

24 IDELR 959

24 LRP 3811

Letter to Pawlisch

Office of Special Education Programs

March 6, 1996

Related Index Numbers

175.005 Eligibility Criteria, Application of Criteria

470.010 State Educational Agency (SEA), Authority to Set Standards

175.035 Eligibility Criteria, Orthopedic Impairment

135.030 Definitions/IDEA, Special Education

340. ORTHOPEDIC IMPAIRMENT

110.015 Compliance and Monitoring, Office of Special Education Programs (OSEP)

Judge / Administrative Officer

Thomas Hehir, Director

Case Summary

Can a state set "reasonable criteria" which multidisciplinary teams must follow to decide whether a student with an impairment as specified under Part B requires special education and related services due to that impairment?

A state can establish reasonable criteria which multidisciplinary teams must use to determine whether a child with an impairment under Part B needs special education and related services as a result of that disability, with certain restrictions. The state's criteria must be based on the individual needs of each child; must not minimize compliance with Part B's evaluation requirements, and must not exclude students who would otherwise be eligible for services under Part B.

Full Text

Appearances:

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Text of Inquiry

Thank you for your letter of December 6, 1995 in which you agreed to extend certain timelines relating to the completion of the LD study we are currently undertaking. The extension will allow our researchers the time necessary to analyze the large volume of data collected. We are excited about the progress made by our researchers to date and are confident that the study will result in some useful findings.

As you know, we have been in close and regular contact with your staff regarding the progress of the study. We are pleased with OSEP's availability and willingness to consult with us on this project as it develops. Because OSEP has set a deadline of July 1, 1996 for implementation of any necessary corrective measures that may be identified as a result of this study, it is essential that we begin planning for various contingencies and that we involve OSEP in the early phases of this planning.

One area that we are focussing attention on is the criteria used by multidisciplinary teams to determine whether a particular child needs special education and related services. In order to be eligible for services as a "disabled" child under Part B, a child must be evaluated as having one or more "impairments" specified in Part B, *and* must be found to *need* special education and related services by reason of one or more of these impairments. 20 U.S.C. 1401(a)(1)(A), 34 C.F.R. 300.7(a)(1). Likewise, under Wisconsin law a child is eligible for special education and related services as a "child with exceptional education needs" (EEN) if the child has a "handicapping condition" specified in state law and because of the handicapping condition *needs* special education. § 115.76(3) Stats.; PI 11.02(10) Wis. Admin. Code.

While both federal and state law set out guidelines for identifying the presence of a particular impairment or handicapping condition, neither federal nor state law include guidelines for determining whether a particular child needs special education by reason of such impairment or handicapping condition. Not every child with an impairment defined under Part B needs special education as a result of such impairment. This is most simply illustrated by reference to a child with a severe physical impairment who needs no modification to the regular education program by reason of that impairment. Currently, under both federal and state law, multidisciplinary teams are required to determine whether a child who has an impairment or handicapping condition also needs special education and related services by reason of that impairment or handicapping condition. Clearly, multidisciplinary teams are currently applying some criteria to determine the need for special education in addition to determining the presence of an impairment or handicapping condition. Our concern is that such criteria are not articulated in law and as a result we question whether they are uniformly applied to children throughout the state. We also share the concern expressed by OSEP in its summary of proposed IDEA, Amendments of 1995 that "too many children are served in inappropriately restrictive environments, and, in some communities, that children---particularly minority children---are often inappropriately identified as disabled. . . ."

Our researchers are gathering data on the criteria used by multidisciplinary teams to determine the need for special education. We are hopeful that their research will provide some useful insight. In the meantime, we must begin developing language for a rule which would address criteria for making this determination. While we believe that the results of our study will show that a revision to Wisconsin's LD criteria is not required to assure consistency with federal law, if such a revision is required, inclusion of a rule addressing criteria for determining a need for special education will also be essential in this state.

We are asking OSEP to provide guidance on the

following:

1. May Wisconsin establish reasonable criteria that must be used by multidisciplinary teams in determining whether a particular child with an impairment defined under Part B needs special education and related services by reason of such impairment?

2. What limitations if any apply to such criteria?

3. If limitations apply to such criteria, what is the authority upon which such limitations are based?

4. If a child is receiving educational benefit as described in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) in the regular education program does the child under any circumstances need special education?

5. What guidance can OSEP offer with regard to the rule language we are developing relating to determining the need for special education? What models addressing the need for special education have been reviewed, approved and/or disapproved by OSEP in other states?

Because we are working toward implementation of any necessary corrective measures by July 1, 1996, we ask that OSEP respond to this inquiry no later than March 1, 1996. Thank you for your continuing assistance.

Text of Response

This is in response to your letter to the Office of Special Education Programs (OSEP), dated December 14, 1995. In your letter, you explain that Wisconsin is in the process of developing a rule setting out criteria for multidisciplinary teams to use in determining whether a student with an impairment needs special education and related services under Part B of the Individuals with Disabilities Education Act (Part B), and seek guidance from this Office in connection with this process. Your specific questions and OSEP's responses follow.¹

1. May Wisconsin establish reasonable criteria that must be used by

multidisciplinary teams in determining whether a particular child with an impairment defined under Part B needs special education and related services by reason of such impairment?

States may establish reasonable criteria for determining whether students need special education and related services, so long as individual determinations are made for each student and the full range of the student's special educational needs is considered. However, the State's criteria may not (1) serve to diminish adherence to Part B's evaluation procedures; or (2) operate to exclude any students who, in the absence of the State's criteria, would be eligible for services under Part B.

2. What limitations if any apply to such criteria?

3. If limitations apply to such criteria, what is the authority upon which such limitations are based?

Since these questions are related, we have combined the response.

The general limitations that are applicable to a State's criteria for determining whether a student with an impairment needs special education and related services are addressed in our response to question 1 above. More specifically, in order to meet Part B's definition of "children with disabilities," a student must be evaluated as having an impairment specified in 34 CFR § 300.7(a), and, by reason of the impairment, need special education and related services. *See* 20 U.S.C. § 1401(a)(1); 34 CFR § 300.7(a). Public agencies must ensure that the required evaluations of children suspected of having a disability are conducted in accordance with §§ 300.530-300.534, and also, in the case of students suspected of having learning disabilities, in accordance with the additional procedures at §§ 300.540-300.543.

The Part B regulations make explicit that before a disabled student may be initially placed in a special education program, a full and individual evaluation of

the student's educational needs must be conducted in accordance with the requirements of § 300.532. *See* 34 CFR § 300.531. The term "evaluation" means "procedures used in accordance with §§ 300.530-300.534 to determine whether a child has a disability *and the nature and extent of the special education and related services that the child needs*. The term means *procedures used selectively with an individual child* and does not include basic tests administered to or procedures used with all children in a school, grade, or class." *See* 34 CFR § 300.500(b) (emphasis added).

The student's evaluation must be conducted by a multidisciplinary team, including at least one teacher or other specialist with knowledge in the area of suspected disability, and no single procedure may be used as the sole criterion for determining an appropriate educational program for a student. *See* 34 CFR §§ 300.532(d)-(e). Although Part B contains no explicit guidelines for determining whether a student with an impairment needs special education, Part B does require full and individual consideration of the unique needs of each student as evaluations are conducted and determinations are made about the nature and extent of each student's educational needs.

In determining whether a child's impairment adversely affects educational performance, the multidisciplinary team must consider non-academic as well as academic areas. Therefore, the assessment is more than the measurement of the child's academic performance as determined by standardized measures. While State operational criteria are useful in determining whether a child needs special education and related services because of an impairment, the multidisciplinary team must have the ultimate authority to make such determinations using their professional judgment based on the child's evaluation.

4. If a child is receiving educational benefit as described in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) in the regular education program does the child under any

circumstances need special education?

As you know, in *Bd. of Educ. of the Hendrick-Hudson Central Sc. Dist. v. Rowley*, 102 S.Ct. 3034 (1982), the Supreme Court held that the School District was not required to provide a sign language interpreter to a deaf student, who was performing above average in the regular classroom, and rejected the parents' arguments that services under the Part B of IDEA should be designed to maximize a student's potential. The dispute in *Rowley* was not over *whether* the child needed supplementary aids to benefit from regular class instruction, but rather *what* aid was required in order to provide the child with an "appropriate" public education. The Court did not establish any one test for determining the adequacy of educational benefits received by a child and neither has OSEP, because it will vary for each individual student, depending on his or her unique educational needs. However, the Court in *Rowley* rejected the position that a student's advancement from grade to grade in the regular education program necessarily meant that the student was receiving a free appropriate public education. *Rowley*, 102 S.Ct. at 3049 n.25. Therefore, OSEP does not interpret the *Rowley* decision as relieving school districts of their obligations to provide appropriate special education and related services to individual disabled students who need them even though they are advancing from grade to grade.

For example, in a situation where a student may be passing from grade to grade but is suspected of having a specific learning disability, it would be appropriate for the multidisciplinary team to consider information about outside or extra learning support provided to the child or about any modifications or compensatory strategies used by the child when assessing whether the child achieves commensurate with his or her age and ability levels when provided with learning experiences appropriate for the child's age and ability levels. See 34 CFR § 300.541(a)(1). Such information may indicate that the child's current educational achievement reflects the service augmentation, not what the child's achievement would

be without such help. The information may also bear on whether the child has a severe discrepancy between achievement and ability that is not correctable without special education and related services.

In your letter, you refer to a situation involving a student with a physical impairment whose academic performance does not appear to be adversely affected by the impairment, and who does not require modifications to the regular educational program. It is unclear, however, what you consider as "modifications to the regular educational program." Modifications required by a student with a physical impairment may be as subtle as altering the regular class curriculum or methods of instruction in order to accommodate the student's impairment. If such modifications are considered "specially designed instruction" because they constitute individualized instruction planned for a particular student, they could be deemed special education. The fact that a student with a physical impairment performs well in school does not necessarily mean that he or she does not need special education and related services because of the impairment. This determination would have to be made on a case-by-case basis in light of the particular facts and circumstances.

Courts also have expressly recognized that there are situations where a public agency could conclude, based on full consideration of the student's unique needs, that a student placed in the regular educational environment and making progress in that environment still needs special education or related services in order to receive a free appropriate public education. See e.g., *Yankton School District v. Schramm*, 900 F. Supp. 1182, 23 IDELR 42 (D. S.D. 1995); (instructional modifications and related services provided to student with orthopedic impairment enabling her to take regular classroom instruction constituted special education); and *Conrad Weiser Area School District v. Thomas and Wendy L*, 603 A.2d 701, 18 IDELR 730 (Pa. Commw. Ct. 1992) (student classified as gifted also had learning disability in written expression and thus, was found

eligible for special education services). In these instances, the student's educational performance would be adversely affected in the absence of these modifications.

5. What guidance can OSEP offer with regard to the rule language we are developing relating to determining the need for special education? What models addressing the need for special education have been reviewed, approved and/or disapproved by OSEP in other states?

We trust that the guidance set forth above will provide Wisconsin with a framework for rule development. In addition, we would be happy to review any criteria that Wisconsin develops in advance of the formal State plan approval process. As long as the rule is consistent with Part B, Wisconsin is free to use whatever criteria are helpful in making educational decisions at the local level. I am not aware that OSEP has previously approved specific rules developed by other States which contained explicit criteria for determining whether a student needs special education, and therefore, am unable to furnish you with examples of specific language that Wisconsin could include in the referenced rule.

We hope that this explanation is helpful, and stand ready to provide technical assistance to Wisconsin throughout this rule development process. If we can be of further assistance, please let me know.

Thomas Hehir

Director

Office of Special Education Programs

¹ As you note in your December 14 letter, in determining whether a child is eligible to receive special education and related services under Part B, a public agency must determine: (1) whether the child has an impairment, consistent with the definitions at 34 CFR § 300.7; and (2) having determined that the child has an impairment, whether the child needs special education and related services by reason of such impairment. Because we understand your questions to be directed solely to the latter

determination, we have confined our responses to that issue.

Statutes Cited

20 U.S.C. 1401(a)(1)(A)

Regulations Cited

34 C.F.R. 300.7

34 C.F.R. 300.7(a)(1)

34 C.F.R. 300.7(a)

34 C.F.R. 300.530-300.534

34 C.F.R. 300.532

34 C.F.R. 300.531

34 C.F.R. 300.500(b)

34 C.F.R. 300.532(d)-(e)

34 C.F.R. 300.541(a)(1)

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