

A Question of Eligibility



Qualifying for Special Education



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*(...who is not an attorney and is not giving legal advice,
only discussing legal information;
if you need an attorney, please get one.)*

The eligibility conundrum...

One early identified, well served baby whose language development is on target at age three and is now ready to transition to Part B, the public school years...

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An educational system that is designed to provide support only in cases of the student's failure, i.e., the proven "adverse impact" of his/her "disability"...



= The benefits of early identification and intervention may be compromised or negated by a system that is designed to address failure, not achievement.



...find yourself asking,
“**W**hat’s the **T**heoretical **F**ramework here?”

According to the IDEA,
a “**child with a disability**” is...

- (A)(i) ...a child with mental retardation, **hearing impairments (including deafness)**, speech or language impairments, visual impairments...
- (ii) who, by reason thereof, needs special education and related services (IDEA, Part A, Section 1401)

(3) **Deafness means a hearing impairment** that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification **that adversely affects a child's educational performance.** (Regulations: Part 300 / A / 300.8 / c

Eligibility according to Part C and Part B

Infant or toddler who has...

- (i) developmental delay in the areas of cognitive, physical, **communication**, social adaptive

OR

- (ii) has a diagnosed physical or mental condition which **has a high probability of resulting in developmental delay;**

Child must...

- have a qualifying disability, AND
- must **also need specialized instruction**

in order to be eligible for special education services,

- based on their state's eligibility criteria.

Fed reg: 20 U.S.C. 1432(5)(A)(B)

The term “developmental delay” and all eligibility criteria are defined by each state.

Eligibility Specs: Ohio Example

for eligibility, a child must have...



1. a loss of at least 50 db hearing loss or greater, according to ASHA guidelines for birth to five.
2. An average pure tone hearing loss of 25 db or greater for the frequencies 500, 1000 and 2000 hertz in the better ear **which has an adverse affect on the child's educational performance** related to the documented evidence of:
 - a) a more severe hearing loss during the development years than is currently measured
 - a) a history of chronic medical problems that have resulted in fluctuating hearing, presently or in the past; or
 - a) a delay in diagnosis, provision of amplification, or initiation of special programming.
2. A hearing loss in excess of 25 db for the frequencies 1000 through 8000 hertz in the better ear resulting in such poor auditory discrimination that it has an adverse effect upon the child's educational performance.

Colorado eligibility: two categories...

- I. 2.08 (3) A child with a hearing disability shall have a deficiency in hearing sensitivity as demonstrated by an elevated threshold of auditory sensitivity to pure tones or speech where, even with the help of amplification, the child is prevented from receiving reasonable educational benefit from regular education.

AUDIOLOGICAL

- (a) A "deficiency in hearing sensitivity" shall be one of the following:
 - (i) An average pure tone hearing loss in the speech range (500 - 2000 Hz) of at least 20 dBHL in the better ear which is not reversible within a reasonable period of time.
 - (ii) An average high frequency, pure tone hearing loss of at least 35 dBHL in the better ear for two or more of the following frequencies: 2000, 4000 or 6000 Hz
 - (iii) A unilateral hearing loss of at least 35 dBHL which is not reversible within a reasonable period of time.

- II. 2.08 (3) (b) Criteria for a hearing disability preventing the child from receiving reasonable educational benefit from regular education shall include one or more of the following:

- (i) Sound-field word recognition (unaided) of less than 75% in quiet as measured with standardized open-set audiometric speech discrimination tests presented at average conversational speech (50-55 dBHL). Interpretation shall be modified for closed-set tests.
- (ii) **ACADEMIC** Receptive and/or expressive language delay as determined by standardized tests:
 - (A) under 3 years: less than one-half of expected development for chronological age.
 - (B) 3 to 8 years: 1 year delay or more.
 - (C) 9 to 13 years: 2 years delay or more.
 - 2.08 (3) (b) (ii) (D) 14 to 21 years: 3 years delay or more.
- (iii) An impairment of speech articulation, voice and/or fluency.
- (iv) Significant discrepancy between verbal and nonverbal performance on a standardized intelligence test.
- (v) Delay in reading comprehension due to language deficit.
- (vi) Poor academic achievement.
- **(vii) Inattentive, inconsistent and/or inappropriate classroom behavior.**

States are given the discretion to define and determine their instruments and procedures that measure the delays that demonstrate adverse educational impact of a disability.

(See: IDEA Part A Sec. 1401)



Such procedures must (300.306)C(1)(i) “draw upon information from a variety of sources, including aptitude and achievement tests, **parent input**, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior; (ii) ensure that information obtained from all of these sources is documented and carefully considered.”

You Can Challenge Assessments

- **Did the persons conducting the assessments have appropriate qualifications**, skills and experience to evaluate children/students who are deaf or hard of hearing?
- Was the assessment sufficient in scope and intensity to identify gaps in language, communication, auditory, academic and social skills?
Was the assessment a diagnostic tool versus a screening tool?
- **Often the tests do not have sufficient scope or depth to identify the more subtle or underlying gaps in skills.** As appropriate to the child's communication mode, make sure that sign fluency, listening, auditory skill development, attention, pragmatic language, communication, and social and behavior skills are included in addition to an in-depth language assessment.
- Is there testing or **parent observation** in situations similar to the new school setting (noisy, multiple speakers, strange environment without a parent?)
- Was there at least **one person at the eligibility meeting to interpret test findings and discuss performance and eligibility issues** who had appropriate **expertise** in the education of children/youth who are **deaf/hard of hearing?**

Congratulations!



“This kiddo is right where he needs to be and our work here is done! Good luck with school!!”

Challenging Ineligibility: Ask the tough questions!

■ What if I don't trust their evaluation?

- Request Independent Education Evaluation (IEE) by an independent expert from the private sector; ask him/her to answer these questions:
 - Does the child have a disability?
 - Does the disability mean the child needs special education services?
 - What special education services does this child need?

- For children entering Part B, is there recognition of the benefits of early intervention services, and their impact on the child's development and performance. How will the school sustain the current level of progress if special education services are not offered? **Who at the school will be monitoring this?**

Were "Special Considerations" for d/hh children as required by the IDEA taken into account?

iv) *Consider the communication needs of the child, and in the case of the child who is deaf or hard of hearing, consider*

- *the language and communication needs,*
- *opportunities for direct communication with peers and professionals in the child's language and communication mode,*
- *academic level,*
- *and full range of needs including opportunities for direct instruction in the child's language and communication mode, and*

(v) *Consider whether the child requires assistive communication devices and services."*

IDEA Sec. 614 (3) (B)

This is not a rhetorical question:

Is the school ready to take responsibility if my child does not make adequate progress, defined as one year's growth in one year's time (1:1 rule) if s/he is not considered eligible for special education? That is the question, and for some parents, compensatory damages will be the answer.



The Supreme Court Ruling on Eligibility: Forest Grove School District v T.A. (2009)

A case about tuition reimbursement for a disabled child who was not found eligible for special education and received no special education services from the public school district. The Supreme Court held that:

- This dispute “...concerns not the adequacy of a proposed IEP but the School District’s failure to provide an IEP at all . . . moreover, when a child requires special education services, a school district’s failure to propose an IEP of any kind is at least as serious a violation of it’s responsibilities under IDEA as a failure to provide an adequate IEP.”
- “The District’s position similarly conflicts with IDEA’s ‘Child find’ requirement . . . [requiring States] .. to identify, locate, and evaluate all children with disabilities’ to ensure that they receive needed special education services.”
- “Indeed, by immunizing a school district’s refusal to find a child eligible for special education services no matter how compelling the child’s need, the School District’s interpretation [of the statute] would produce a rule bordering on the irrational.”
- This would “leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether.”

The Court ruled in favor of the Parents:

“. . . we conclude that *IDEA* authorizes [tuition] reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.” (emphasis added)

“Progress has occurred because of the effective support given in the early intervention program.”

“The challenge for the school program becomes how to sustain the progress made by the child in the early hearing detection and intervention (EHDI) programs.

Critical development during the window of opportunity for language learning is still occurring that will differ markedly from how neurologically intact (hearing) children learn. In other words, *just because a DHH child has ‘met the bar’ at preschool doesn’t mean that the bar stops moving.*”

- Cheryl DeConde Johnson, EdD



Arm yourself with your own answers.

“The IEP must provide a clear statement of how the child’s disability affects the child’s involvement and progress in the general education curriculum.... and the **preschool** child’s participation in appropriate activities.”

(Section 1414) (A) (aa) (bb)



Making your *statement*.

“My child needs...”

1. Specially Designed Instruction



(300.39) (b) (3) “means adapting, as appropriate to the needs of an eligible child under this part the content, methodology, or delivery of instruction

(i) to address the unique needs of the child....

(ii) to ensure access of the child to the general curriculum.

2. Related Services (Note: Related Services alone don't qualify for Special Ed support!)

(300.34) “...means transportation, and such developmental, corrective and other supportive services as are required to assist (the child) to benefit from special education...” including:

(a partial, hypothetical list...)

- Includes **interpreting services**: “oral transliteration services, cued languaged transliteration services, sign language transliteration and interpreting services, and transcription services such as communication access real0time translation (CART) C0Print, and TypeWell) IDEA 34 CFR Part 300, (C) (4)
- Includes **Parent Counseling and Training** to help us acquire the necessary skills that will allow us to support the implementation of our child’s IFSP or IEP.)
- Includes speech-language pathology & audiology services
- Specifically *excludes* services to children with surgically implanted devices including cochlear implants...the “optimization of that device’s functioning (e.g. mapping), maintenance of that device or replacement of that device.

Strategy: The Language Acquisition Window



- “Deal” arguments justified a “super-FAPE” during a developmental window of opportunity.
- “In evaluating whether an educational benefit is meaningful, logic dictates that the benefit **“must be gauged in relation to a child's potential.”** *Polk*, 853 F.2d at 185. 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.

Deal v Hamilton County Bd of Ed. 6th Cir.
(2005)

Remember: Failure is not required by the IDEA (2004 Reauthorization)

...”even though the child has not failed or been retained in a grade, and is advancing from grade to grade” a free and appropriate public education must be available to any child with a disability who requires these services.

Section 300.101(c) IDEA 2004



Strategy: Social Goals

“ . . . and the preschool child’s participation in appropriate activities.”
(Section 1414) (A) (aa) (bb)

- D/hh kids need social skills training because they often miss social cues from inferential learning.
- Write goals related to social skills training but not stemming from behavior intervention needs (you do not have to go there!).
- Social-behavioral goals go under the category of supplementary aids & services

Social skills training...

~ an academic “enabler”

~ improve teacher acceptance

~ write a goal for the whole class to have training in communication skills with d/hh student

See: Burns, Edward A Handbook for
Supp. Aids & Services, Springfield IL
2003 Charles C. Thomas

Potential problems under the surface of a 504 Plan



- No parental participation/approval
- No right to due process
- No case management
- No funding mandate

Transition Timelines to Keep in Mind

(Don't let eligibility debates cause delays
in the child's support—plan ahead.)

Countdown to Transition...

- Learn the eligibility criteria in your state; if eligibility could come into question, begin developing strategy accordingly (9-12 mos ahead)
- Set general timelines for transition with IFSP team—invite the preschool teacher to join this convo if appropriate (8-9 mos ahead)
- Identify preschool choices; learn about IEP format; determine who will be at the Transition meeting (6 mos ahead)
- Consider private therapy to “bridge” Part C to B and gain more expert input; Set Eligibility Determination meeting date with district request that any DRAFT IEPs the school will be working from be shared with you at least two weeks ahead of time (3 mos ahead)
- Research the appropriate “specialized instruction” applications for the child & write a DRAFT IEP that captures the IFSP values in IEP vocabulary (6 weeks ahead)
- Complete transition portfolio (available at www.handsandvoices.org “The Transitions Packet”) and share it along with DRAFT IEP with the transition team (2 weeks ahead)

Arizona Case Study:

A large metropolitan school district Audiology department sent out an email to private-practice audiologists stating, "Many of these audiograms/ reports, and/or verbal exchanges made to parents contain specific recommendations such as FM systems, HI services, IEP's, classroom placement, etc. Though these recommendations are well-intentioned, an abnormal audiogram does not automatically make a child eligible for accommodations under special education law."

- TRUE
- The district politely asked them to "not make specific recommendations about how to manage students in the schools."
 - Districts cannot constrain private providers from making recommendations that would constitute (at the very least) "parent input" if the family requested such recommendations be considered in the eligibility and IEP discussion.
- This can also be construed as the district not wanting parents to ask that their child be assessed for IEP eligibility.
 - While it is true that an audiogram alone does not imbue eligibility, the private provider recommendations speak directly to the need for accommodation and potentially "specialized instruction" which are relevant to any discussion of the child's eligibility.

Hawaii: Eligibility limited even for EI

- Recent changes in the law require a child to have a severe sensorineural hearing loss in order to be eligible for EI services.
- Children are starting to be discharged now because their loss isn't "big" enough and they are still too young to be showing any delay!



When the system (legislative, EHDI, education, health, etc...) needs improvement—enter the change agents: PARENTS!

Parents in Hawaii are uniting in response to these changes in their law, writing, calling and protesting.

Oregon: another Part C Debacle

- Strict & exclusive EI eligibility criteria in state code often excludes unilateral and milder losses.
- Part C program says that they recognize this excludes many children needing services but will not make any changes until the Federal Regulations roll out.
- Individual regional program eligibility problems compounded because some are not set up to bill Medicaid and those kids don't access services.
- Wait there's more! OR Child Find—MIA?
 - 299 total 2007 count includes all disabilities; 98 were EHDI babies
 - 309 total 2008 count includes all disabilities; 131 were EHDI babies
- Bad example: a child was denied services despite his ABR because even though there was a confirmed loss and the audiologist checked yes to EI, he was found ineligible because file notes indicated a need for further testing for auditory neuropathy.
- Worse example: a child with profound bilateral hearing loss was declined for EI despite having a confirming ABR because speech & language development checked out “just fine” at five mos on the generic evaluation form.

Maine: a Part C struggle, a victory, another struggle...



Children with any degree of hearing loss are eligible for Part C (which is great - after much struggllleeee)

but recently we are seeing some Part C Service Coordinators only put "service coordination" on the IFSP (our service coordinators are generalists...and know nothing about hearing loss...).

For some, the only way they are eligible for "appropriate" services is if they score two standard deviations BELOW the norm on a standardized assessment test!

Most of our babies test perfectly "normal" at birth on developmental assessments so now we've got another struggle to deal with...

What makes the choice work for your
child is what makes the choice right.™

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