



STATE OF DELAWARE
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MEMORANDUM

DATE: April 30, 2013

TO: All Members of the Delaware State Senate
and House of Representatives

FROM: Ms. Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: H.S. 1 for H.B. 46 [Gifted & Talented Start-up Grants]

The State Council for Persons with Disabilities (SCPD) has reviewed H.S. 1 for H.B. 46 which authorizes the Department of Education (DOE), pending available funds, to offer competitive two year start-up grants to public schools for the purpose of developing new gifted and talented programs. SCPD endorses the proposed legislation subject to one amendment.

The model contemplated in the original bill encouraged participation by students from "diverse backgrounds". The substitute bill deletes that reference in favor of encouraging "participation by students from 'traditionally underserved' populations" (lines 26-27). Both references could be interpreted as only focusing on the socioeconomic, cultural, and racial status of students. Indeed, since special education students have been eligible for specialized services under the federal IDEA and Section 504 since approximately 1975, one could argue that they are not "traditionally underserved". SCPD recommends the renumbering of Subsections (b)(5) and (6) as (6) and (7) respectively and insertion of the following new Subsection (5) to read as follows: "(5) Preference shall be given to programs that explicitly provide for the participation of students with disabilities who are capable of high performance with accommodations or related services." This approach would maintain the preference for "underserved" populations while adding a separate "preference" for programs including students with disabilities. The term "high performance" is based on text in lines 36 and 39. Consistent with the attached articles, public schools often overlook eligibility of students with disabilities for gifted programs. Both federal policy letters and case law confirm that students identified under both the IDEA and §504 may qualify for gifted programs.

Thank you for your consideration and please contact SCPD if you have any questions regarding our observations on the proposed legislation.

cc: The Honorable Matthew Denn
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

hb 46 ed-gifted students 4-30-13

SmartStart: Eligibility -- Intellectually Gifted

[Overview](#) | [Key Points](#) | [Links](#) | [Additional Resources](#)

This SmartStart is updated with references to the IDEA 2004 statute, the 2006 IDEA Part B regulations, and the 2008 amendments to the Part B regulations.

Overview

Giftedness is not an IDEA disabling condition and students are not IDEA-eligible on that basis alone. However, gifted students may be IDEA eligible notwithstanding their classification as a gifted student. 34 CFR 300.8; and *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010).

Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source.

GIFTEDNESS & ELIGIBILITY

- In order to qualify for special education and related services, a student must be between the ages of 3 and 21 and must satisfy both parts of a two-part test:
 - The student must meet the definition of one or more of the categories of disabilities which include: mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities; and
 - The student must be shown to be in need of special education and related services as a result of his disability or disabilities.
- 34 CFR 300.8(a)(1).
- Giftedness is not a disabling condition that meets the IDEA two-part test for eligibility. *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010).
- Generally, a student is in need of special education services when the student's disability impacts the student's educational performance. Special education services are not required where the disability does not have an adverse effect on the student's educational performance. *J.D. v. Pawlet Sch. Dist.*, 33 IDELR 34 (2d Cir. 2000); *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 47 IDELR 121 (1st Cir. 2007); and *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010).

ELIGIBILITY INDEPENDENT OF GIFTEDNESS

- The mere fact that a student is gifted does not disqualify him from eligibility for special education and related services under the IDEA. A student who needs special education because of a qualifying disabling condition retains his rights under the IDEA, even if the student is intellectually gifted. *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010) (holding that a gifted student with Asperger syndrome could be eligible under the autism classification and require services to address behavioral or social challenges). See *Board of Educ. of the City of New York*, 28 IDELR 1093 (SEA NY 1998).
- A student that is eligible as a "student with a disability" is eligible regardless of the student's academic success. The student's academic achievement is irrelevant when the student otherwise meets the eligibility criteria. *Williamson County Bd. of Educ. v. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009) (holding that despite a 143 IQ and passing grades, the student's ADHD adversely affected his educational performance, qualifying the student for special education).

- A categorical exclusion from SLD eligibility based on identification as gifted under state law violates the IDEA. A student classified as mentally gifted may nonetheless meet IDEA eligibility criteria. *Letter to Ulissi*, 18 IDELR 683 (OSEP 1992). See also *District of Columbia Pub. Schs.*, 49 IDELR 82 (SEA DC 2007).

IDENTIFYING GIFTED CHILDREN WITH SLD

- The IDEA shift away from the use of discrepancy models may result in problems when it comes to the ability to identify gifted children with SLD. However, the U.S. Department of Education noted that: "Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD." 71 Fed. Reg. 46,647 (2006). SmartStart: Response to Intervention -- IDEA Requirements.

SECTION 504 ELIGIBILITY

- Because intellectual giftedness is not a disabling condition, intellectually gifted students are not eligible under the IDEA or Section 504 solely on that basis. See *Roane County Sch. Sys. v. Ned A.*, 22 IDELR 574 (E.D. Tenn. 1995).
- Section 504 requires districts making placement decisions to draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. As a result, gifted students may independently qualify under Section 504. *Ferguson-Florissant R-II (MO) Sch. Dist.*, 56 IDELR 56 (OCR 2010).

Links

- [SmartStart: Eligibility Determinations Under IDEA](#)
- [SmartStart: Eligibility Under Section 504 and/or the ADA](#)
- [SmartStart: Evaluation of Specific Learning Disabilities](#)
- [SmartStart: Response to Intervention -- IDEA Requirements](#)

Additional Resources

Additional resources on this topic are available for purchase from LRP Publications:

- [IDEA Eligibility Case Law: A Desktop Reference to Key Decisions](#) by Amy E. Slater, Esq.
- [What Do I Do When ...® The Answer Book on Section 504 - Fourth Edition](#) by John W. Norlin, Esq.

Please share your experience and expertise. Forward any suggested additions or changes to this or other Smart Starts to SmartStarteditor@lrp.com.

Last updated: November 26, 2012

Key points:

- Do not preclude gifted students from special education
- Discuss school difficulty, need for specially designed instruction
- Base eligibility decision on full, individual evaluation

Don't rule out eligibility based on student's high IQ, giftedness

*By Jim Walsh, Esq.**

It's a good thing "Anonymous" writes all of these letters to OSEP.

Anonymous often asks good questions, thus eliciting helpful responses from the department. Take, for example, the letter to Anonymous reported at 55 IDELR 172 regarding the eligibility of students.

Anonymous posed a question that often comes up in IEP team meetings: Can a student who is gifted and talented be eligible for special education? Can a student with high cognitive ability be eligible under the IDEA?

OSEP informs Anonymous that there is nothing in the law or regulations that would automatically preclude a gifted student from being eligible for special education services. The key is simply whether the student meets the definition of a child with a disability.

It is important that your IEP team doesn't automatically rule out eligibility based on the student's high IQ or giftedness in other areas.

The student must have one of the impairments specified in the law and must, as a result of that impairment, need special education and related services. OSEP offers an example of a student with ADHD and high cognitive ability who has a need for "special education and related services to address the lack of organizational skills, homework completion and classroom behavior." Such a student might be classified as OHI.

Similarly, OSEP advised that a student with Asperger syndrome might be eligible because of "needs in the affective areas, social skills and classroom behavior, as appropriate."

Discuss school difficulty

For a recent case that demonstrates this principle, take a look at *Klein Independent School District v. Hovem*, 55 IDELR 92 (S.D. Tex. 2010).

This case dealt with a student who scored higher than 600 on the verbal and math portions of the SAT and yet was eligible for special education services because of an LD that affected written expression. Being strong in one area does not mean the student will not be eligible for IDEA services.

On the other hand, it's safe to say that the student must experience difficulty in school. That is, the student's impairment must adversely affect his educational performance to the point that the student *needs* special education services.

There is much controversy about this point, particularly with regard to students with LDs. But the definition of an LD in federal regulations specifically requires that the student does not achieve adequately as compared to the student's age or to grade-level standards. So, the student has to have some difficulty in school.

Moreover, the "need" that the student demonstrates must be a need for specially designed instruction.

Address individuals, not 'automatics'

In another recent case example, a federal court ruled that a student with an orthopedic impairment was not eligible for special education services because her disability, serious though it was, did not result in a need for any special type of instruction. She just needed some physical accommodations to get around school. Sounds like Section 504 to me. See *D.R. v. Antelope Valley Union High School District*, 55 IDELR 163 (C.D. Cal. 2010).

So when you put all that together, it should sound familiar. Eligibility of students is based on an evaluation that demonstrates that the student meets the standards in the law. This must be based on a full, individual evaluation.

The student must: 1) have an impairment that 2) adversely affects educational performance 3) to the point that the student needs specially designed instruction. There are no automatics. Every child must be considered individually, taking all factors into account.

Keep applying those standards in an individualized fashion, and you will make good decisions. Also, you won't have to send off any anonymous letters to federal agencies.

Special Ed Connection® *related stories and resource:*

- OSEP File: IDEA protects gifted students with qualifying disabilities (Oct. 12)
- Know when intellectually gifted students qualify for IDEA, Section 504 (Feb. 12)
- Fact sheet: Common Misconceptions about Differentiated Instruction
- Checklist: Examples of Accommodations for Students (July 21)

Click [here](#) to read more of Jim Walsh's columns.

Learn more about the audio CD Evaluation and Eligibility: Evolving Legal Trends and Best Practices for Compliance.

**Jim Walsh is a founding shareholder of Walsh, Anderson, Brown, Gallegos & Green PC in Austin, Texas. He has conducted training for hundreds of school districts and is a highly sought-after speaker in Texas and throughout the country.*

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January 13, 2010

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Key points:

- 2 percent to 5 percent of gifted students also have learning challenges
- Consider reports from parents, teachers about children's needs
- Conduct expedited evaluation if observations uncover problems

Don't assume gifted children will be ineligible for special ed

A young student tests as gifted, so his school district places him in a general education classroom. The parents file for due process, arguing the school system ignored past reports showing their child requires a small class size and individualized attention because of his severe ADHD and learning disabilities.

Such was the case in *District of Columbia Pub. Schs.*, 49 IDELR 82 (SEA DC 2007), where an impartial hearing officer ordered the District of Columbia to reimburse the parents of a gifted child with ADHD and LD for their child's private day school tuition because it failed to evaluate the student for special needs.

Just because a child rates as gifted does not guarantee he can function appropriately in a classroom for top-level students. Several studies have found 2 percent to 5 percent of gifted children also have learning challenges.

Gifted students sometimes test so well in intelligence assessments that their other special needs sink under the radar, said Patricia J. Whitten, an attorney at Franczek Sullivan PC in Chicago. Districts are especially likely to miss a child's learning difficulties if his parents and past teachers don't report anything.

"If a student does well enough on the gifted testing," Whitten said, "I don't think a school district would necessarily think to evaluate him for special education unless other information were provided by his parents or teachers."

Investigate a child's educational history

If parents or past teachers do share concerns about a gifted child's behavior, you should investigate a child's educational history and decide if an evaluation is needed, Whitten said.

In *District of Columbia*, ignoring parent and teacher reports translated to a denial of FAPE for the school system. The district based its placement decision solely on the student's gifted status, even though teachers from the boy's private kindergarten program said he needed small class sizes and individualized support to overcome his inattention and disruptive behavior.

These concerns should have triggered an evaluation for special education, said Jason Ballum, an attorney at Reed Smith LLP in Richmond, Va.

"Students with high IQs cannot be excluded automatically from the special education and eligibility process," Ballum said. "Any automatic exclusion would violate the IDEA."

To avoid denying a gifted child FAPE, consider the student's educational history to uncover whether he needs to be evaluated for special education.

"In order to make a correct eligibility decision," Ballum said, "school divisions should conduct their own evaluations and observations of the student, particularly if the student had not previously been enrolled or served by the school district."

Special Ed Connection® *related stories:*

- Not ready to evaluate? Document emerging behaviors (April 28)
- Board mulls ways to recognize focus on gifted students in special ed (April 21)

Contact Jason Ballum and Patricia J. Whitten . Also learn more about the guide What Do I Do When ... The Answer Book on Special Education Practice and Procedure .

Cara Nissman Kraft covers school psychology and early childhood education issues for LRP Publications.

April 28, 2008

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55 IDELR 172
110 LRP 52277

Letter to Anonymous

Office of Special Education Programs

N/A

January 13, 2010

Related Index Numbers

175.002 Attention Deficit Disorders

175.011 Gifted and Talented

215. GIFTED AND TALENTED

Case Summary

The mere fact that a student is "gifted" does not disqualify him from eligibility for special education and related services under the IDEA. OSEP explained to an interested individual that students with high cognition may also have disabilities, such as ADHD, Asperger syndrome, or a specific learning disability, that require IDEA services. OSEP observed that the IDEA does not address the topic of gifted students. However, "It remains the Department's position that students who have high cognition, have disabilities, and require special education and related services are protected under the IDEA and its implementing regulations," OSEP Acting Director Alexa Posny wrote. OSEP pointed out that a student with high cognition and ADHD could be considered to have an other health impairment, and could need special education and related services to address lack of organization skills and difficulty completing homework. Likewise, a gifted student with Asperger syndrome could be eligible under the autism classification and require services to address behavioral or social challenges.

Judge / Administrative Officer

Alexa Posny, Acting Director

Full Text

Dear []:

This is in response to your letters dated October 8, 2009 and October 10, 2009 to U.S. Department of Education (Department) Secretary Arne Duncan. Both letters were forwarded to the Office of Special Education and Rehabilitative Services (OSERS) for response. Your letters ask for clarification of the Individuals with Disabilities Education Act (IDEA) as it applies to children with disabilities requiring special education and related services who have high

cognition (what you term, "twice exceptional students," "students who are gifted" and "students who have high cognition and have disabilities") as well as how other laws apply to this population, including the Elementary and Secondary Education Act (ESEA), section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA).

As you are aware, the ESEA was amended in 2002. Laurel Nishi of my staff in the OSERS informed you during a phone call on November 12, 2009, the Department is currently conducting a "Listening and Learning" tour to seek public input about changes to the ESEA. By the end of the year, the Secretary or a senior staff member had led "Listening and Learning" events in all 50 states. During the phone call, you stated that you would take advantage of this public hearing opportunity to share the concerns you raise in your letters as they relate to the ESEA. It is also my understanding that the Department's Office for Civil Rights (OCR) sent an electronic mail (e-mail) response to you on December 8, 2008, regarding concerns you raised with that office about protections and services under Section 504 and the ADA for students who have disabilities and high cognition. Therefore, this letter will not address either of those concerns. This letter addresses your concerns as they relate to the IDEA.

In your letter dated October 8, 2009, you specifically referenced students with high cognition and disabilities such as Attention Deficit Hyperactivity Disorder (ADHD), Asperger's Syndrome, and specific learning disabilities related to reading, writing, and mathematics who struggle to timely complete grade-level work and have difficulties with organizational skills, homework completion, affective areas, social skills, classroom behavior, reading and math fluency, writing and math operations.

The IDEA is silent regarding "twice exceptional" or "gifted" students. It remains the Department's position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations. Under 34 C.F.R. §300.8, a child must meet a two-prong test to be considered an eligible child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services. For example, a child with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate. Likewise, a child with Asperger's Syndrome could be considered under the disability category of autism and the individualized evaluation would address the special education and related services needs in the affective areas, social skills and classroom behavior, as appropriate.

With regard to students with specific learning disabilities (SLD), the Analysis of Comments and Changes in the regulations implementing Part B of the IDEA (71 Fed. Reg. 46540, at 46647 and 46652, August 14, 2006) contemplates that there will be some students with high cognition who need special education and related services:

Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of

children with SLD who are gifted, to be used to identify children with SLD ...;

No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified.

Moreover, it has been the Department's long-standing position that, in general, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child to determine whether the child's current academic achievement reflects the service augmentation, and not what the child's achievement would be without such help.

Based on this analysis, we believe that the IDEA and its regulations do provide protections for students with high cognition and disabilities who require special education and related services to address their individual needs.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

I hope this information is helpful. If you have further questions, please do not hesitate to contact Dr. Deborah Morrow, of my staff, at 202-245-7456.

Regulations Cited

34 CFR 300.8

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