

Addressing Student Absences and Truancy Under IDEA & Section 504



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2

Compulsory Attendance

- *"[F]or a child who turned age 11 before December 1, 2009 or who entered grade 6 before 2009, the child's parent [or] guardian . . . shall send that child to a public school during the entire school year from the age of 6 to the child's sixteenth birthday."*
- *"[F]or a child who turns age 11 on or after December 1, 2009 or a child who was age 11 before that date and enters grade 6 in 2009 or later, the child's parent [or] guardian . . . shall send the child to a public school during the entire school year from the age of 6 to the child's eighteenth birthday."*

MCL 380.1561

3

Exceptions

- Attending state approved nonpublic school.
- Child is less than 9 years old, district does not provide transportation, and child lives more than 2.5 miles from a public school.
- Child is 12 or 13 years old and attending confirmation classes for 5 months or less.
- Attending religious instruction for no more than 2 class hours per week.
- Graduated/fulfilled graduation requirements.
- Homeschooled.
- At least 16 years old and parent grants permission.



4

Truancy Process

- May request attendance officer send registered letter to parents setting meeting to discuss absenteeism.
- If attendance officer is notified of unexcused nonattendance, must send parent registered letter requiring child's immediate attendance – with notice to superintendent.
- If parent refuses to comply, attendance officer must file a complaint against the parent.

5

Truancy Penalties

- Parent: misdemeanor = up to \$50 fine and 90 days in jail.
- Child: delinquency = family court jurisdiction/possible court placement.

6

Truancy & Special Education

"The record indicates that Mrs. Torrie's arrest was based upon probable cause and a valid arrest warrant. The facts are undisputed that Mrs. Torrie failed to send Desmond to school. I have been unable to find any legal support for the plaintiffs' contention that Michigan's compulsory attendance laws do not apply to handicapped students or that defendants had an obligation to inform the prosecutor that Desmond was receiving special education services. Plaintiffs' claims of false arrest, false imprisonment and malicious prosecution must fail."

Torrie v Cwayna,
841 F Supp 1434 (WD Mich1994).



7

Delinquency & Special Education

"[I]n the case of a handicapped student, a school board may petition the probate court to take jurisdiction over the student . . . only after administrative proceedings under the school code's special education provisions have terminated and a final decision has been made that no program within the school system can adequately address the child's special needs and satisfactorily develop the child's maximum potential."

Flint Bd of Educ v Williams,
88 Mich App 8 (1979).

8

But Wait . . .

9

What About "Child Find"?

"All children residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, [must be] identified, located, and evaluated."

34 CFR 300.111(a)(1)(i).

10

Do You Suspect a Disability?

"Child find must also include [c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade"

34 CFR 300.111(c)(1).

11

Bd of Educ of Syracuse City Sch Dist, **37 IDELR 232 (SEA NY, 2002)**

- Teen girl became defiant, difficult at home; attendance became a problem; misconduct increased and grades declined.
- Informal BIP did not work.
- Parent provided district independent psych report recommending eligibility.
- District did not evaluate because it believed poor attendance, not disability, was causing problems.
- Parent sought private school tuition reimbursement, alleging "child find" failure.

12

Absences Not a “Per Se” Basis to Suspect . . .

- “I disagree with respondent’s assertion that the student’s problems were essentially attendance related and did not merit a referral to the CSE. A student’s failure to perform in school because of absence from school does not per se afford a basis to suspect that the student has a disability. However, the record in this case reveals that the student’s absences involved more than truancy. She did not attend school for an extended period of time, despite having received assistance from a therapist, a guidance counselor, and school personnel.”

13

but coupled with other factors . . .

“There were several warning signs of an emotional impairment, including her sudden decline in academic performance, her absenteeism, her disciplinary violations, her turbulent family background and the cautionary notes in the neuropsychologist’s report. She was found to have major depressive disorder and then dysthymia, both of which are characterized by a pervasive mood of depression, and oppositional-defiant disorder. I conclude that respondent had sufficient information to warrant a referral to its CSE by the fall of 1999.”



14

Hilliard City Sch Dist, 112 LRP 53622 (SEA OH, 2012)

- Student refused to attend school; grades declined.
- 2 private psych reports concluded that mental impairments prevented student from attending school.
- District initiated truancy proceedings and offered a shortened day.
- No referral for evaluation.
- SEA: District violated “child find”; failed to address basis for absenteeism.

15

Pencader Charter Sch, 60 IDELR 26 (SEA DE, 2012)

- Student was excessively absent, insubordinate; admitted to psychiatric hospital, diagnosed with mood disorder.
- School prohibited student from returning to school; suggested that student enroll elsewhere; provided home-based instruction.
- School leader noted at a meeting that student had strange behaviors, staff were fearful of him.
- SEA: Student should have been referred for evaluation.

16

Southwest ISD, 39 IDELR 203 (SEA TX, 2003)

- Student attended only 16 days during 9 month period; returned to school only after school filed truancy petition.
- School knew that student had troubled home life and two young children.
- Student testified at hearing that poor attendance was due to childcare issues.
- When she attended, student earned good grades and was well adjusted.
- SEA: No “child find” violation.

17

Expanded Section 504 Eligibility

“It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, . . . the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”

ADA Amendments Act of 2008
(Eff. 1/1/09)

18

Definition of Disability

- A physical or mental impairment that substantially limits one or more major life activities;
- A record of impairment; or
- Being regarded as having an impairment



19

Physical or Mental Impairment

- Physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting following body system:
 - Neurological; musculoskeletal; special sense organ; respiratory, cardiovascular;
 - Reproductive; digestive; genito-urinary;
 - Hemic and lymphatic; skin and endocrine
- Mental or psychological disorder
- Not an exhaustive list of specific conditions or diseases

20

“Substantially Limits”

- Term not defined in statute or regulations
- Individual assessment
- OCR:
 - Does not mean severe restriction or inability to perform major life activity
 - Consider whether activities are limited in condition, duration, or manner

21

Mitigating Measures

- ADAAA: May not consider ameliorative effects of mitigating measures when determining 504 eligibility (except normal eyeglasses/contact lenses).
- Examples of mitigating measures:
 - Medication
 - Inhaler
 - Epi-Pen
 - Hearing Aids/Cochlear Implants
 - Assistive Technology
 - Reasonable accommodations/related services

22

OCR Example

- A student with allergies that requires allergy shots to manage the condition would be covered under Section 504 if without the shots the allergy would substantially limit a major life activity

23

Major Life Activities before ADAAA

- | | |
|---------------------------|-------------|
| • Caring for one's self | • Hearing |
| • Performing manual tasks | • Speaking |
| • Walking | • Breathing |
| • Seeing | • Learning |
| | • Working |

24

Major Life Activities after ADAAA

- Everything from slide #27
- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
- Operation of major bodily functions of:
 - Immune system
 - Normal cell growth
 - Digestive system
 - Bowel
 - Bladder
 - Neurological system
 - Brain
 - Respiratory system
 - Circulatory system
 - Endocrine system
 - Reproductive system

25

Major Life Activity of Learning

Learning is just one major life activity to consider when determining a student's eligibility under Section 504.

26

Section 504 "Child Find"

- A public school must "undertake to identify and locate every qualified handicapped person residing in [its] jurisdiction, regardless of the nature or severity of the person's handicap."
- A public school "that operates an elementary or secondary education program or activity shall conduct an evaluation . . . of any person who, because of handicap, needs or is believed to need special education or related services. . . ."

34 CFR 104.32, 104.35.

27

Section 504 "Related Services"

CAUTION: OCR interprets the phrase "related services" broadly to include things such as:

- Medication administration
- Modifications of policies and procedures
- Classroom-based accommodations

28

Hamilton Local Sch Dist, 58 IDELR 82 (OCR, 2011)

- 7-year-old student with hypoglycemia and migraines was absent 34 days during 7-month period.
- District did not refer; instead filed truancy charges and removed student to alternative digital school.
- OCR investigation revealed pattern of filing truancy petitions without considering underlying physical/mental condition (e.g., suicidal, severe asthma, ADHD/ODD, chronic allergies).

29

"Sufficient Knowledge to Suspect"

"[T]he evidence indicates that the District had sufficient knowledge to suspect the Student of having a physical impairment that substantially limited a major life activity. . . . [T]he evidence further establishes that the Student's teacher knew that the Student's medical conditions were impacting her attendance at school. . . . [T]he District's records indicate that the District knew that the Student had at least 22 absences related to her medical conditions. . . ."



30

Systemic Corrective Action

"[T]he District will request consent to evaluate for disability from the parent/guardian of each student who was assigned by the District to the Alternative Academy programs during the 2009-2010 school year because of truancy and for whom it was suggested during a truancy hearing, by the student or parent/guardian, that the student missed school because of a mental or physical condition."

31

Wilson County Sch Dist, 60 IDELR 113 (OCR, 2012)

- 13-year old student with multiple illnesses (seizures, GERD) missed many days of school; parents requested homebound services and medication administration.
- District retained student due to absences but did not refer her for evaluation or provide homebound services.
- OCR: District had evidence that the student's illnesses were affecting her attendance and participation in school sufficient to trigger evaluation duty.

32

Emotional Impairment

Behavioral problems manifested over an extended period of time that adversely affect student's education such that student cannot benefit from learning experiences without special education. Behaviors must include one of the following:

- Inability to build/maintain satisfactory interpersonal relationships in school setting,
- Inappropriate types of behavior/feelings under normal circumstances,
- General pervasive mood of unhappiness/depression,
- Tendency to develop physical symptoms/fears associated with personal/school problems.

R 340.1706.

33

Rule Outs

- "[D]oes not include persons who are socially maladjusted, unless it is determined that the persons have an emotional impairment."
- Does not include students whose behaviors are primarily result of intellectual/sensory/health factors.

34

Is the Student IDEA Eligible?

- 15-year-old student was disruptive, used profanity, was insubordinate and truant.
- Out of school, student used illegal drugs, was sexually promiscuous, ran away from home, forged checks, and was hospitalized on multiple occasions.
- Diagnosed conduct disorder.
- Student had a troubled childhood.
- Parent sought residential placement at public expense.
- District argued that the conduct was not disability related.

35

Is the Student IDEA Eligible?

"Perhaps these facts do not show that A.C. is irresistibly compelled to cut school, but they do tend to show that her truancy and defiance of authority result from a genuine emotional disturbance rather than from a purely moral failing. The school district . . . has presented no evidence to the contrary."

*Independent Sch Dist No 284 v A.C.,
258 F3d 769 (CA 8, 2001).*

36

Does the Conduct Stem From Disability?

- Student enrolled in private school for years; developed pattern of stealing, inappropriate dress, sexual misconduct, drug abuse, cutting, purging, and truancy.
- Diagnosed with mood disorder, anomia, conduct disorder, trichotillomania, borderline personality disorder, & expressive language disorder with mild amnesic features.
- Placed in several therapeutic treatment programs.
- Parents requested evaluation from resident district and sought private school tuition reimbursement.

37

Conduct Disorder Not Automatic Rule Out

"It is undisputed that Ann repeatedly misbehaved in school by cutting class, taking drugs, and stealing. . . . However, Ann also engages in hair pulling and cutting herself, was diagnosed with a mood disorder, diagnosed with borderline personality features and attempted to commit suicide. . . . [I]t is more likely than not that all of Ann's problems, not just her misconduct, underlie her erratic grades, expulsions and need for summer school. Although Ann exhibits conduct disorder, she also meets the criteria for emotional disturbance as a student exhibiting inappropriate behavior under normal circumstances and a pervasive depressive state, which adversely affect her educational performance. She therefore qualifies as a disabled student who, by reason thereof, needs special education."

*Eschenasy v New York Dep't of Educ,
604 F Supp 2d 639 (SD NY, 2009)*

38

Social Maladjustment

- Student progressed normally from grade to grade and earned average grades until 11th grade; arrested for burglary, snuck out of parents' house, stole from parents, used drugs, broke school rules, truant.
- Continued to score well on tests, but grades suffered.
- Student, parent, and teacher all agreed that difficulties resulted from truancy, lack of motivation, and poor study habits.
- District evaluated and determined ineligible; concluded behavior was related to conduct disorder.
- Student enrolled in private school and parent sought tuition reimbursement.

39

"Bad Conduct" ≠ Eligibility

"Courts and special education authorities have routinely declined, however, to equate conduct disorders or social maladjustment with serious emotional disturbance. The fact that a child is socially maladjusted is not by itself conclusive evidence that he or she is seriously emotionally disturbed. Indeed, the regulatory framework under IDEA pointedly carves out 'socially maladjusted' behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded."

*Springer v Fairfax County Sch Bd,
134 F 3d 659 (CA 4, 1998).*

40

Look For Causal Connection

"In the eleventh grade Edward stopped attending classes, regularly used drugs and alcohol, and engaged in other criminal activities. The precipitous drop in Edward's grades at this time appears to be directly attributable to his truancy, drug and alcohol use, and delinquent behavior rather than to any emotional disturbance."



*Springer v Fairfax County Sch Bd,
134 F 3d 659 (CA 4, 1998).*

41

W.G. v New York City Dep't of Educ., 801 F Supp 2d 142 (SD NY, 2011)

- High school student with minor behavioral difficulties; ultimately failed classes and was expelled.
- History of substance abuse, truancy, and legal troubles.
- Diagnosed Bipolar, ODD.
- Parent unilaterally placed student in residential placement and demanded that district pay.
- District evaluated and found student not sp. ed. eligible; problems stem from social maladjustment and substance abuse.
- Court agreed: *"the academic problems . . . were the result of his truancy – he failed his classes because he failed to go to school at all – and the refusal behavior was principally the product of a conduct disorder, narcissistic personality tendencies and substance abuse. . . ."*

42

W.G. v New York City Dep't of Educ.

"[T]he distinction between emotional disturbance and other underlying social or behavior problems is significant – the IDEA does not require school districts to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is neither unable to attend nor impeded by an emotional condition to a marked degree in following through on his ability to attend."

43

What About 504?

Does the Student have:

- A physical or mental impairment?
- Substantially limits major life activity?

May not consider effects of mitigating measures.

Congress intends for broad coverage.

44

Thoughts on Eligibility

- Legal decisions do not provide clear guidance.
- Evaluate to determine cause of truancy.
 - Situational/environmental or disability related?
- Be creative in the evaluation process.
- Consider related misconduct.
 - Disability related vs. volitional
- Conduct 2-prong eligibility analysis:
 - Does the student meet eligibility criteria?
 - Does the student need sp.ed./related services?
- For possible EI eligibility, consider "social maladjustment" rule out.
- Don't forget Section 504.

45

IDEA FAPE

FAPE means special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA;
- (c) Include an appropriate preschool, elementary, or secondary school education; and
- (d) Are provided in conformity with a legally compliant IEP.



46

"Rowley" Standard

"Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."



47

"Deal" Standard

"In evaluating whether an educational benefit is meaningful, logic dictates that the benefit "must be gauged in relation to a child's potential." Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children."

Deal v Hamilton County,
392 F3d 840 (CA 6, 2004)



48

Lexington County Sch District One, 57 IDELR 190 (SC, 2011)

- Student was diagnosed with Asperger's and LD; symptoms exacerbated by father's death, mother's new marriage, and relocation to new state.
- Student ultimately refused to attend school; first district addressed attendance issues in IEP with counseling services.
- Student moved. New district did not address attendance issues in IEP and discontinued counseling. Student refused to attend school.
- District pursued truancy and did home visits but did not provide counseling or psych evaluation to determine why he would not attend school.

49

Lexington County Sch District One

- Parent placed student at Montcalm School (MI), where student thrived.
- Court: "[T]he District's failure to even attempt counseling or obtain a psychological evaluation to address the causes of D.T.'s resistance to school is inadequate. . . . D.T. would not be able to obtain any benefit from the IEP designed by the District if he refused to attend school altogether."

50

Bd of Educ of Oak Park, 21 F Supp 862 (ND Ill, 1998)

- 18-year old girl with history of chronic truancy; missed 24 days freshman year, 74 days sophomore year; earned poor grades; delinquent behavior outside of school
- District tried self-contained program and work-study program but never included goals in the IEP to address truancy.
- Court: the district had not "properly addressed [the student's] school-related behavioral problems at [school]: her class cutting, truancy, and disciplinary problems."
- District ordered to pay for residential school tuition.

51

WOW!!!

"When a student is enrolled at school, a free appropriate education requires at a minimum that the student be present and on time. . . . This Court cannot conclude an IEP, which failed to address in some fashion [his] persistent absence and tardiness, could be 'adequate and appropriate. . . .' [The district's placement offer] failed to address [the student's] underlying sensitive personality, his difficult relationship with his mother, his need for a period of separation from his mother, and the potentially adverse consequences of placing [him] within [that program's] client mix."

*Lamoine Sch Comm v Ms. Z,
353 F Supp 2d 18 (D Me, 2005)*

52

Address Poor Attendance in IEP

- IEP must:
 - Include annual goals to meet child's needs that result from child's disability to enable child to be involved in and make progress in general curriculum and meet each of the child's other educational needs that result from disability;
 - Include statement of related/supplemental aids/services needed to attain goals and be involved in general curriculum;
 - In the case of a child whose behavior impedes the child's learning or the learning of others, consider the use of behavioral interventions/supports/strategies to address behavior.

53

Consider Necessary Related Services

- FBA/BIP
- Transportation
- Psychological services
- Counseling services
- Social Work services
- Parent Counseling/Training
- Medical services for diagnostic/evaluative purpose

54

Consider Continuum of Placements

- Reduced Day
- Alternative Programs
- Home-Based
- Day Treatment
- Residential

55

Section 504 FAPE

“Special or regular education and related aids and services that are designed to meet the individual needs of the student with disabilities to the same extent that those of nondisabled students are met. . .”

34 CFR 104.33

56

Nondiscrimination

“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”

28 CFR 35.130(b)(7).

57

Traverse City Area Public Schools (OCR, 2012)

- Parent sought automatic future home instruction during ragweed season.
- District refused to provide plan for future automatic home instruction.
- Relying on state law, district’s practice was to wait up to 15 days to develop homebound IEP.
- OCR: District failed to modify policies and practices to plan for foreseeable absences and failed to provide the child a FAPE.

58

Additional Considerations

- Duty to evaluate/reevaluate
- Discipline
- Homebound
- Home-Based
- Drop/Disenroll

59

Summary

- Does absenteeism trigger duty to evaluate under IDEA/504?
- Evaluate/reevaluate to determine cause of absenteeism.
- Is student eligible under IDEA or 504?
- If eligible, address absenteeism in IEP/504 plan.
- Consider creative programming to allow student to receive meaningful educational benefit and to address disability related needs.
- Beware of desire to drop/disenroll/discipline.

60

