*. Perry A. Zirkel, *RTI and Other Approaches to SLD Identification under the IDEA: A Legal Update,* 40 LEARNING DISABILITY Q. 165 (2017); Perry A. Zirkel, *ADHD Checklist for Identification under the IDEA and Section 504/ADA*, 293 Ed.Law Rep. 15 (2013).

[12] This bridging criterion is actually part of the classification step, being expressly specified in the regulatory definition of each non-combined one except SLD, which implicitly incorporates it. For the split of judicial interpretations of the scope of "educational performance, *compare*, *e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2015) (broadly extending to social skills), *with C.B. v. Dep't of Educ*., 322 F. App'x 20, 246 Ed.Law Rep. 58 (2d Cir. 2009) (academics only).

[13] 20 U.S.C. § 1401(3)(A)(ii) ("by reason thereof, needs special education and related services"). For a recent example of the causal criterion, see *Durbrow v. Cobb Cty. Sch. Dist.,* 887 F.3d 1182, 353 Ed.Law Rep. 33 (11th Cir. 2018); *cf. T.B. v. Prince George's Cty. Bd. of Educ*., 897 F.3d 566, __ Ed.Law Rep. __ (4th Cir. 2018) (lack of motivation). More generally, as the aforementioned case law analyses reveal, the primary decisional criterion most often is the need for special education. *See supra* note 11. For other recent examples, *compare M.G. v. Williamson Cty. Sch.,* 720 F. App'x 280, 353 Ed.Law Rep. 673 (6th Cir. 2018); *D.L. v. Clear Creek Indep. Sch. Dist.,* 695 F. App'x 733, 347 Ed.Law Rep. 751 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1439 (2018) (finding lack need for special education), *with L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 341 Ed.Law Rep. 60 (9th Cir. 2017) (finding need for special education). For a discussion of the blurry scope of this critical factor, see, e.g., Perry A. Zirkel, *A New Major Court Decision: Are Blurred Boundaries Worth the Price on the Eligibility Side?* 25 EXCEPTIONALITY 1 (2018*)*.