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Message from the Chair

by Nathan A. Adams, IV

Have you ever wondered why you cannot sign up for the Education Law Committee on the Florida Bar annual fee statement? The answer is that the Education Committee is a substantive law committee, rather than a section of The Florida Bar.

I am privileged to serve as this year's Chairman of the Education Law Committee. One of my key goals is to find out whether it would be reasonable for this Committee to transition to section status in three to five years.

To join the Education Law Committee now, lawyers must complete a Committee Preference Form on the Bar website during the preference form period commencing on December 1 and ending January 15. From firsthand experience I can tell you: it is easy to miss the deadline. If you do, you must ordinarily wait another year to re-apply.

Lawyers are busy. The holidays are upon us during sign ups. Many never learn of them or misunderstand them in light of the annual fee statements. Several lawyers in this camp contacted us mid-year eager to join the committee and become involved. We had to tell them to wait (and not forget to sign up in December). It is hardly a recipe for marketing success.

Education committee appointments are for one year, so the sign up is an annual obligation. In contrast, standing committee appointments are for three years (July 1 to June 30).

Fundraising is also more difficult for a substantive law committee. Standing committees can fundraise by offering CLE for sale on the Bar's online catalog and by collecting dues, but we cannot. If the education committee offers CLE for sale, such as our certification exam preparation materials, all of the proceeds go to the Bar.

The Education Committee may not even utilize Bar letterhead, which makes contacting members via correspondence awkward for committee officers. Our letterhead advertises our firms or employers rather than the committee.

So what does it take to become a section? The most important requirement is to demonstrate to the Board of Governors' Program Evaluation Committee how roughly one percent of Florida Bar members in good standing will join the proposed section and pay dues. This is roughly 820 members today. In contrast, we had 64 members this year, down from 72 last year.

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Thanks goes to Vice-Chair Youndy Cook who has formed a subcommittee including K-12, college, and university lawyers to begin a membership drive to see how much we can increase membership even with the institutional disadvantages that confront us. She needs your help.

Most of us can think of at least ten lawyers working in the field of education who are not members of the Education Law Committee. Lawyers who represent private institutions, state colleges (f/k/a community colleges) and most school districts north of West Palm Beach should be members. **Before January 15, please invite the education practitioners whom you know to join the Education Law Committee and don't forget to do it yourself**.

One school of thought is there just are not enough lawyers interested in or practicing education law to satisfy the threshold for section status. Maybe so or maybe we will find that if we expand the net as wide as feasible to reach lawyers who have any connection whatsoever with educational institutions (e.g., bond, intellectual property, and other lawyers) that we come close enough. At worst, a drive will expand our membership and opportunities to interact.

Related to numbers is a requirement that we prove that the committee can generate minimum mandatory dues or fees of about $3,000 per year. Judging by the demand for CLE that we offer, this would not be difficult if we could retain the related revenue. Thanks goes to Vice-Chair Ana Segura for continuing to recruit lawyers to offer quality CLE of interest to our entire membership.

There are other criteria as well that the committee should be able to satisfy including demonstrating consistent publications. With this issue, we return to print under the leadership of Jason Fudge, Bob Harris and their publications subcommittee with a focus on students with disabilities. Thanks also goes to them. As always, the articles are exclusively the work and viewpoint of their authors, not of the committee, its leadership or members. We welcome responses and rebuttals.

The Education Law Committee also continues to set the bar (don't groan) for innovative use of technology. We have discovered that it is cheaper, more efficient, and an excellent way to offer CLE in simulcast webinar and videoconferencing format. Equally, we have learned that holding committee meetings this way is not optimal as compared to in-person meetings. Last month, we agreed to expand our in-person meetings and networking opportunities to twice per year.

Our next meeting will be via webinar and videoconference all day on January 25 beginning at 8:30 a.m. It will be a CLE for those preparing for education certification or interested in a primer on the subjects covered on the exam. Please join us if you can and share your recommendations, articles, responses to articles, CLE proposals, or membership ideas with us. We look forward to a great New Year.

Eligibility and the "Unidentified Disabled"
(Can Children with Good Grades be Eligible for Services?)

by Mark S. Kamleiter, Esquire[1] and Laura Pincus, Esquire[1]

Introduction (By Mark S. Kamleiter, Esq., parent attorney)

The concept for this article arose from some significant problems that I have noticed in my representation of children with disabilities in Florida schools. I have found that there is a considerable disconnect between what the law is relative to certain children's eligibility to receive educational services and accommodations under the Individuals with Disabilities Education Act (hereinafter IDEA) and the reality of the eligibility process as I have encountered it in Florida schools. These are the overlooked or unidentified disabilities, because there is an unfortunate tendency for the problems of these children to pass unnoticed by the teachers and administrators who are charged with discovering and identifying educational disabilities.[2]

The range of children with disabilities which fall into this class include children with ADHD; Aspergers; seizures, sensory, auditory processing, and reactive attachment disorders; or some combination of these. This list is not exhaustive and I am continually finding new disorders that are causing children to suffer educationally, but who are being missed by their teachers and administrators.

"Why is this occurring?"[3] I believe that teachers and administrators really want to help struggling children, so why are they missing children who qualify legally? More than that, why is there often an impassioned resistance on the part of educators to recognize these children as eligible under the IDEA?

I think I have discovered several possible reasons for this failure to recognize disabilities. Consider the following:

1. **Misunderstanding the genesis of the problem:** Far too often, educators viewed the disability as a "behavior," in the sense that the child is in control of the problem and can just stop doing it – if he/she wanted to. The child is considered lazy, unmotivated, or rebellious. The child is just not "paying attention." The child talks back, or is oppositional. The child simply refuses to stay in his/her seat or area. All of these "behaviors" may well be indicators of an underlying disability.

   I have lost count of the number of children with Asperger's that I have identified *after one encounter with them* in my office and yet they have passed many years struggling in public schools, without anyone even suspecting what was wrong. Once these children were identified, found eligible, received services and their teachers understood their disability, they were able to flourish.

2. **Failure to believe in the disability:** I still have educators tell me that they do not believe in the existence of Bipolar Disorder or ADHD. These are real disorders, and they can have significant impact upon a child's education. If we still have educators who simply don't "believe" in certain disabilities, then we must educate our educational professionals better. The fact that the public, including doctors, are now beginning to gain a better understanding of these disabilities and how they present may actually explain why more children are being identified today than in the past.

3. **Resistance to perceived fraud:** There is no question that some parents may attempt to obtain ESE eligibility for improper "non-educational" reasons (such as obtaining SSI, gaining an improper advantage on high-stakes testing, or obtaining McKay scholarships for non-disabled children). There are, unfortunately, individuals posing as parent advocates who claim to be capable of obtaining ESE eligibility even in truly doubtful cases. I acknowledge that this does happen and that districts cannot participate in this kind of fraud. At the same time, let me point out what the school district's obligation is in these circumstances. Regardless of the parent's potentially improper motivations, the only issue for the school district is: Does the child have an educational disability?

4. **Failure to understand the legal eligibility thresholds**: Many educators, who are in positions where they must decide whether a child is eligible for IDEA services, are ignorant of the legal requirements relative to the eligibility of children with "unidentified disabilities." This is particularly true where the children are making passing or even good grades. It is not like the law has suddenly changed. The law has always included these children. In 1997, the IDEA was amended to make it clear that Congress intended children whose disability interfered with their interaction with their environment to be covered by the law. They specifically mentioned ADHD so as to quiet some of the controversy as to whether ADHD and related disorders were eligible for IDEA services.[4]

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A Thorny Question:

How can this misunderstanding of Congress' intent in the IDEA have continued so long? Some possible answers can only be provided by ESE directors and the Florida Department of Education (hereinafter FDOE). Is the FDOE putting undue pressure on school districts to limit the numbers of children recognized with disabilities? Are school districts deliberately trying to prevent these children from receiving services? If either of these possibilities is true, it is unconscionable and must stop.

The FDOE and school districts point out that, in fact, Florida has a rate or percentage of children identified with disabilities which is above the national norm. An argument can be made that, in fact, the problem is that some children are being identified who are not actually educationally disabled, while other children with educational disabilities are not being identified.

The above argument requires one to have confidence in the national percentage rates for children with disabilities in the population. Admittedly, the FDOE has no other figures to go by and, thus, must plan accordingly. But this discrepancy may actually be an indicator that the problem of unidentified children with disabilities is a national issue. My colleagues from around the country are finding that children with educational disabilities are often not identified, or are being identified late in their educational careers (middle school and high school).

There are incredible increases in the numbers and percentages of children being identified with Autism, as well as ADHD and other disorders. Could these increases in the numbers of children being identified be putting strong pressure on the national averages? If states and individual school districts are trying to hold their numbers of identified children with disabilities down to the national (or state) averages, might they be concerned about figures that do not truly represent the numbers of children with educational disabilities? What if these figures no longer represent the reality of the numbers of children with disabilities?

A Suggested Answer:

If we are faithful to the requirements for the identification of disabilities, then we will not need to worry about either "over-identification" or "failure to identify."

Over the past few years, our firm has dealt with at least a hundred cases where school districts had previously refused parents' request for eligibility for their child. Eventually we have successfully established the needed eligibility, although usually with great difficulty and cost to the parents. Sometimes, we have had to file for due process, although to this point we have not had to bring a "failure to identify" case to hearing. These matters were settled, because in the end it was clear that these children were qualified for services under the law.[5]

Both the genesis of the eligibility confusion and the answer is found in the law.

The single statutory clause that has caused the most confusion among educators is 20 USC § 1401(3) (ii). This clause is part of the definitions section of the IDEA. The first clause (i) provides the laundry list of disability categories that most of us are very familiar with. The second clause (ii) appears to add a limiting condition, which has probably caused many educators to refuse eligibility to children with passing or good grades.[6]

This clause adds, as a condition of eligibility, the concept that a student must not only meet one of the IDEA disability categories, but also, ***"by reason thereof, need(s) special education and related services (see statute below)."*** It is probably logical reasoning for educators attuned to their academic mandates to assume that this clause means that a student with passing grades does not "require special education or related services."

As logical as that thinking may seem to us, it is not the law. The law has made it very clear that "education" is more than what we consider academics.

Children with passing grades may also have educational disabilities

As with most educational matters regarding children with disabilities, we find that Federal law controls this area of education. A look at the federal regulations at 34 CFR § 300.8(c)(9) helps define disabilities under OHI.

§ 300.8 Child with a disability. (a) (9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness

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with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourettes syndrome; and

(ii) Adversely affects a child's educational performance.

From this regulation, we learn, at least in part, how to determine whether a student requires special education. In other words, in addition to possessing a qualified disability, that disability must "[a]dversely affect(s) a child's educational performance."[7]

F.A.C. 6A-6.030152(4)(a) helps clarify the meaning of proxy iii ("adversely affects a child's educational performance"); it states that beyond evidence of the disability, the criteria for ESE eligibility requires "evidence of another health impairment that results **in *reduced efficiency in schoolwork* and *adversely affects the student's performance in the educational environment***." Breaking this down, the Rule provides two factors for educators to examine in making eligibility determinations:

1. Reduced efficiency in school work" – This not necessarily means only academics. Problems with organization and auditory processing delays, for example, will certainly reduce efficiency in school work.
2. "Adversely affects the student's performance in the education environment" - This also does not necessarily mean only academics. A student's performance in the "educational environment" can include the student's social/emotional status, behavioral interactions, as well as a number of other student issues or disorders.

The Florida Department of Education, through its *Exceptional Student Education Compliance Manual*, has attempted to clarify even further the requirement in Rule 6A-6.030152(4)(a). This Compliance Manual requires ***documented evidence*** of a health impairment that adversely affects the student's performance in the ***educational environment***.

Consideration of Non-academic and academic levels of performance

In the *Letter to Fenton*, OSEP further clarifies that those making eligibility decisions must do two things:

1. First, the decision must be made on an individual basis. This is an important point and places school districts, which make sweeping determinations based upon academic performance, in danger of charges of "pre-determination."[8]
2. Secondly, in making the eligibility decision, one must consider both "*non-academic*," as well as "academic," considerations.

The courts have also spoken out on these issues. An older Supreme C*ourt case,* the *Rowley* case,[9] noted in finding that a deaf child had not suffered due to the district's refusal to provide an individual interpreter that the child had not suffered academically, and not socially or emotionally either. This dictum demonstrates that the court considers more than just academics in deciding student needs. Factors such as social and emotional status are equally important.

The federal case that probably speaks most clearly to the issues being discussed here, is *Mr. and Mrs. I v. Maine School Administrative District 55.* This case deals with a young student with Asperger's Syndrome and "depressive disorder. While she generally did well academically, she demonstrated developing social and communication issues in Grades 4 and 5. She made a suicide attempt when she was 11. The parents then asked for services under IDEA, but the district refused, offering § 504 accommodations instead.

Because he also focused upon the child's academic achievement and non-disruptive classroom behavior, the due process hearing officer agreed with the school district. The federal court judge found that "educational performance" was defined too narrowly by the school district and that the student's disability did negatively impact her "educational performance." The judge noted that

> Maine's broad definition of educational performance "reflects and harmonizes with the recognition of both Congress and the Maine legislature that the purpose of education is not merely the acquisition of academic knowledge but also the cultivation of skills and behaviors needed to succeed generally in life." It is also consistent with First Circuit case law. See *Roland M.,* 910 F.2d at 992 ("purely academic progress-maximizing academic potential-is not the only indici[um]" relevant to IDEA claims).

The Maine federal district judge defined "adversely affects" as follows:

> Neither the federal statute and regulations nor the Maine statue and regulations define "adversely affects." Ordinary usage suggests that any negative effect should be sufficient. The phrase has no qualifier such as "substantial," significant," or "marked," unlike language in other portions of the same regulation. See e.g. 34 C.F.R. §300.7(c) (1) ("significantly affecting"); *id.* §300.7(c) (4) ("to a marked degree"); id. §300.7(c) (6) ("significantly subaverage"). At least one academic commentator has agreed, and has also suggested that "[d]ecision-makers adding a qualifier to adverse effect

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> are engaging in inappropriate judicial lawmaking …" *Garda*, supra at 485 (citing, inter *alia Cedar Rapids Cnty. Sch. Dist. V. Garret F. ex rel. Charlene F.,* 526 U.S. 66, 77 (1999)).

Finally, the federal judge concluded that in light of the evidence,

> The parents have shown an adverse effect on L.I.'s educational performance. … Indeed, the teachers and counselor found social isolation, poor communication, self-injurious behavior during class time, and failure to adapt or accept others' world view. All these failings demonstrate an adverse effect on L.I.'s education performance, as measured by academic areas, non-academic areas, and the goals outlined in Maine's broad general curriculum standards.

One could argue that this was a Maine case, and it does not have much precedential value in Florida. But Florida has its own similar due process case, which was decided in favor of the student being a "child with a disability" in both administrative due process and then again in the federal district court, where the school district attempted to overturn the decision. This case, *T.D.-F., vs. Manatee County School Board*, Case No. 04-0257E (June, 2004) and *Manatee County School Board vs. T.D.-F*, (Middle District – Florida, September, 2005), follows the same logic and comes to the same holding as the Maine court.

In this case, the petitioner was a nine year-old student in Manatee County, who had a full-scale IQ of 123. He was making "A"s and "B"s and progressed normally through the grades. At the same time, he had a longstanding history of ADHD, depression, and hearing loss. At the beginning of the 3rd grade, his school found him qualified under § 504. His teachers found that he was not well organized, easily distracted, and bothered other students (tapping foot or pencil). He had negative conduct on 100 days during his third grade. He was frequently disciplined by "standing on the wall."[10]

Midway through the fourth grade year, Petitioner was transferred to a class with a new teacher[11] who provided the petitioner with "specially designed instruction on a *de facto* basis without an IEP." Despite the District's continued refusal to give Petitioner an IEP, the hearing officer held that the teacher was providing "specially designed instruction … within the meaning of 20 U.S.C. Section (3) (A) and 34 C.F.R. Section 300.26," and that the child "is eligible for an IEP."

The hearing officer went further, holding that Manatee County Schools had violated the child's procedural safeguard rights in several ways:

1. Failure to provide a "timely and accurate evaluation of Petitioner"
2. Violation of "34 C.F.R. Section 300.532(f) by using academic progress and standardized test scores as the *sole criteria*[12] for determining Petitioner's eligibility for an IEP"
3. Denial of an IEP that would have met Petitioner's unique needs.

These were not just technical violations. The hearing officer found that the violations caused real harm to the child, noting that the "consequences of the procedural safeguard violations included elevated levels of anxiety and depression and decreased self-esteem."

The hearing officer found that "Section 504 and the IDEA are not mutually exclusive. Respondent must satisfy its responsibilities under each statute." He went on to state:

> Respondent cannot evade the IDEA by accommodating Petitioner in a 504 plan. Respondent must satisfy the separate requirements of Section 504 and the IDEA. *Yankton School District v. Schramm*, 93 F.3d 1369, 1369, 1376 (8th Cir. 1996)

The hearing officer found further:

> Respondent's exclusive reliance on academic performance to determine eligibility under the IDEA is misplaced. Educational performance is not limited to academic progress, and it is inappropriate to use passing grades or achievement test scores as a litmus test for determining eligibility for an IEP. *Yankton*, 93 F.3d at 1376 *8th Cir. 1996); *Elida Local School District Board of Education v. Erickson*, 252 F.Supp. 2d 476 (N.D. Ohio 2003); *Westchester Area School District v. Chad C.*, 194 F.Supp.2 2d 417 (E.D. Pa. 2002); *Corchado v. Board of Education; Rochester City School District*, 86 F. Supp. 2d 168 (W.D.N.Y. 2000); and *Mary P. v. Illinois State Board of Education*, 919 F. Supp. 1173 (N.D. Ill. 1996).

OSEP's *Letter to Clark* (2007) also warns against using purely academic criteria or measures for determination of disability. It notes that:

> [I]n conducting an evaluation, the public agency must use **a variety of assessment tools** and strategies to gather relevant functional, developmental, and academic information. Therefore, IDEA and the regulations clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance. Furthermore, 34 CFR 300.101(c) states that each State must ensure that a free appropriate public education (FAPE) is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

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T.D.-F., vs. Manatee County School Board was appealed to Federal Court by Manatee County. The Court in *Manatee County School Board vs. T.D.-F*, (Middle District – Florida, September, 2005) ratified the findings and legal conclusions of the hearing officer.

It is worthwhile to consider here what it means to use "a variety of assessment tools and strategies." For the purposes of this document, we assume that there has been a scientific diagnosis or other foundation showing the child has a disability, which might cause him/her to have an "educational disability." That diagnosis should also be established through a variety of assessment tools and should be scientifically based. The factors being considered here relate to the assessment necessary to determine whether a child "requires specially designed instruction" due to his disability. For this purpose, District's should consider the following factors:

1. **While grades are a factor, they cannot be the sole factor**. Grades by themselves often do not faithfully indicate a child's true academic performance.
2. **Standardized Measures are a factor.** They may be an indication of a child's true academic levels, although some caution is advised, since some children perform poorly on this kind of assessment.
3. **Are assessments such as FCAT, PSAT, etc. a valid consideration?** These results may be a factor to consider, but they were not designed to identify disabilities and must be looked at with great caution.[13]
4. **Student work product as a factor.** The student work product that is not "selectively supplied" could show the student's ability to perform academically and functionally. The key for me would be found in how scientifically valid the work product sampling has been.
5. **Assessment of student's executive functioning, communication, social, emotional, and behavioral status as a factor**. Where appropriate, the child's gross and fine motor abilities may be a factor, as might hearing and vision. Again, these assessments should be scientific, data-driven, and varied. Some of the assessments may be normed checklists, formal assessments, observations (with empirical data), work product, etc.
6. **Parent data, evaluations, and private professional input.** This information needs to be incorporated and fully considered as part of the assessment consideration of the child. If there are conflicts between the parent's private information and the school's information, then an effort to reconcile the information is essential.[14]

De facto accommodation and remediation

Often schools will argue that the child is doing well, in all areas, without an IEP. First, it is important to note the *Manatee County* decision discussed above. The ALJ (ratified by federal court) found that the school was providing the student with a *de facto* IEP. In other words, the school was, in the end, providing the child with his educational needs, but doing so in such a way as to deprive the child of his legal right to an IEP.

IEPs are important for more than providing educational services and accommodations to children with disabilities. The whole educational scheme under IDEA is designed to afford children with disabilities the full protections and privileges of the Act. This can only be done when the child is brought under the umbrella of the Act through eligibility and the drafting of an IEP. Providing specially-designed instruction and accommodations, without the legal recognition of eligibility and the protections it affords, violates the child's rights.

Conclusion

This has been a brief review of some of the law related to the issue of eligibility. The essential point of this article is to ensure that school districts are not inappropriately denying ESE eligibility to students who have disabilities, but who may be at least passing from grade to grade. We can do a better job in ensuring that the rights and needs of students with "invisible disabilities" are protected, and the law provides guidance that will help us in that crucial task.

(Endnotes)

1 Credit given to the research and the original written materials by Claudia Roberts, J.D., Senior Advocate for Special Education Law and Advocacy. These materials were first drafted and researched for use in a complicated case of eligibility, where we were finally successful in obtaining eligibility for the student in question.
While I (Mark S. Kamleiter) have written this document in the first person, so that I might speak to you personally, Laura Pincus, has participated in the research and is a partner in the development of these materials.
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2 20 USC § 1412 (a)(3) Child find (A) In general: All children with disabilities residing in the State, … regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.
3 Every time a parent has to go to an attorney or a professional advocate in order to simply have their child with a disability found eligible for ESE services, this results in an incredible and unnecessary cost to the parent and family.
4 34 CFR § 300.8 Child with a disability. (a) (9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—
(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy,

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ELIGIBILITY, continued

a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourettes syndrome; and
(ii) Adversely affects a child's educational performance.

5 One case is a very representative example. The parent had been trying for two years to obtain IDEA eligibility for her son in middle school. She had been delayed with excuses of the need to do RtI (which was never done in two years) and the argument that a § 504 plan was sufficient. When I was retained, the district again refused eligibility just before summer break. I gave the district until the start of school to change their decision. They again refused eligibility in August. I filed due process. They continued to refuse in the resolution conference and then before hearing the district reversed themselves and gave the child his IEP. This is not a story about brow-beating a school district until they gave in. I heard from the mother a short while ago, and the child who had been making "Ds" and "Fs", had been a behavior problem and continually tardy, was now a "B" and "A" student due to the accommodations and services under his IEP. It is about the kids.

6 This confuses parents as well. Sometimes parents will consult with me and they cannot understand how, if their child has a recognized disability, the school can refuse to provide IDEA eligibility. I have to explain to them that it is not legally sufficient to simply be diagnosed with a disability, but their child needs to require "special education and related services.

7 The Federal regulation naturally would prevail in any perceived conflict between the two definitions.

8 I had this exact scenario very recently. A certain ESE director refused to even evaluate a certain student, on the grounds that he made good grades. A change in ESE directors and new school district legal representation prevented litigation and got this child his evaluation.

9 *Bd of Educ. of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (U.S. Supreme Ct., (1982). This is a case school districts love to cite for other reasons, but in *dicta,* this decision notes in finding that the deaf student did not suffer academically (due to the district's failure to provide an individual interpreter), but also did not seem to have any social or emotional problems. "Amy 'is a remarkably well adjusted child' who interacts and communicates well with her classmates and has 'developed an extraordinary rapport' with her teachers." Rowley 483 F. Supp, 528, 531.

10 Apparently, "standing on the wall" was being forced to stand against a wall, during recess, while the other children played.

11 I am personally familiar with this case. It is my understanding that the school district changed teachers, to one who understood ADHD and who was capable of providing the child what he needed (to some extent), but due to the fact litigation was underway, the District continued to refuse an IEP for the child.

12 Emphasis added.

13 I have had districts say a child cannot be disabled, because he passed the FCAT and I have had the same districts say that failing the FCAT is not an indicator of disability, because the child is passing from grade to grade.

14 I think that it is fair to require that private evaluations include some data and information collected from the educational environment. When I am involved, I insist that the private evaluators collect information from the educational environment.

What Should Institutions Of Higher Education Be Required To Do With K-12 Student Transition Plans?

by Mercy Roberg, M.A. Ed., Stetson University College of Law, Candidate for Juris Doctor, May 2013

A three year-old child is diagnosed with Asperger Syndrome. The parents and child spend the next fifteen years working through IDEA and Section 504 accommodations; attending numerous Individualized Education Program ("IEP") meetings; and advocating for the student's right to a free appropriate public education ("FAPE"). After fifteen years, the child is headed for higher education, with a "recipe" for success, a transition plan, and a summary of performance plan in hand. What should institutions of higher education be required to do with this student's transition plan?

As an increasing number of students with disabilities enter higher education, and as postsecondary institutions attempt to follow the requirements of law, the law itself is often silent, or inadequate to support students. Students who have received special education services throughout their elementary and secondary schooling, over the last 30 years, are now entering higher education ready to succeed.[1] "In 2008, students with disabilities represented an estimated 11 percent of all postsecondary students, and this population appears to have grown over the past decade."[2] Disability resource offices at colleges across the United States are reporting a significant increase in students' registering their disabilities.[3] California and New York public postsecondary schools have seen dramatic increases. In California, the increase is almost 20 percent, and in New York, a 40 percent increase (in students with disabilities, from 1997 to 2000).[4]

When a student with a disability graduates from high school and is accepted into higher education, the student is a product of his Individualized Education Program. The IDEA defines "an individualized education program" ("IEP") as a written statement for each child with a disability that is developed, reviewed, and revised."[5] In leaving high school, however, the student leaves the IDEA and his IEP behind.

Though more students with disabilities are entering higher education, in some ways little has changed since the 1950s. The student's grade point average, approval by the college physician, registrar, and the dean of students was the standard for acceptance into higher education institutions in the 1950s.[6] Today, an algorithm that includes grade point average, standardized test scores, life experiences, followed by approval from an admissions committee, consists of the first steps. Postsecondary institutions "may set their own requirements for documentation so long as they are reasonable and comply with Section 504 and Title II."[7] Documentation for an academic adjustment must identify a current disability or an impairment that substantially limits a major life activity.[8] An issue many students encounter today is that IEPs and Section 504 plans do not meet the qualification for documentation to support an existing disability.[9] Florida postsecondary schools provide a snapshot of the types of documentation needed; St. Petersburg College lists on their website types of documentation needed for:

a. Physical impairments: Students with physical or other health impairments must provide written documentation in the form of medical reports or a letter from a physician detailing the specific diagnosis.
b. ADD/ADHD and psychological, emotional, or psychiatric disorders: Students must provide a letter or report less than three years old detailing the specific diagnosis from a qualified psychologist, psychiatrist or other M.D.[10]

The University of Florida has six components for documenting a learning disability:

- A summary of testing information.
- A statement of diagnosis.
- A statement of the current functional impact of the learning disorder on learning or other major life activities and the degree to which the learning disorder impacts the student in the academic setting.
- A summary of suggested accommodations that would support the student in the academic setting, although it is not expected that evaluators will be aware of available accommodations in the higher education setting. Appropriate accommodations will be determined collaboratively between the student and the disability office.
- The evaluator's credentials, license/certification number, and signature. [11]

K-12 education, for students with disabilities, has changed so dramatically, in the last 20 years, higher education institutions need to reevaluate their processes for disability documentation, and look to adopt a more uniform system for documentation.

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"Parents and students are often surprised to discover these differences, in spite of the fact that the IDEA requires transitional services to prepare students for life after high school. Such services often do not prepare individuals for the burdens placed upon them by the shift from the proactive approach imposed upon schools in public education to the expectations imposed on the student seeking support in a higher education setting."[12]

K-12 focuses on educating the child and creating a viable educational program, whereas higher educational institutions attempt to inoculate themselves from discrimination claims. They are not necessarily focused on educating the student to his fullest potential. Traditionally, IDEA claims are filed for a failure to educate, and Section 504 claims are filed as a discrimination claim—a distinct difference in the purpose and protections of both laws.

Society often sees the need for change before the law catches up. Just as the baby boomers changed society through each stage of their lives, education, workforce, and healthcare, students with disabilities have moved through K-12 and brought significant changes in teaching practices and the law. Now, it is time for higher education to acknowledge the enormous amount of success students with disabilities have achieved. It is higher education's job not only to open the halls, but also to continue to ensure that students achieve their highest potential. The recipe for success has been written, it just needs the help of higher education to take the "good advice."

(Endnotes)

1 U.S. Gov't Accountability Office, GAO-10-33, at 8 (2009), Higher Education and Disability: Education Needs a Coordinated Approach to Improve Its Assistance to Schools in Supporting Students.
2 *Id.*
3 *Id.*
4 *Id.*
5 Peter Wright & Pamela Wright, Wrightslaw: Special Education Law, 99, (2nd ed. 2007, reprinted 2010).
6 Joseph W. Madaus, *Services for College and University Students with Disabilities: A Historical Perspective*, 14 J. POSTSECONDARY EDUCATION & DISABILITY, 1 (Summer 2000).
7 *Id.*
8 *Id.*
9 Office of Civil Rights, US. Dept. of Education, *Transition of Students With Disabilities To PostSecondary Education: A Guide for High School Educators*, (2007, reprinted 2011).
10 St.Petersburg College, http://www.spcollege.edu/pages/disabilityresources.aspx?id=2147484108 (last visited Nov. 18, 2012).
11 Learning Disorder Packet, Disability Resource Center, University of Florida, http://www.dso.ufl.edu/drc/documents/learning_disability_evaluation_process_2.pdf (last visited Nov. 18, 2012).
12 Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 Md. L. Rev. 122, 131 (2004).
13 How can a student monitor the accommodation, when there may only be one final exam, or the student does not know what they are suppose to be monitoring. For example, if a student fails a mid-term, is it the accommodation or is the course too difficult, or did the student not study enough? "Students are often unaware of their particular learning styles and needs, and may not know what accommodations to request. Even when that awareness is present, fear of stigma can impede seeking support." Veronica Parker, National Capacity Building Institute Proceedings, Issues of Transition and Postsecondary Participation for Individuals with Hidden Disabilities 2004, http://www.ncset.hawaii.edu/institutes (last viewed Nov. 18, 2012).

What is provided in K-12 :	What is provided in Higher Education:
Federal Regulations: IDEA, Section 504	Federal Regulations: Section 504, ADA, Title II
Federal identification guidelines, Child Find obligation: must identify students with disabilities	Self-report disabilities
Schools help document disabilities throughout K-12	Students must provide medical, recent documentation of disability (at own expense)
School staff work to find the appropriate accommodations, and are reevaluating on a continuing basis	Students must notify the college if the adjustment is not working[13]
Educators are notified of student disability and work on ways to help student succeed, as required by law.	Many professors are unaware of student disabilities
Accommodations provided by the school-include funding, resources, and solutions when accommodations need to change	Accommodations provided only if it does not inflict undue hardship or fundamentally alters the program
Differentiated instruction	Professor discretion
Assistive technology	Assistive Technology –depends primarily on cost
Parental Notice and Consent - FERPA	FERPA
Access to Education + education designed to meet the child's unique needs	*Protection from discrimination*[14]