

Using an Expert as An Effective Resource

By Jennifer L. Bollero, Esq.

Expert opinions are necessary in special education. No matter how knowledgeable they are about their disabled children, parents should rely on the opinions of trained professionals to help them make informed decisions about therapeutic and educational interventions. School districts will also rely on these professionals to help them design and deliver specialized education. All parties must recognize the important roles played by these professionals.

Who is an "expert"?

Legally an expert is any person who "by knowledge, skill, experience, training or education" possesses "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." Fed.R.Evid. 702. The Individuals with Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C §1414 (d)(1)(B)(vi) allows parents to consult with experts and include experts on their child's Individualized Education Program (hereinafter "IEP") team:

The term 'individualized education program team' or 'IEP team; means a group of individuals composed of -- . . . at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel. . .

Experts can offer opinions based upon their personal observations and/or testing of the child, as well as opinions they may have based solely upon their review of the child's records. The most common experts at IEP meetings are nurses, physicians, psychologists, social workers, and therapists.

Experts may work for the parents or the school district. While the IEP team must consider the opinions of any expert procured by the parents (20 U.S.C. §1414 (d)(3)(A)(i)), the team is not bound by these opinions.

If a district decides on a course of action that is at odds with the recommendations of the expert retained by the parents, the parents are entitled to "prior written notice," a written explanation from the district that specifically states:

- * *a description of the action proposed or refused by the agency;*
- * *an explanation of why the agency proposes or refuses to take the action;*
- * *a description of any other options that the agency considered and the reasons why those options were rejected;*
- * *a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;*
- * *a description of any other factors that are relevant to the agency's proposal or refusal;*

- * *a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and*
- * *sources for parents to contact to obtain assistance in understanding the provisions of this part. 20 U.S.C. §1415 (b)(3) and (c).*

Parents may request a Due Process Hearing and ask an impartial Hearing Officer to determine whether the district was correct in disregarding their expert's advice. An articulate, well-reasoned expert opinion that is supported by objective data is extraordinarily beneficial to an advocate who is attempting to obtain a particular action or prevent an action by a school district on behalf of an eligible child.

Why Do Parents Need Experts?

Reason I: To obtain a clear medical diagnosis of the child

The main reason parents turn to experts is for an accurate diagnosis of their child's disability. Parents cannot get appropriate help for their disabled child unless they fully understand the nature and extent of the child's disability.

Some individuals refer to this diagnosis as a "label." This phrase is inaccurate. A medical diagnosis must be reached according to best medical practice, including accepted clinical tests and observations by a licensed medical professional. IDEA allows for a multitude of medical diagnoses to obtain eligibility. A solid medical diagnosis of the child by a qualified professional is a necessary starting place for parents.

As a rule, school districts are **not** qualified to make medical diagnoses of disabled children. School districts may perform educational testing to evaluate the child's skills, learning style and other characteristics that make the child eligible for special education services. However, even if an IEP team uses educational testing and observation to determine that a particular child is autistic, this is not the same as a medical diagnosis of autism.

Parents will naturally have concerns about their child's disability that go beyond the school environment and will turn to experts for guidance about these issues. This leads to another reason why parents turn to experts - for advice about available treatments.

Reason II: To obtain advice for medical or therapeutic treatment of the disability

Once the parents understand that their child has a particular disability, they naturally want to do whatever they can to help the child learn and adapt to this condition. From a medical perspective, it is accepted best practice for experts to advise parents about the best medical and/or therapeutic remedies to help the disabled child. Acceptable ways to treat a child's disability may include medications, surgeries, and therapies.

The express goal of this advice is to maximize the child's health, development and general welfare.

The parents and experts will select therapies or interventions that are designed to bring the child as close as possible to the development and skills the child would have if not disabled. These may include consideration of or work towards:

- * an actual **cure** of the child's condition - that is, any and all available treatments which will actually reverse the condition or treatment so the child no longer meets the medical diagnostic requirements for that condition or disability; or,
- * a **drastic improvement** in the child's condition - that is, any and all treatments which will so improve the condition or disability that the effects on the child's life are practically neutralized, even though the child may still technically meet the medical diagnostic requirements for the condition or disability.

In addition, parents will request advice from experts about support and education for themselves and other family members affected by the child's disability. In other words, parents need information and support from experts to help them cope with the practical realities of their child's disability. One of these practical realities are the experiences the disabled child and the parents have with the school district.

Reason III: To help develop an appropriate educational plan for the child

When considering how a child with a disability relates in the school environment, parents need to understand the impact of the disability on learning or negotiating the school premises. As members of the IEP team, parents want to participate meaningfully in planning their child's education. They will rely on their experts and the school's experts to do so.

No parent wants to underestimate their child's abilities and no parent wants to see their child struggle needlessly. Finding that sweet spot of challenged independence is crucial for parents - and usually their own experiences with their child's disability are insufficient for them to fully understand what is **appropriate** in school.

Please note the differences between what is **appropriate** and what is **best**.

In all areas of the child's life outside of school, parents will legitimately pursue the best remedies for their child. This is the "therapeutic benefit" standard, and is a natural and expected part of good parenting.

However, in the school environment, the school district must only consider what is **appropriate** for the child. This is the lesser "educational benefit" standard required by IDEA. Generally, appropriate educational interventions and services will provide the student with meaningful educational benefit, but will **not** maximize the student's potential.

Congress and the courts are steadfast in their refusal to require schools to do what is therapeutically or educationally *best* for disabled children. *Best* is the clear domain of families, not the legislatively mandated standard for schools.

There is a legal difference between services and interventions that provide a disabled student with **educational benefit**, and those that provide **therapeutic benefit**.

Schools must only provide services and interventions designed to improve the student's ability to learn *at school*. Schools are not legally required to provide any intervention or service *solely* to improve the child's medical or therapeutic welfare.

This is a subtle distinction: a legal hair that parents and school districts frequently must split. Common sense dictates that educational benefits will have therapeutic windfalls, and that therapeutic benefits will improve a child's performance at school.

The time that all children - disabled and not disabled - spend in school is crucial for them to reconcile who they are within their communities. This is especially true for disabled children who must reconcile the impact of their disabilities with the expectations of modern communal life.

Nevertheless, the law is clear that schools must accommodate only those disabilities that affect the child's ability to function in and learn at school. Any impact that reaches beyond the school experience is outside the scope of the school's responsibilities.

Experts are key in determining the nature and extent of the disability's impact on learning or functioning in school. However, experts must provide this input only to the extent that it allows the child to participate in school **as a disabled child**.

Unlike the standard in a medical or therapeutic setting, there is no requirement that experts provide advice about how to cure or drastically reduce the effects of the child's disability in school. A child with autism must only have those accommodations that will allow him to function meaningfully in school *as a child with autism*. No matter how tempting it is to utilize therapeutic resources at school for the purpose of improving the autism so it no longer medically exists, or is so reduced as to appear non-existent, this is a clear overreaching of the IEP process.

Yet, there is no express prohibition of a child obtaining a therapeutic windfall from an educational benefit. If a particular autistic child requires a particular educational program (for example, Applied Behavior Analysis or ABA) in order to receive an appropriate education, and that educational program has the added benefit of removing that child from the autistic spectrum, Congress and the courts will certainly have no objection.

One common problem that arises when parents consult with experts to plan an educational program is that the parents or the expert or both forget to apply the "educational benefit" standard.

Assume parents take their child to a child psychologist for an evaluation. The psychologist diagnoses the child with Attention Deficit Hyperactivity Disorder (ADHD)

and tells the parents that the child "needs an aide" in school. When the parents advise the school that the child needs an aide, the school refuses to provide one.

How will a Hearing Officer decide if the child is legally entitled to an aide?

The decision will depend on many factors but one is most important: is the child able to learn without an aide? If the expert, when recommending the aide, believes that the child likely would be able to learn without an aide, but likely will learn **more** with an aide (the "therapeutic benefit" standard), it is unlikely that the Hearing Officer will award the aide.

If the expert testifies that the child will not receive meaningful educational benefit without an aide (the "educational benefit" standard) and has objective data to support this opinion (the "educational benefit" standard), the Hearing Officer is far more likely to award the aide.

Therefore, parents and the experts they hire must remember that for **educational purposes**, the expert's opinion should address:

- * how the disability affects the child at school; and,
- * how services and interventions can be delivered in the school environment to enable the child to receive an appropriate education.

How Should Parents Choose their Experts?

I. Be clear about why you retained the expert

The most important factor for parents to keep in mind is *why* they are consulting with an expert. This is more easily accomplished if the expert is a school district employee. All reports, tests and opinions completed by school district experts will be for educational purposes.

Parents should never look to school district experts for opinions about the ultimate medical or therapeutic conditions of their disabled children. Not only are districts not required by law to give medical or therapeutic advice: depending on state requirements for practicing medicine, school district employees may be legally prohibited from giving medical or therapeutic opinions.

Therefore, if an IEP team - based upon school testing - determines that a child can receive the *educational label* of autism as a qualifying condition under IDEA, this does not mean that the district employees have *medically diagnosed* the child with autism. In fact, it is more likely that without a medical diagnosis of autism, a school team would be uncomfortable finding a child eligible under the label of autism. To avoid the quagmire of practicing medicine without a license, the team may find the child eligible under "speech/language" or "other health impairment."

If parents do not have a solid medical understanding of their child's disability, they are best served by finding an appropriately licensed person to give current medical tests and evaluations for this purpose. The parents should ask their pediatrician or family doctor for references for such an opinion. These clinical evaluations - whether

physical or psychological - will comply with the "therapeutic standard" explained above: that is, the practitioner and parent will determine what cause of action is in ***the best interest of the child***.

If the parents already have a medical or therapeutic diagnosis and need further testing and opinions about how the disability will affect the child's performance in school, they should secure an educational evaluation of the child. IDEA requires school districts to conduct these evaluations, and in some circumstances, even pay for outside evaluators to administer tests. The results of this evaluation will be used to develop an *appropriate educational program for the child*.

If parents have concerns about the methodology or validity of tests conducted by school district personnel or clinical professionals paid by the district, they are free under IDEA to obtain independent evaluations at their own expense. Reports by independent evaluators will become a part of their child's file and must be considered by the IEP team.

When choosing an expert outside the district, the parents should strive to find a professional who is truly objective. In other words, it is crucial that the expert not have a personal interest in the outcome of the evaluation. This is especially true if the parents anticipate that the IEP team will view the evaluation results unfavorably. Therefore, while it is expected that the expert will fundamentally support the priorities identified by the parents, it is not fatal if the expert disagrees with the parents on minor points. In fact, this demonstrates that the expert is truthful, and is not just acting as a "hired gun".

The expert's opinions and recommendations should be written into a report that is easily understood by a layman (in addition to conversations that the expert may have with IEP team members), and should be supported by objective data about the child. The report must be unambiguous about:

- * the expert's diagnosis of the child's disabilities;
- * the child's need for special education services;
- * specific services recommended by the expert recommends, and,
- * why.

If the expert believes that the child will not be able to learn without specific interventions, the expert must state this in plain language. If the parents are not sure about the strength of their expert's opinion, or whether this opinion relates to a "therapeutic standard" or an "educational standard" they should ask the expert to clarify the opinion.

In cases where the parents or advocate expects the school district to contest the expert's opinion, all parties must keep in mind that the expert is a potential witness and may be expected to testify to their opinion under oath.

II. Keep the expert's qualifications in mind

Although all properly licensed experts are deemed competent to offer advice in their area of expertise, some experts are "more qualified" than others. In other words, certain licensing standards are more persuasive for educational or IEP purposes.

If the expert's opinions and report will be used for educational purposes (that is, to determine an appropriate educational program for the child), an expert who has a background in education, in addition to professional licensing, will usually make a good witness.

For example, licensed clinical psychologists can administer and score psychological tests on disabled children. Licensed clinical psychologists can provide competent advice about how the test results reflect the child's performance in school. If the clinical psychologist is also a licensed ***school psychologist***, this individual may be especially persuasive when explaining to district personnel how the test results should translate into an appropriate educational program for the child. It will also be more difficult for the district to characterize this expert's opinions as "therapeutic" advice, not "educational" advice.

In Summary

Although most parents are very knowledgeable regarding the needs of their disabled children, they are encouraged to get advice from qualified experts. Parents should to keep in mind the purposes for which they are consulting the expert and what they will need in a written report. This additional information will help the parents plan effective medical, therapeutic and educational programs for their disabled child.

When qualified experts provide insights and reports that are useful to the child's IEP team, there is great hope that the resulting educational program will be appropriate and will meet the child's unique educational needs.

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About Jennifer Bollero, Esq.

Ms. Bollero received her undergraduate degree from Northwestern University and her Juris Doctor degree from Loyola University of Chicago School of Law. She is a former member of the adjunct faculty at Elgin Community College Paralegal Program, and serves on the Professional Advisory Committee of the Autism Society of Illinois and the Illinois Attorney General's Special Committee on Special Education. Ms. Bollero is a former special education mediator for the Illinois State Board of Education. She has authored numerous articles on special education and has conducted a variety of seminars on school topics in Illinois and nationally. In her seminars, she teaches how to effectively, calmly, and productively navigate an I.E.P in a way that everyone "Plays well together". She brings years of personal as well as professional experience. She will show us how Playing Hearts Not Poker is in the best interest for our child.

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