



February 9, 2017

### ***“PRE-REFERRAL SERVICES” AND ISSUES IN-HOME MAY DETERMINE CHILD’S ELIGIBILITY FOR SPECIAL EDUCATION***

Before a child enters special education, some districts offer interventions to help the child succeed in his/her troublesome areas. These interventions, also called “pre-referral services” or “general education interventions,” are perfectly acceptable and often do help the child succeed.

The issue comes when those pre-referral services are more substantial than simple interventions and could be considered special education services. A recent Ninth Circuit case caused the court to declare: If a District is offering special education services to a student (such as a one-on-one aide), then that student should have an individualized education program (“IEP”). That may sound completely common-sensical: If a child is already receiving special education services, then that child should be found eligible for special education. Why then, did it take three courts and two appeals to figure it out?

The hiccup in the Ninth Circuit case, *L.J. v. Pittsburg Unified School District. No. 14-16139 (9th Cir. 2016)*, was the child was performing satisfactorily academically in his general education classroom. The child was bright and did not appear to need special education, despite the fact he had been diagnosed with oppositional defiant disorder, ADHD, bipolar disorder and had suicidal tendencies. When the student’s mother asked for the child to be evaluated, the district convened a student study team, placed the child in another school, gave the child a behavioral plan and a one-on-one aide. Two IEP meetings were subsequently held, and because the child was academically performing satisfactorily with those services, he was denied eligibility for special education.

Both the trial and district court were distracted with the fact the child was performing well academically. Both courts concluded the child did not need special education. The Ninth Circuit, however, located the issue: L.J. was only able to perform satisfactorily (despite three disabling conditions) because of the special education services he received while in the general education setting. He was essentially already in special education, but without the benefit of a proper written IEP. The Ninth Circuit ordered the district to formulate an IEP for the student.

Aside from the IEP issue, the court found an additional factor to consider: issues arising in the home may be relevant to the IEP if they affect academic performance. L.J. had severe emotional disturbances which led to two suicide attempts. Although the suicide attempts only happened at home, the “Emotional Disturbance” or “ED” should have been addressed in the IEP since it caused the child’s absences and, therefore, impacted the student academically.

Going forward

Districts are reminded to use common sense when asking whether a student needs special education services. To avoid the mistake Pittsburg made, districts should consider whether the general education intervention is comparable to services offered to special education students. If so, the district may be offering special education services prematurely and depriving the student of a proper, written IEP. Further, districts should be aware that the question of “Where does this happen?” is not as relevant as, “What is the impact academically?” and, if in-home issues are affecting the student academically, then districts should address those issues in the IEP.

If you need any further assistance or advice, please feel free to contact our office.

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