

Legal issues involving dyslexia, dysgraphia and dyscalculia

By the New York State
Association of School Attorneys

According to the National Center for Education Statistics, about 14% of public school students qualify for special education services pursuant to the federal Individuals with Disabilities Education Act (IDEA). Among those 6.7 million students, 19% have a speech or language impairment, 10% have autism and smaller percentages have other disabilities including intellectual disability or emotional disturbance. But the largest category – called “specific learning disability” – involves more than a third of all special education students. Some specific learning disabilities, as defined by the state education commissioner, include:

- **Dyslexia** – “A condition affecting reading skills often characterized by difficulties in areas including (but not limited to) phonological processing, decoding, fluency, and/or spelling.”

- **Dysgraphia** – “A condition impacting writing skills often characterized by difficulties in areas including (but not limited to) legibility and automaticity [ability to do things without conscious thought].”

- **Dyscalculia** – “A condition impacting math skills often characterized by difficulties in areas including (but not limited to) working memory, spatial/quantity concepts impacting number sense, and symbol recognition/use.”

Schools’ ability to serve students with dyslexia, dysgraphia and dyscalculia has been getting increased attention in recent years in the form of guidance documents from the U.S. Department of Education and the State Education Department. And school districts have been experiencing more litigation on issues related to these learning disabilities.

This article answers frequently asked questions related to these learning disabilities and provides practical suggestions for school personnel.

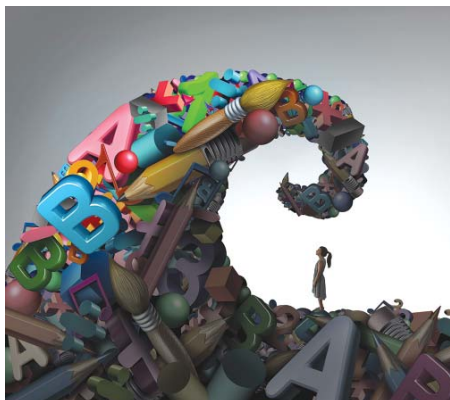
Who determines if a child has a learning disability and is eligible for special education services?

New York State requires all school districts to have a Committee on Special Education (CSE) that is authorized to identify students in need of special education services and develop qualified students’ individualized education programs (IEPs). Students may be referred to the CSE by their parent or school personnel when there is a concern that the student has an underlying disability, including a potential learning disability. The CSE must conduct a full evaluation whenever an initial referral is made; however, the CSE is only required to evaluate a child to determine whether that child requires special education based on the classification criteria under the IDEA.

What are the criteria for determining if a child has learning disability and is eligible for special education services?

A student is eligible for CSE classification, and therefore special education services, when the CSE determines that the student has a disability as defined by one of 13 special education classifications and that disability impacts the student’s ability to learn. The CSE must develop an IEP for classified students that identifies and addresses the student’s specific needs related to that student’s disability. The student’s parent is a member of the CSE throughout the entire CSE process, including determining initial eligibility and in IEP development.

Students with disabilities also receive protections against discrimination under Section 504 of the Rehabilitation Act. Students with IEPs automatically receive all Section 504 protections. Students with disabilities who



do not require an IEP, but who have a physical or mental impairment that substantially limits one or more major life activities, qualify for a Section 504 Plan that provides accommodations to address their disabilities.

What is the definition of a learning disability?

The definition of a learning disability varies depending on the diagnostic criteria used. The IDEA defines a learning disability for special education purposes as:

A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.

Dyslexia, dysgraphia, and dyscalculia are three specific learning disabilities that can, in some cases, qualify a student for special education services under the IDEA.

Is a CSE required to determine whether a student has dyslexia, dyscalculia and dysgraphia?

No. CSEs are not required to identify specific diagnoses such as dyslexia, dyscalculia and dysgraphia when determining eligibility and developing a student’s IEP. Rather, for students who may have one of those disorders, the CSE must determine whether the student has a specific learning disability as defined by the IDEA and recommend appropriate special education supports to support appropriate annual goals and educationally related deficits.

If the student has a disability that does not affect the student’s ability to learn, the student may be entitled to a Section 504 Plan if the disability substantially limits at least one of the student’s major life activities (functions including caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working).

What does state law say about dyslexia, dyscalculia and dysgraphia?

In 2017, Section 305 of the Education Law was amended so that school districts may use the terms dyslexia, dyscalculia, and dysgraphia in “evaluations, eligibility determinations, or in developing an IEP.”

While there was no bar to school districts using these terms prior to 2017, the amendment was responsive to the increased attention on these disorders and the confusion faced by many CSEs in addressing these disorders. In response to this change in the law, the state commissioner of education released a guidance memo in August 2018 to assist schools with supporting students with dyslexia, dysgraphia and dyscalculia.

Consistent with federal guidance, the state guidance states that a school district *may* consider whether a student meets diagnostic criteria for dyslexia, dysgraphia, and dyscalculia. However, there is no requirement in state or federal law or guidance that a school district must determine whether a student has dyslexia, dysgraphia or dyscalculia.

When is it appropriate for a school district to seek a diagnosis of dyslexia, dysgraphia or dyscalculia?

The short answer is that much is left to the discretion of the school district regarding whether it is appropriate to seek a diagnosis of dyslexia, dysgraphia or dyscalculia.

According to the U.S. Department of Education’s Office of Special Education Programs, a school district is only required to evaluate a student in the areas related to the student’s suspected disability (*Letter to Unnerstall*, 2016). Such an evaluation *may* include assessing for a specific disorder, such as dyslexia, if such assessment is necessary to determine whether the student is a child with a disability and is consistent with the district’s efforts to meet the student’s educational needs.

For example, a student may be referred to the CSE due to concerns related to the student’s reading progress in reading fluency and decoding. The CSE must fully evaluate the areas of concern related to the student’s reading, including fluency and decoding. Identifying a deficit in an area of reading that impacts the student’s ability to learn could be sufficient for identifying the student with a specific learning disability in need of an IEP. This procedure can be done without identifying whether dyslexia is present, provided that the specific area of deficits are identified by the CSE and addressed by the IEP.

Is a diagnosis of dyslexia, dysgraphia or dyscalculia sufficient for special education classification?

No. In 2015 guidance, the U.S. Department of Education’s Office of Special Education Programs said that a student who has been diagnosed with dyslexia, dyscalculia, or dysgraphia is not automatically eligible for special education services (just as a diagnosis of ADHD does not result in an automatic classification). Rather, the disability must also affect the student’s ability to learn. This same requirement applies to all of 13 special education classifications under the IDEA.

It is possible for a student to have a disability, such as dyslexia, dysgraphia or dyscalculia, but not require special education classification and services or Section 504 accommodations. The key issue is whether and to what degree the disability affects the student’s ability to learn. It is role of the CSE or Section 504 Team to make such determinations.

What should a school district do if a parent requests an evaluation for a specific learning disability such as dyslexia, dysgraphia or dyscalculia?

A school district must assess a student in all areas of suspected disability when conducting a CSE or Section 504 evaluation. This includes suspected areas of disability identified by the parent.

See NYSASA, page 15

New regs clarify rules for medical exemptions

By **Kimberly A. Fanniff**
SENIOR STAFF COUNSEL

Although religious exemptions to immunization requirements have been eliminated in New York State, schools can still permit unvaccinated students to attend school if they have a valid medical exemption. On Aug. 13, the state Department of Health and Office of Children and Family Services issued emergency regulations regarding how doctors must submit a request for a medical exemption to school officials. Physicians who are licensed to practice



"I assure you, vaccines are safe and effective. I'm a father. My kids are vaccinated." – Howard A. Zucker, State Health Commissioner

in New York State can no longer just submit a signed statement to the child's

school. Now physicians must complete a form approved by the State Department of Health or the New York City Department of Education and state the specific reasons why a vaccine may be detrimental to the health of a child.

To be considered valid, the physician must state the he or she has determined a child has a medical contraindication or precaution to a specific immunization consistent with guidance from the U.S. Centers for Disease Control's Advisory Committee on Immunization Practices or other nationally recognized evidence based standard of care. The reasons must also

be documented in the state Immunization Information System.

The regulation now defines admittance or attendance at school to mean being enrolled or admitted to school for the purpose of participating in or receiving services at such school, including special education, participation in sports or other school sponsored events/activities and being transported on a school bus or other vehicle with other school children except when such services, transportation, events or activities are open to the general public.

A full copy of the revised regulations is available at: <https://on.ny.gov/2NmzsJJ>.

Special ed services for students who aren't immunized - How can it work?

By **Pilar Sokol**
DEPUTY GENERAL COUNSEL

Amid concern about how public schools can serve special education students who are unvaccinated, state officials have released a new FAQ (frequently asked questions) document. It is the third issued since a new law eliminated religious exemptions to immunization requirements.

The FAQ says that if parents do not vaccinate a child with a disability who is entitled to special education services and the child does not have a valid medical exemption, parents will need to homeschool such children.

According to the FAQ, homeschooled children with disabilities who are not immunized and have no medical exemption can receive special education services pursuant to a plan called an IESP – an

"individualized education services program." IESPs are distinct from IEPs, or individualized education programs in that IEPs are designed for students who attend a public school.

The location in which a homeschooled child receives services pursuant to an IESP is determined by the school board. Options can include the child's home or elsewhere other than a public, private or parochial school. Examples include a therapy provider's office or public gathering sites accessible to the general public such as community centers.

In addition, a school board can determine whether to have services provided by school staff or contractors.

Read the FAQ, which covers other subjects, at <https://on.ny.gov/2NjdaIR>. Prior FAQs and other relevant information can be found at https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/.

FMLA leave for CSE meetings? U.S. Dept. of Labor says yes

By **Pilar Sokol**
DEPUTY GENERAL COUNSEL

In an opinion letter dated Aug. 8, 2019, the Wage and Hour Division at the U.S. Department of Labor (DOL) concluded that employees can take intermittent leave under the federal Family Medical and Family Leave Act (FMLA) to attend a committee on special education (CSE) meeting held to discuss their child's individualized education program (IEP).

The FMLA allows employees – including employees of school districts and BOCES – to take up to 12 weeks of unpaid leave for medical or child-care purposes during a designated 12-month period. Generally, such leave may be used on an intermittent or reduced leave schedule when necessary because of a family member's serious health condition or to make arrangements for changes in care.

The need of an employee-parent "to attend CSE/IEP meetings addressing the educational and special medical needs of their children – who have serious health conditions as certified by a health care provider – is a qualifying reason for taking intermittent FMLA leave," according to DOL. This is true even if the school district does not provide medical services.

In a footnote, DOL noted this opinion applies to any meetings held pursuant to the federal Individuals with Disabilities Act, and any applicable state or local law, regardless of the term used for such meetings.

Although the opinion letter does not carry the weight of a court's opinion, school districts should be aware of DOL's interpretation and evaluate its potential impact on their FMLA intermittent leave policies, practices and contractual provisions.

The full text of DOL's opinion letter is available at: bit.ly/2Z2eEOy.

NYSASA, from page 13

The CSE is required to conduct a full evaluation when a student is referred to the CSE. The CSE must examine data from a variety of assessment tools, including, but not limited to, standardized assessments and curriculum-based measures.

If a parent asks for a dyslexia evaluation, it is good practice for a district representative to contact that parent and seek more information, e.g., which specific reading difficulties are of concern. Those areas of concern must be fully evaluated in addition to any areas of concern identified by the school.

The CSE or Section 504 team should consider the parent's request along with teachers' input and relevant evaluations and data.

What can parents do if they disagree with an evaluation conducted by the district?

Parents who disagree with a district's CSE evaluation have the right to request an independent educational evaluation

(IEE). An IEE is an evaluation conducted at the school district's expense by a professional outside of the district.

When a parent properly requests an IEE, the school district must either grant the parent's request or initiate a due process hearing to demonstrate that its evaluation of the student was appropriate.

The parent is able to choose the evaluator, provided the evaluator meets the district's criteria. School districts should have clear criteria for IEEs that specifies required evaluator credentials, fees for specific evaluations based on the local geographic rates, and the geographic criteria for evaluators.

What is the role of the school psychologist in the evaluation and identification of dyslexia, dysgraphia or dyscalculia?

Although not widely known, Education Law 7600 allows (but not does require) school psychologists who are employed by a school to evaluate and diag-

nose certain disorders, including learning disorders. This could include the diagnosis of dyslexia, dysgraphia and dyscalculia, with the important caveat that an individual school psychologist must possess the personal competency (including relevant training and professional experience) and have access to the required assessment tools to make such diagnoses.

In addition, a psychological evaluation conducted by a school psychologist is a required component of any initial CSE evaluation, regardless of the suspected disability.

How can school leaders ensure their districts are fully addressing student needs related to learning disabilities?

School districts should ensure that their CSE and Section 504 team members – including administrators, teachers, school psychologists and service providers – possess a thorough understanding of the diagnostic features of specific learning disabilities and the legal requirements for ad-

ressing those learning disabilities through a student's IEP or 504 Plan. This includes an understanding of how to assess a student in all areas of a suspected disability and the ability to engage in a conversation about these specific disorders at CSE meetings and with parents. Developing CSE and Section 504 teams that are familiar with dyslexia, dysgraphia and dyscalculia will prepare those teams to collaboratively engage in problem-solving with families, and in turn, assist with providing an appropriate education for students.



McGinnis

Members of the New York State Association of School Attorneys represent school boards and school districts. This article was written by attorney Anne M. McGinnis of Harris Beach PLLC. McGinnis is also a licensed psychologist and a certified school psychologist.