Steven L. Beshear
Governor

Dr. Terry Holliday
Commissioner of Education

EDUCATION AND WORKFORCE DEVELOPMENT CABINET
DEPARTMENT OF EDUCATION

Capital Plaza Tower • 500 Mero Street • Frankfort, Kentucky 40601
Phone: (502) 564-4770 • www.education.ky.gov

Policy Letter #2010-11-01

Establishing Student Eligibility For IDEA Services

Kentucky Department of Education
Division of Learning Services (DLS)
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Rationale

Over the past two years, I have become increasingly concerned over IDEA eligibility practices that the Division of Learning Services (DLS) staff have observed in local school districts. Due to districts' failure to follow IDEA procedures in federal and state law, Kentucky's percentage of students identified as having disabilities under IDEA has significantly increased since 2000.

At the same time, critical outcomes for students with disabilities have failed to keep pace with educational outcomes for general education students. The achievement gap between students with and without disabilities is significant and continues to increase in many districts. Graduation rates for students with disabilities are lower, and dropout rates higher, as compared to non-disabled students.

Part of the failure to ensure positive outcomes for IDEA students is general education's lack of understanding in appropriately teaching students with diverse learning needs. Students who do not learn in the "typical" manner begin lagging behind their classmates at an early age. If inappropriate instruction continues and educational progress remains delayed, diverse learners are often inappropriately placed in special education.

Once in special education, students' access to the general education curriculum is frequently limited. This continues to affect the special education students' academic achievement, leading to unacceptable outcomes in graduation and dropout rates and post-school success.

KDE believes that general education requirements such as Response to Intervention (RtI) will ultimately aid school districts with teaching diverse learners. Two keys with RtI are intervening early at the first sign of difficulty and appropriately instructing students with diverse learning needs through differentiated instruction. Through the use of RtI, most diverse learners will have their needs met in general education. Special education will no longer be the "fallback position" for low-achieving students.

DLS has assumed a major role in addressing Kentucky's over-identification issues over the past two years. During that time, DLS has conducted data verification visits and initiated focused monitoring of districts with IDEA identification rates of more than 15%. Districts violating IDEA by failing to provide appropriate interventions, evaluations and eligibility determinations have been cited for IDEA violations.

Districts cited for noncompliance have one year to come into compliance with IDEA. To assist districts with correction of noncompliance, DLS and the Special Education Cooperatives (Co-ops) have been providing districts with technical assistance and training related to appropriate IDEA identification.

To further assist districts, DLS, with the help of the Co-ops, recently revised documents related to record reviews of student folders. The resulting Compliance Record Review Document sets out DLS's interpretation of IDEA. The Document is posted on the KDE web site at: http://www.education.ky.gov/KDE/Instructional+Resources/Exceptional+Children/Monitoring/

The Compliance Record Review Document contains specific guidance on proper IDEA eligibility practices. It is intended to provide technical assistance to districts as well as notice to districts regarding DLS's interpretation of IDEA requirements related to student eligibility. It will also guide DLS's efforts at determining district compliance with IDEA during on-site visits and desk audits for SY 2010-11.

This Policy Letter is to be used in conjunction with the Compliance Record Review Document. The Letter contains DLS's interpretation of its regulations in the area of Identification, Evaluation and Eligibility where the language of the regulations is unclear. It is my expectation that both the Compliance Record Review Document and this Policy Letter will assist districts in achieving IDEA compliance.

R. Larry Taylor

R. Larry Taylor, Director
Division of Learning Services
Office of Next Generation Learners

Interventions

The legal requirement for Kentucky's RtI-type process for all disability categories was put into Kentucky's Child Find requirement in 2007. (707 KAR 1:300, Section 3). In spite of the law being in effect for over two years, DLS continues to find little to no evidence that the following requirements are being implemented:

- Relevant research-based instruction and intervention services are provided in regular (general) education settings prior to or as part of the referral process
- Instruction and intervention services are provided by qualified personnel
- Data-based documentation of repeated assessments of achievement or measures of behavior are collected and evaluated at reasonable intervals; and reflect systematic assessment of student progress during instruction; and
- Results are provided to the child's parents

DLS has also found a lack of understanding about interventions required by the Child Find regulation. Information provided in student folders demonstrates that accommodations are persistently substituted for the required interventions.

Interventions are defined as changes to **instruction**. Alterations in physical surroundings (preferential seating), materials (large print) or curriculum adaptations (extended time, reducing the quantity of materials to be mastered by students) are accommodations. They are not interventions. See Compliance Record Review document, Item 61, pages 38-40. http://www.education.ky.gov/NR/rdonlyres/0F89B537-EACD-4D69-99CF-6BFF35797BC0/0/RecordReviewDocumentjuly12final.pdf

As explained in Item 61 of the Record Review, districts not providing appropriate interventions prior to or during the referral process are in violation of 707 KAR 1:300, Section 3. Any students, including preschoolers, identified for IDEA services that have not received appropriate interventions have been illegally identified as eligible under IDEA.

A district found in violation of the intervention requirement by DLS will be required to implement a Corrective Action Plan (CAP) to remedy the systemic violation, as well as the individual student violation. The CAP will consist of:

- Establishing a district-wide process to ensure compliance with federal and state requirements for determining eligibility; and,
- Re-determining the individual student's eligibility using the new, compliant process

If the student is found ineligible for IDEA services after going through the district's new eligibility process, including documentation of research-based interventions, the student must no longer receive IDEA services. The district *may* also be required to repay IDEA funds that were obtained in violation of IDEA.

The individual student remedy will undoubtedly cause hardship for the local district. Parents and school staff will not understand the reason the student, once "eligible" under IDEA, is no longer able to receive services. District administrators will be equally unhappy as they look for money to repay IDEA funds to KDE. To avoid students from being illegally identified in the first place, districts must immediately begin implementing a process which ensures IDEA compliance for determining eligibility.

KDE is in the process of reorganizing its agency structure. As part of the reorganization, emphasis has been placed on diverse learners and differentiating instruction for all students. This change will further enhance technical assistance and resources currently available to districts from KDE.

Information related to research-based instruction and interventions may be found at the *What Works Clearinghouse at http://ies.ed.gov/ncee/wwc/reports/default.aspx ??*

Evaluation

❖ *Triangulation of data*

IDEA eligibility must be established through multiple sources of information. Just as a stool cannot stand on one leg, IDEA eligibility cannot stand on one piece of evidence. This means information regarding student eligibility must be triangulated.

The purpose of triangulation is to increase the credibility and validity of results. In the case of IDEA eligibility, triangulation means there are multiple data sources that substantiate the existence of a disability. Data triangulation includes triangulation of time, space and persons. An Admissions and Release Committee (ARC) can be confident of an eligibility determination, if different methods of evaluation that take place in varied settings, by multiple evaluators and at different times, lead to the same result.

DLS has observed the following inappropriate evaluation practices in which triangulation was not utilized while reviewing student folders for eligibility:

- One piece of evidence, such as a doctor's statement, is used to determine eligibility for OHI
- Only an IQ score or an adaptive behavior score is used to determine eligibility for MMD. This occurs when either the IQ score or the adaptive behavior score is not two standard deviations below the mean and the ARC relies upon only the lower score to establish eligibility, even though both scores are required to be two standard deviations below the mean
- On reevaluation of a student with a Mild Mental Disability, a new adaptive behavior score that is higher than the original score is completely disregarded by the ARC, in order for the student to continue to receive special education services

Districts with IDEA identification rates of more than 15% must begin an immediate shift in thinking about IDEA eligibility. **Rather than looking for any piece of information to support IDEA eligibility, ARCs must begin requiring proof that the student is IDEA-eligible.** This means districts must review their evaluation practices and require their ARCs to triangulate data.

❖ *Observations*

The requirement for observations as part of the Child Find and evaluation processes is found in two sections of Kentucky's IDEA regulations:

- 707 KAR 1:300, Section 4(14)(b) and (c), *Evaluation and Reevaluation Procedures*
- 707 KAR 1:310, Section 1(3), *Determination of Eligibility* (Behavioral Observations)

In addition to the regulatory requirements, observations also play a key role in answering the question of whether the disability has an *adverse effect* on the student's educational progress.

During its review of student folders, DLS noted the critical evaluation piece of observations was missing from numerous student eligibility determinations. Many districts do not routinely require student observations as part of the eligibility process. Even if listed in the evaluation plan or cited in a psycho-educational assessment, there is often little to no evidence showing the observations occurred, or that the observation information was carefully considered by the ARC.

In omitting observations as part of evaluation planning, ARCs are misinterpreting the two sections of Kentucky's IDEA regulations cited above. DLS's analyses of the observation requirements are set out in a. and b. below, for the two separate observation regulations.

a. *Review of existing observation data, "Child Find, Evaluation and Reevaluation"*- 707 KAR 1:300, Section 4(14)(b) and (c)

Section 4(14) of the Kentucky regulation states:

> (14) As part of an initial evaluation, if appropriate, or as part of any reevaluation, the ARC and other qualified professionals, if necessary, shall review existing evaluation data on the child including: ...
>
> (b) Current classroom-based, local, or state assessments and classroom-based observations; and,
>
> (c) Observations by teachers and related services providers

Immediately following this regulation is Section 4(15), which refers to the referral phase of the Child Find process. It states:

> (15) "On the basis of the review" (of existing data) "and input from the parents, the ARC shall identify what additional data, if any, are needed to determine:
>
> (a) Whether the child has a particular category of disability and the educational needs of the child, or in the case of a reevaluation of the child, whether the child continues to have a disability, and the educational needs;
>
> (b) The present levels of academic achievement and related developmental needs of the child; ..."
> 707 KAR 1:300Section 4(15)(a) and (b)

By reading the two sections together, DLS interprets the regulations as requiring ARCs to review current classroom-based assessments and observations, and observations by teachers and related services providers, as part of the referral process. As a result of the review of existing data, ARCs during evaluation planning will determine additional data needed to determine if the student qualifies for services under IDEA, then, if eligible, the IEP services required by the student.

DLS's position is bolstered by its review of federal law. 707 KAR 1:300, Section 4(14) is based on the federal requirement found at 34 C.F.R. §300.305(a), *Additional requirements for evaluations and reevaluations.* In its comments to the federal regulations, the Office of Special Education Programs (OSEP) explained its regulation as follows:

> Observation data will generally be a part of the existing data reviewed for any child suspected of having a disability. Section 300.305(a)(1) requires the eligibility group to review existing evaluation data, including classroom-based observations and observations by teachers and related services providers. (Emphasis added.)

OSEP's comments affirm DLS's belief that observations are a required part of student evaluation under IDEA.

DLS has contacted OSEP for additional guidance in defining "existing evaluation data. OSEP has advised DLS that existing evaluation data may take many forms. It may also include informal as well as formal observations. OSEP provided the following examples as sources of classroom-based observations that the ARC may use in its review of existing data:

- Disciplinary information
- Office referrals
- Anecdotal information based on a teacher's observations presented at a Teacher Assistance Team may be reduced to writing

Examples of observation data from teachers or related services providers referenced in (c) of 707 KAR 1:300, Section 4(14) include data from AIMSweb and DIBELS.

In rare circumstances, current observation data may not be available. A medically fragile child living in a hospital, a three-year old student moving to Kentucky from another state or a student who has been home-schooled probably will not have existing evaluation data.

Absent unusual circumstances which are documented by the ARC, **DLS is requiring observations set out in the Child Find process [707 KAR 1:300, Section4 (14)] to be part of the evaluation information used to determine IDEA eligibility.**

b. Behavioral Observations, *"Determination of Eligibility"*- 707 KAR 1:310, Section 1(3)

The second observation requirement found in Kentucky's special education law is at 707 KAR 1:310, Section 1(3), *Determination of Eligibility.* The regulation states:

> (3) In making eligibility determinations, an LEA shall draw upon information from a variety of sources, **which may include:**
>
> (a) Response to scientific, research-based interventions;
> (b) Vision, hearing, and communication screenings;
> (c) Parental input;
> (d) Aptitude and achievement tests;
> (e) Teacher recommendations;
> (f) Physical condition;
> (g) Social or cultural background;
> (h) Adaptive behavior; or
> **(i) *Behavioral observations.***
>
> (Emphasis added.)

Clearly, every source of information listed above will not be needed to determine eligibility for every student. For example:

- "Aptitude and achievement tests" are not a part of evaluation information used to determine eligibility for a First Steps toddler entering preschool, since 3-year old children have not participated in formal standardized testing
- Information on "physical condition" may not be needed for students with intellectual disabilities
- "Adaptive behavior" information is not necessary for a student suspected only of having a speech/language impairment

However, omitting this same information when determining eligibility for the following disability categories would be inappropriate and would violate Kentucky's IDEA regulations:

- "Aptitude and achievement tests" are required to determine student eligibility for a Specific Learning Disability
- "Physical condition" information is necessary for students suspected as Other Health Impaired (OHI) or as having an Orthopedic Impairment (OI)
- "Adaptive behavior" information is required when ARCs are considering if a student has a Mild Mental Disability or a Functional Mental Disability

Districts have incorrectly interpreted the regulatory language at 707 KAR 1:310, Section 1(3)(i) as making behavioral observations a permissible part of the evaluation process. By not requiring behavioral observations in evaluation planning, ARCs are omitting essential sources of data needed in making accurate eligibility decisions under IDEA.

DLS recently contacted OSEP for guidance, to assist districts in understanding the observation requirement. According to OSEP, the "behavior" observations requirement is meant to be construed broadly.

Behavior observations mean more than requiring a functional behavioral assessment for students with problematic behaviors. Behavior observations also include:

- Observing student responses to teaching, learning and instruction
- Looking at and diagnosing what works during instruction to the student
- Determining what triggers negative behaviors, as well as positive responses to instruction

Even though every source of information listed in 707 KAR 1:310, Section 1(3) is not required for every student, OSEP's guidance makes it clear that observations are a necessary source of information and must be included in eligibility determinations. Information gleaned from observations must be considered with other data about the student. The data must then be triangulated and a decision reached regarding eligibility.

In developing the evaluation plan, the ARC must consider the information needed to support the existence of the disability for the individual student. If a student is inattentive and OHI is suspected as a disability, behavioral observations must be done. Likewise, a student with complex behavioral issues will have multiple behavioral observations. A student having difficulty with written expression must be observed, to note her responses to the teacher's instructions.

As noted earlier, data triangulation requires the observations be across time and settings, and by multiple evaluators.

Behavioral observations may also be part of the data used to establish the crucial "adverse effect" requirement in Kentucky special education law. By using observations to compare a student's performance to peers, the ARC has additional information that allows it to determine whether the student's educational performance is significantly and consistently below the level of similar-aged peers as required by the regulations.

DLS's position is that behavior observations *are required* as part of the evaluation for every category of suspected disability.

Additional Observation Considerations

❖ *Function of Observations*

ARCs must understand the function of observations and tailor observations to the purpose for which they are being used. For example:

- If a child is experiencing difficulties in academics, the observations must be done in academic classes
- If a child is experiencing difficulties in less-structured environments, the observations must be done in less-structured settings, such as transitions between classes, the lunch room and physical education class

Observations must be done by staff trained to do the observations. Depending on the student suspected disability, observations may be more valuable if done on different days and different times of day. As noted above in the *Triangulation of Data* discussion, spacing the time between observations ensures the observations are not affected by factors unrelated to the disability, such as:

- Illness
- Lack of sleep
- Temporary family problems
- Daily interactions with other students or teachers
- Hunger

DLS has observed records in student folders that show a lack of understanding of the reason for observations. The following practices are not acceptable:

- A school psychologist's observation of the student during psycho-educational testing is accepted by the ARC as one of the required observations.
- A student suspected of a specific learning disability in math is observed during language arts only.
- Several observations are conducted by the same person close in time on the same day, resulting in diminished quality and less information for the ARC.
- Observations of a preschool child occur at screening or during testing, rather than settings where the child's behavior of concern happens.

❖ *Number of Observations Required*

The Kentucky regulations require observations. This means a minimum of two observations must be done; however, many situations require more than the minimum of two. The number of observations conducted is based upon the needs of the child. Additional observations may also be required when the results of two observations are inconsistent.

Other individual factors affecting the number of observations required include:

- A student with challenging behavior or with behaviors shown inconsistently throughout the day may require additional observations across settings
- Students with complex behaviors may need multiple observations (for example, students suspected of having an autism spectrum disorder).
- Students taking medication may need to be observed at different times of the day

❖ *Observations for Students Suspected of a Specific Learning Disability*

DLS's position is that a minimum of two observations are required during the evaluation process. If the student is suspected of having a Specific Learning Disability, one of the two observations must comply with 707 KAR 1:310, Section 2(8), *Additional Procedures for Evaluating Children with Specific Learning Disabilities.*

Observations – Summary

Appropriate observations are designed to obtain information about the student's suspected disability that may not be available through other means. Observations serve an important purpose in triangulating data, as they document the effects of a suspected disability and provide important information about student performance, behavior and "adverse effect."

Item 67 of the Compliance Record Review Document reflects DLS's policy in this area. Beginning in SY 2010-11, for districts to comply with Item 67, ARCs must consider current classroom-based, local or state assessments and classroom-based observations; and observations by teachers and related services providers, as part of the initial evaluation process.

In most cases, the ARC will have access to existing student data, including observations. However, as explained above, in rare cases, there may be no existing data. If there was no existing data for the ARC to consider, the district may mark "Not Applicable" (NA) on the Record Review Document for Item 67, only if the ARC documents its reasons for omitting the information from the Evaluation Plan.

Conclusion

Policy Letter #2010-11-01 marks the first in a series of IDEA policy statements by the Division of Learning Services. The next letter - *Reevaluation of Students with Disabilities* - will be issued shortly. Additional letters will follow so that KDE and the Co-ops may provide general supervision and technical assistance to local school districts in their efforts to comply with IDEA requirements.