“CHILD FIND”: THE LORE V. THE LAW*

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The relatively extensive and continuing case law illustrates that “child find” under the Individuals with Disabilities Education Act (IDEA)¹ and, as a secondary matter, Section 504 of the Rehabilitation Act² is subject to incomplete understanding and implementation.³ Part of the problem is that the meaning of child find in the original version of the IDEA focused on its collective application⁴ whereas the meaning has shifted in recent decades to its individual meaning.⁵ To clarify the modern meaning, the following items use a law v. lore approach,⁶ comparing prevalent perceptions and practices with an objective synthesis of the relevant

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Updated material is highlighted in yellow.  
² 20 U.S.C. §§ 705(20) and 794 (2014).  
³ The footnotes of this Article provide an ample sampling of the ongoing pertinent case law. For a recent trends analysis of the frequency and outcomes of the relevant rulings from 1994 through 2016, see Perry A. Zirkel, Child Find Under the IDEA: An Empirical Analysis of the Judicial Case Law, 45 COMMUNIQUÉ 4 (May 2017).  
⁴ The reference to “institutional” in this context refers to the local education agency obligation to provide continuing public notices about the availability of evaluation and services for the many children with disabilities legally or practically excluded from the school system.  
⁵ As shown infra, this modern meaning refers to the obligation to evaluate the child upon reasonable suspicion of eligibility and to proceed from the time of reasonable suspicion to initiate the evaluation, via the requisite consent, within a reasonable period. The specific boundaries of both components are not bright lines. Perry A. Zirkel, The Law of Evaluations under the IDEA: An Annotated Update, 297 Ed.Law Rep. 637 (2013) (illustrating the overlap between the period for consent and the subsequent period for completion and between evaluation and FAPE);  
legislation, regulations, agency interpretations, and case law. The items are grouped into three sequential categories, those that are general, those specific to reasonable suspicion, and the fewer items specific to reasonable period. For each pair of item, the first one, which is in regular font represents the “lore,” and the second one, which is in italics, represents the “law.” Each contains inevitable variance, and they provide you with the opportunity to examine and assess your own perceptions, practices, and interpretations.

**GENERAL**

1. **Lore:** The IDEA specifically spells out the modern meaning of child find (i.e., after the original requirement providing access for excluded students with disabilities collectively).

   **Law:** Not so. *The IDEA legislation* and *regulations* only indirectly and incompletely set forth the modern meaning of child find. Instead, a long line of case law has established this *individualized* meaning.

2. **Lore:** The modern, individualized meaning of child find is limited to the obligation to evaluate a child upon reasonable suspicion of eligibility.

   **Law:** Not quite. *The limitation to evaluation, as separate from eligibility, is technically correct,*

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7 See *supra* notes 1–2.
9 The administering agency for the IDEA within the U.S. Department of Education is the Office of Special Education Programs (OSEP). Its counterpart for Section 504 in relation to students is the Office for Civil Rights (OCR). For a systematic overview, see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 Ed.Law Rep. 767 (2012).
10 The case law here is limited to court decisions, because they—along with the other cited sources—provide the framework for the hearing and review officer decisions, which have relatively negligible precedential weight.
12 34 C.F.R. § 300.111 (2015) (adding migrant children and “[c]hildren who are suspected of being a child [eligible], even though they are advancing from grade to grade”; *id.* §§ 300.131–300.134 (paralleling statutory specifics for parentally placed private school children) and 300.140 (providing exception from non-jurisdiction of hearing officer process).
but the courts have added a second, related obligation—to initiate the evaluation process within a reasonable period of time.\textsuperscript{13}

\textbf{Reasonable Suspicion}\textsuperscript{14}:

3. \textbf{Lore}: For the first, reasonable-suspicion obligation, an absolute red flag is a written request from the parent to evaluate the child.

\textbf{Law}: No. If the district has no reason to suspect that the child is eligible, the district may decline to conduct the evaluation provided that it gives the parents written notice that includes the basis for the refusal and notification of their procedural safeguards.\textsuperscript{15} (However, in such circumstances, the child is entitled to the IDEA protections against disciplinary changes in placement.\textsuperscript{16})

4. \textbf{Lore}: Aside from a parent’s formal referral without the district’s requisite response, the strongest “red flag” in terms of the courts’ review of reasonable suspicion child find claims is low or declining grades.

\textbf{Law}: No, this factor alone, or even in combination with others, without other connected evidence that would raise a reasonable suspicion of not only 1) the criteria for one or more IDEA classifications, but also 2) the resulting need for special education, more often than not does not suffice, particularly when district personnel provide alternate reasons for such

\begin{itemize}
  \item \textsuperscript{14} For a more detailed analysis, see Zirkel 2015, supra note 6.
  \item \textsuperscript{15} 71 Fed. Reg. 46,636 (Aug. 14, 2006) (OSEP commentary accompanying the latest IDEA regulations); Letter to Anonymous, 20 IDELR 998 (OSEP 1998). \textit{But cf. J.Y. v. Dothan City Bd. of Educ.}, 63 IDELR ¶ 33 (M.D. Ala. 2014) (“The education agency's obligations upon a parent's initiation of a request for evaluation do not depend on whether agency employees would themselves have thought a referral for evaluation to be warranted”).
  \item \textsuperscript{16} 34 C.F.R. § 300.534(b)(2) (2015).
\end{itemize}
Instead, the most potent factor in this case law is therapeutic hospitalization. 18

5. Lore: The use of response to intervention (RTI) or other such intervention leads to district vulnerability to losing litigation based on child find. 19

Law: Quite the contrary, in the majority of cases, the use of interventions—whether formally part of an RTI process or, much more often, part of either an earlier school-based systematic process or simply a classroom teacher’s individual efforts—has counted against an alleged reasonable-suspicion child find violation. 20 The key is whether they have been sufficiently successful.


6. **Lore:** Providing the student with a 504 plan is also likely to lead to losing child find litigation.

**Law:** In the vast majority of court decisions to date, the districts’ implementation of a Section 504 eligibility process, usually with the non-rigorous result of a 504 plan, has not been a major contributing factor to the judicial outcome of the case. The limited exception may be within the context of a disciplinary change in placement to the extent that in a recent unpublished decision the court interpreted the 504 eligibility meeting as triggering protection when a “teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the . . . other supervisory personnel of the agency.”

7. **Lore:** The reasonable-suspicion meaning of child find applies to disciplinary changes in placement, i.e., the “deemed to know” child protection.

**Law:** This conclusion may no longer be legally valid. The reason is that in the most recent IDEA amendments, Congress—while keeping the parent- and personnel-triggering protections—eliminated the one where “the behavior or performance of the child demonstrates the need for such services.”

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are not likely to recognize and rely on this nuance.\textsuperscript{24}

8. **Lore:** For courts, in determining reasonable suspicion, the opinions of outside experts, such as physicians, psychologists, and professors generally has more weight than those of teachers and other school personnel.

**Law:** *In general, courts give more credence to the school personnel because the controlling criteria are expertise in the need for special education and familiarity with the child in the school context.*\textsuperscript{25} *The outside experts often fall short based on these criteria.*\textsuperscript{26}

**Reasonable Period:**\textsuperscript{27}

9. **Lore:** Once the district has the requisite reasonable suspicion, the reasonable period to request parental consent for the evaluation is approximately 1–2 weeks.

**Law:** *No. The reasonable period varies considerably depending on the particular

circumstances of the case, but a 1–2 week period is stricter than the courts find to be fatal.28

10. **Lore:** Even if the district exceeds the reasonable period standard, it is a *per se*, i.e., automatic substantive violation of the IDEA.

**Law:** *No, the courts consider the violation to be procedural, thus in some cases—depending on the circumstances—amounting to harmless error.*29

**MISCELLANEOUS OTHER:**

11. **Lore:** If the court concludes that the district violated its child find obligation, the remedy is limited to an order to evaluate the child.

**Law:** *In some cases, an evaluation order may be the remedy.*30 However, because the district violated its duty for a timely evaluation and other events have typically transpired before the court’s decision, the consequences—depending on subsequent circumstances—may warrant

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compensatory education\textsuperscript{31} or even tuition reimbursement.\textsuperscript{32} Moreover, the court may also award attorneys’ fees.\textsuperscript{33}

12. \textbf{Lore:} If the court concludes not only that the district violated its child find obligation but also that the child was not eligible, the parent is still entitled to compensatory education and/or attorneys’ fees.

\textbf{Law:} Not necessarily, depending on the court. In the lead case contrary to this view, the Fifth Circuit ruled that neither compensatory education nor attorneys’ fees were available because the violation was a harmless procedural error, reasoning that “[the] IDEA does not penalize school


districts for not timely evaluating students who do not need special education."³⁴

13. **Lore:** For students in private schools, child find only applies to parentally placed (i.e., voluntarily w/o any claim of eligibility or FAPE), not unilaterally placed, students, and this child find obligation applies only to the district where the private school is located.

**Law:** No. For parentally placed students, the 2004 amendments of the IDEA imposed a child find obligation for the limited equitable-participation purpose on the district of location.³⁵

However, the district of residence continues to have the more general child find obligation to any student in a private school upon parental request for “the purpose of having a program of FAPE

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made available [by the district] to the child. Moreover, this obligation extends to children in private schools whose parents are residents of other countries.

14. **Lore:** Child find does not extend to a) migrant students, b) homeless children, c) preschool children, or d) home-schooled students.

**Law:** Correct in terms of home-schooled children only. Child find clearly extends to migrant, homeless, and other school-age children even if not enrolled. It also applies to preschool children.

15. **Lore:** Section 504 does not provide a corresponding individualized obligation of child find.

**Law:** Quite the contrary, both the regulations and the courts make sufficiently clear that child find applies for the broader definition of disability under Section 504 just as it does for the narrower scope of eligibility under the IDEA. The Section 504 regulations expressly require evaluation for individuals who, by reason of an impairment that substantially limits a major life activity “need or are believed to need special education or related services.”

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37 Letter to Sarzynski, 66 IDELR ¶ 51 (OSEP 2015).


40 See, e.g., *Metro. Nashville & Davidson Cty. Sch. Sys. v. Guest*, 900 F. Supp. 905, 104 Ed.Law Rep. 634 (M.D. Tenn. 1995). The required age range now starts at age 3, whereas at the time of this case, it was optional for each state at the preschool level. The outcome is the same.

41 34 C.F.R. § 104.35 (2013) (emphasis added). The accompanying procedural safeguards regulation repeats this quoted language. *Id.* § 104.36.
courts have concluded that Section 504 imposes an individualized child find duty upon school
districts. For example, citing Third Circuit precedents, a federal district court in Pennsylvania
ruled: “In establishing a [Section 504] claim, a plaintiff must demonstrate that the defendants
knew or should have known about the disability.”42 As an example of corresponding agency
enforcement, OCR recently found a district in violation of its child find obligation under Section
504, resulting in a resolution agreement that included as the remedy compensatory education
and staff training.43

added) (refusing to dismiss IDEA-alternative § 504 claim for student with depressive disorder). For other examples
where courts recognized this duty but decided in favor of the district for an insufficient factual foundation, see B.M.
v. S. Callaway R-II Sch. Dist., 732 F.3d 882, 297 Ed.Law Rep. 712 (8th Cir. 2013) (summarily rejecting §504 claim
where district’ efforts to evaluate the student with behavioral problems under the IDEA did not amount to bad faith
or gross misjudgment); G.C. v. Owensboro Pub. Sch., 711 F.3d 623, 290 Ed.Law Rep. 527 (6th Cir. 2013)
(summarily rejecting sole § 504, i.e., w/o IDEA, child find claim for student with behavioral problems).