

# “Unique Needs” Revisited New Decision from the SD DOE

by John A. Hamilton

In the previous issue of the *South Dakota Report* (Volume 31, Issue 2), SDAS published an article entitled, “*What Does it Mean to Serve a Child’s Unique Needs? It Means Disability Classification is Irrelevant.*” The article was prompted by calls and other information SDAS received wherein school districts were limiting special education services to the educational issues directly-related to a child’s special education classification. The article explained that limiting services to those directly relating to the child’s classification runs counter to the language of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) and its federal regulations, federal policy, a letter from the South Dakota Office of Special Education, and case law.

The prior article shared how one of the stated “purposes” of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their *unique needs* and prepare them for further education, employment, and independent living.” 34 C.F.R. § 300.1 (emphasis added). IDEA requires schools to evaluate in all areas of suspected disability. The regulations require that schools “must ensure in evaluating each child with a disability ..., the evaluation is sufficiently comprehensive to identify *all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.*” 34 C.F.R. §300.304(c)(6) (emphasis added). “Special Education” is defined, in part, as “specially designed instruction, at no cost to the parents, to meet the *unique needs* of a child with a disability ....” 34 C.F.R. §300.39 (emphasis added). The regulations refer repeatedly to meeting each child’s unique needs.

The prior article also shared federal policy and case law describing how a student’s IEP services must be based on the child’s unique needs. For example: “[D]ecisions regarding the provision of services that are appropriate for an individual child must be based on the child’s unique needs and not on the disability category in which the child is classified.” *Letter to Anonymous*, 37 IDELR 126 (OSEP February 12, 2002). The prior article also referenced a letter from the South Dakota Office of Special Education from 1999, stating in part: “The program is to be individualized based upon the student’s unique needs. Therefore, a program cannot be designed solely upon the disabling condition under which the child is

eligible for special education; but rather must be based upon the specific educational needs as determined through the evaluation process and by the placement committee.”

The previous article described a clear roadmap of a district’s responsibilities for meeting each child with a disability’s unique needs under IDEA. The information shared in that article also described how some districts have taken the position that services are not required beyond the particular disability classification. One may recall the following example from that article:

- ♦ A child with a Specific Learning Disability (SLD) in Math also has a diagnosis of Dyslexia, but the Dyslexia does not qualify as an SLD under South Dakota rules because there is not a large enough discrepancy between intelligence and achievement scores in reading. The parent was told the district would not address the Dyslexia because it is unrelated to the SLD in math.

SDAS subsequently filed a State Complaint regarding that child’s situation, with one of the issues being whether the district failed to develop an IEP that met all of the student’s unique needs.

## New Response on “Unique Needs” from South Dakota Special Education Programs Office

The South Dakota Special Education Programs Office issued its State Complaint decision on June 17, 2016, finding the particular district out of compliance with IDEA. The decision noted that special education and related services are to be individually determined based on each child’s unique needs, citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656 (U.S. 1982). It referenced the definition of “special education” as set out above, stating, “Both the amount and type of services that ensures FAPE depends on the child’s identified needs as defined in the IEP by the IEP team. The unique needs of a student with a disability encompass more than a mastery of academic subjects.”

The State Complaint decision also stated: “Part B of IDEA and final regulations do not impose any limitation of services to be provided based on the areas of severe discrepancy. IEP services are based on the needs of the whole child,

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# Intersectionality Problems with Gendered Disability Discrimination

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**T**itle I of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in the context of employment, but it has not always worked flawlessly. In fact, empirical data has suggested that its effect on overall employment for individuals with disabilities has been neutral to negative. The ADA has worked even less well for women with disabilities than for men. Why would this be so? Professor Jennifer Bennett Shinall's forthcoming law review article, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination* considers this question.<sup>1</sup> In answering it, she confronts the widespread problems of what legal scholars call "intersectionality."

In the twenty-six years now since the ADA was enacted by Congress and signed by President George H.W. Bush in 1990, men with disabilities have fared better in the job market than women.<sup>2</sup> Several labor economists have demonstrated this fact empirically. One leading study found that following the passage of the ADA, the average number of weeks worked per year for women with disabilities declined more than the average number of weeks worked for men with disabilities.<sup>3</sup> Another, examining the impact of state disability discrimination laws, concluded that in terms of workers with

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not just the child's identified disability." (Citing *Letter to Anonymous*, 51 IDELR 251 (OSEP 2008)). Because this particular district was not addressing the student's Dyslexia, the district was found out of compliance for failing to consider all the unique needs of the student in the development of the IEP. As a result, the district must take corrective action, including providing training in developing an IEP to meet the unique needs of students with disabilities for all administrators and personnel involved in determining eligibility and drafting and implementing IEPs. The district must also undergo a review of its policies and procedures on determining eligibility and meeting the unique needs of students with disabilities.

## Additional Federal Policy Guidance

The OSEP Policy Letter cited in the State Complaint decision, *Letter to Anonymous*, 51 IDELR 251 (OSEP 2008), provides a very interesting discussion of this topic, specific to students with Specific Learning Disabilities. In the scenario presented to OSEP, the local school district utilized the "severe discrepancy" model to evaluate students for specific learning disabilities (the model used by most districts in South Dakota). OSEP clarified that use of a severe discrepancy model "should be just one part of a multi-factored evaluation." OSEP stated, "The public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under 34 CFR § 300.8; and the content of the child's individualized education program (IEP), including information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities). Further, *no single*

*measure or assessment may be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.* 34 CFR § 300.304(b)(2) [emphasis added]."

OSEP further stated, "The Department's long-standing policy is that special education and related services are based on the identified needs of the child and not on the disability category in which the child is classified."

OSEP concluded: "In applying the above requirements, each public agency must ensure that each child with a disability is provided with a program of special education and related services that will enable the child to be involved and progress in the general curriculum; that is, the same curriculum as for nondisabled children. If an LEA elects to use a severe discrepancy and assigns point values to particular areas based on a formula, there is nothing in IDEA or the Part B regulations that would require a public agency to make determinations about the services that a child with a disability must receive based on the assigned point values." "Thus, a district may provide reading or language services to a student with a specific learning disability even if the student shows a discrepancy between intellectual ability and achievement only in the area of mathematics."

While this policy letter happened to address the exact situation presented in the State Complaint, it is important to remember that the concept is universal. In other words, it does not matter what a given child with a disability's special education classification may be; services must always be based on each child's unique needs.

If parents continue to encounter districts claiming they cannot or will not provide services beyond those linked to the child's disability classification, parents should ask the district what it is basing its position upon and request a copy of whatever the district claims to use as its authority. SDAS also recommends the parents contact SDAS for assistance in addressing this issue.