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By Reason Thereof: Causation and Eligibility Under the Individuals with Disabilites Education Act

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BY REASON THEREOF: CAUSATION AND ELIGIBILITY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

I. INTRODUCTION

As an adolescent, A.D. suffered from both Attention Deficit Hyperactivity Disorder ("ADHD") and a speech impediment.[1] By the time he entered the seventh grade, A.D. began exhibiting various behavioral problems that eventually led to his placement in the "At Risk" program at his junior high school.[2] The following year, A.D. continued to struggle with behavioral problems at school as he faced traumatic difficulties at home, including the death of his baby brother and increased tensions between himself and his stepfather.[3] During this time, A.D. also began abusing alcohol.[4] Ultimately, the school suspended A.D. for ten days as a result of his increasingly poor behavior and, in particular, an incident in which A.D. robbed a school-sponsored concession stand.[5] Although A.D.'s mother requested special education services for her son on the basis of his ADHD,[6] A.D. was ultimately deemed ineligible for special education by the United States Court of Appeals for the Fifth Circuit because the court concluded that A.D.'s need for services was not caused by his ADHD.[7] This comment explores

1. Alvin Indep. Sch. Dist. v. A.D. *ex rel.* Patricia F., 503 F.3d 378, 379–80 (5th Cir. 2007) (A.D. received special education services on the basis of his speech impediment and his ADHD until he completed the third grade, at which time his mother and the school district agreed that he no longer required such services).

2. *Id.* at 380. The Fifth Circuit did not discuss A.D.'s behavioral problems in much detail. However, the district court's opinion described a pattern of behavior that included "hitting another student's arm, throwing spitballs, throwing pencils, using obscene language, dress code violations, verbal confrontations, and various other disrespectful and disruptive behaviors." Alvin Indep. Sch. Dist. v. A.D. *ex rel.* Patricia F., 2006 WL 2880513, *3 (S.D. Tex. 2006).

3. *Alvin*, 503 F.3d at 380.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 384.

the issue posed in cases like A.D.'s, in which children with qualifying disabilities are denied special education services because a court or other hearing authority determines that their needs for such services are not caused by the disabilities themselves.

Special education law is primarily governed by the Individuals with Disabilities Education Act ("IDEA"),[8] which provides federal funds to state and local education agencies that provide a "free appropriate public education" to students with disabilities.[9] While the IDEA requires a causal link between a qualifying disability and the need for special education services,[10] neither the IDEA itself, nor the federal regulations that implement it, provide guidance on how to interpret this requirement.[11] This comment demonstrates how courts and other hearing authorities may utilize principles of statutory construction and notions of causation derived from tort law in order to confront problems of mixed causation in IDEA eligibility cases in a way that better adheres to the legislative purposes of the IDEA.

Part II of this comment provides background on the IDEA, its history and purpose, and how it defines "a child with a disability." Part II also provides a brief overview of how eligibility determinations are made under the IDEA and the services available to those students who are deemed eligible. Part III provides a more in-depth look at the problem presented in A.D.'s case and other similar cases, and explores different ways courts interpret the IDEA's eligibility provisions when faced with problems of mixed causation. Part III also describes the difficulties inherent in determining the causes of behavioral and academic problems for many students with certain types of disabilities, as well as the consequences that may result when students with certain disabilities fail to receive the services they need. Part IV then uses principles of statutory construction and causation theory derived from tort law to explain how the causation requirement in the IDEA

8. 20 U.S.C. §§1400–1415 (2008). While § 504 of the Rehabilitation Act, 29 U.S.C. §794 (2008), is also relevant to special education law, it is outside the scope of this comment.

9. 20 U.S.C. §1412(a)(1)(A).

10. *See* 20 U.S.C. §1401(3)(A) (the IDEA confers eligibility on those students who have a qualifying disability and who "by reason thereof" need special education).

11. *See* 34 C.F.R. §§300.1–300.818 (2008).

eligibility provisions should be interpreted by courts and other hearing authorities in order to apply the IDEA in accordance with its legislative purpose.

II. BACKGROUND: THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. History and Purpose

Prior to 1975, the future looked bleak for many individuals with disabilities.[12] Hundreds of thousands of disabled persons were housed in state institutions, where they often failed to receive educational or rehabilitative services.[13] Moreover, a lack of resources at many public schools and a widespread failure to diagnose and to understand certain types of disabilities forced many disabled students to venture outside the public education system in search of appropriate educational services.[14] In order to address these problems, Congress enacted the Education for All Handicapped Children Act in 1975.[15] While the Act successfully improved educational opportunities and results for students with disabilities, its implementation was sometimes hampered by inefficient methodologies and low expectations regarding the academic potential of disabled children.[16]

In 1990, the Act was amended and renamed the Individuals with Disabilities Education Act.[17] Congress expanded the class of protected persons "in recognition of the changing dynamics of special education . . . ."[18] These amendments also expanded

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12. *See* Office of Special Education and Rehabilitative Services, U.S. Office of Special Education Programs, HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 2 (2000), *available at* http://www.ed.gov/policy/speced/leg/idea/history.pdf.

13. *Id.* at 2–3.

14. 20 U.S.C. § 1400(c)(2) (2008).

15. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§1400–1415 (1975)). *See* Moira O'Neill, *Delinquent or Disabled? Harmonizing the IDEA Definition of "Emotional Disturbance" with the Educational Needs of Incarcerated Youth*, 57 HASTINGS L.J. 1189, 1200 (2006).

16. 20 U.S.C. §1400(c)(3)–(4) (2008).

17. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101–476, §901, 104 Stat. 1141, 1142 (1990).

18. Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1156 (2007).

the services available under the IDEA and, in particular, added a requirement that transition services be provided to help disabled students depart from the public education system and enter their adult lives.[19] Then, in 2004, Congress reauthorized the IDEA[20] in an attempt to incorporate it more fully into President Bush's No Child Left Behind philosophy.[21]

In reauthorizing the IDEA, Congress stated in its findings that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[22] Furthermore, Congress identified protecting the rights of all disabled children and their parents,[23] as well as providing all disabled children an education designed to meet their unique needs, as purposes of the reauthorized IDEA.[24] Unfortunately, current interpretation of the causal link required by the IDEA's eligibility provision has caused the IDEA to fall out of line with these purposes.

B. Defining a "Child with a Disability"

In order to be eligible for special education and related services, a student must be a "child with a disability."[25] The IDEA defines a "child with a disability" as a child having "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . and who, *by reason thereof*, needs special education and related services."[26] Although these provisions may appear easy to

19. Cynthia L. Kelly, *Individuals with Disabilities Education Act – The Right 'IDEA' for All Children's Education*, 75 J. KAN. B.A. 24, 25 (2006).

20. 20 U.S.C. §§1400–1415 (2008).

21. Nicholas L. Townsend, *Framing a Ceiling As a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229, 255-56 (2007). The No Child Left Behind philosophy emphasizes equality of educational opportunity with results measured by performance on state academic proficiency assessments. *See*, 20 U.S.C. §6301 (2008).

22. 20 U.S.C. §1400(c)(1).

23. 20 U.S.C. §1400(d)(1)(B).

24. 20 U.S.C. §1400(d)(1)(A).

25. 20 U.S.C. §1414(a)(1)(B).

26. 20 U.S.C. §1401 (2008) (emphasis added). Each of the qualifying disabilities is

interpret, they pose significant challenges for courts and other authorities charged with determining eligibility for special education and related services because of the lack of clear guidance in the IDEA with respect to many of the key terms used in these provisions and in the federal regulations that implement them.[27] Although several of these challenges have been explored in commentary,[28] the causal link required by the "by reason thereof" language has been left untouched by commentators.

One possible explanation for the lack of discussion surrounding the "by reason thereof" requirement may be the belief that the requirement of causation has been incorporated into another eligibility requirement of the IDEA.[29] The IDEA-implementing federal regulations require in the definition of each of the enumerated disabilities that the student's particular disability "adversely affect" the student's academic performance.[30] For example, although "speech impairment" is listed in the federal regulations, a student's speech impairment must "adversely affect [the student's] educational performance" in order for it to rise to the level of a qualifying disability.[31]

Once a hearing officer determines that a student's speech impairment "adversely affects" his academic performance, it may seem obvious to that officer that the student needs special education services "by reason of" that speech impairment. While it may appear that these two requirements are asking the same question, they are the subjects of very different debates over interpretation. With respect to the requirement that a disability "adversely affect" a student's "educational performance," controversies have formed over how broadly the term "educational performance" should be construed and over

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enumerated and further defined in the IDEA-implementing federal regulations. *See* 34 C.F.R. §300.8(c)(1)–(13) (2008).

27. Robert A. Garda, Jr., *Who is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 292 (2006) ("These apparently simple provisions are in fact among the most complex requirements of IDEA.").

28. *Id.*; Robert A. Garda Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441 (2004); Hensel, *supra* note 18.

29. *See* Garda, *supra* note 27, at 294 (noting that, because the IDEA-implementing federal regulations require the disability to adversely affect the student's educational performance in order for eligibility to attach, "most courts and hearing officers identify only a two-part test for IDEA eligibility").

30. *See* 34 C.F.R. §300.8(c)(1)–(13) (2008).

31. 34 C.F.R. §300.8(c)(11).

how "adverse" the effects of a student's disability must be on that performance.[32] Although the "by reason thereof" requirement has not yet been fully explored, courts struggle to define the term "need" as it is used in that subsection of the IDEA eligibility provisions as a separate requirement from the "adversely affects" requirement.[33] Moreover, it is important to recognize that these requirements are actually two separate elements of IDEA eligibility, both as a matter of statutory construction[34] and as a matter of judicial precedent.[35] Therefore, in order to be considered eligible for special education services, a student must (1) have an enumerated disability, (2) that adversely affects his educational performance, *and* (3) by reason thereof, need special education services.

Further complicating the issue of causation in many IDEA eligibility cases is the fact that many of the definitions of qualifying disabilities incorporate additional elements of causation beyond the "adversely affects" requirement. For example, a student with autism will not be classified as autistic under the IDEA-implementing federal regulations if that student's academic performance is adversely affected primarily because of an "emotional disturbance."[36] The definition of "emotional disturbance," in turn, specifically excludes from eligibility those students whose problems are caused by "social maladjustment," a term that is not defined in either the federal regulations or by experts in the field.[37] Similarly, the definition of "specific learning disability" excludes students whose

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32. *See generally,* Garda, *supra* note 27, at 295–306 (identifying a number of disagreements among courts with respect to those terms).

33. *Id.* at 306–315.

34. *See infra* notes 107–110 and accompanying text (explaining that, as a matter of statutory construction, the words "by reason thereof" must be given their due effect as the words chosen by the legislature in crafting the IDEA).

35. *See* Mr. I. *ex rel.* L.I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 13 (1st Cir. 2007) (distinguishing the "adversely affects" requirement from the "by reason thereof" requirement) (citing Mark C. Weber, *Special Education Law and Litigation Treatise* § 2.2(1) at 2:4 (2d ed. 2002); Garda, *supra* note 28, at 490-91).

36. 34 C.F.R. §300.8(c)(1)(ii) (2008).

37. 34 C.F.R. §300.8(c)(4)(ii) (2008). *See, e.g.*, Kenneth W. Merrell and Hill M. Walker, *Deconstructing a Definition: Social Maladjustment Versus Emotional Disturbance and Moving the EBD Field Forward*, 41(8) PSYCHOL. SCH. 899, 901 (2004). ("[T]he description of this construct has been left to individuals and organizations within the field, as well as to the state and local education agencies responsible for implementing special education services . . . However, there has never been a single description of [social maladjustment] that has been universally recognized."). *Id.*

learning problems are caused by "environmental, cultural, or economic disadvantage[s]."[38]

These definitions, while making the determination of causation and eligibility even more complicated for courts, can also provide another means—beyond incorporation of causation into the "adversely affects" requirement—for some authorities to deny eligibility on causation grounds without directly referencing the "by reason thereof" requirement. For example, the exclusion of "social maladjustment" from the definition of "emotional disturbance" in the federal regulations may allow authorities to exclude from eligibility those students whose behavioral problems may at least partially stem from external contributing factors (i.e., drug use, sexual abuse, or problems at home). One such case involved a young man identified as M.C.[39]

When M.C. was in the seventh grade, a male cousin began sexually abusing him.[40] The abuse escalated over the next two years, despite a protective order against the cousin.[41] When he was in the ninth grade, M.C. was diagnosed with ADHD.[42] During the 2002-2003 school year, when M.C. was in the tenth grade, he was suspended three times: once for fighting, once for assaulting a fellow student, and once for marijuana possession.[43] Amid this flurry of suspensions, M.C.'s parents requested special education services for their son from the school district's Committee on Special Education ("CSE").[44] In May 2003, the CSE determined that M.C. was not eligible for special education services under the IDEA because he failed to meet the criteria for classification as emotionally disturbed.[45]

A second CSE meeting in July of that year affirmed the determination of ineligibility.[46] Although the second CSE meeting was the first time the evidence of M.C.'s past sexual abuse was brought to light,[47] "[t]he CSE believed that it was

38. 34 C.F.R. §300.8(c)(10)(ii) (2008).

39. N.C. *ex rel.* M.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532 (S.D.N.Y. 2007).

40. *Id.* at 535.

41. *Id.*

42. *Id.* at 536.

43. *Id.*

44. *Id.*

45. *M.C.*, 473 F. Supp. 2d at 537.

46. *Id.* at 538.

47. *Id.* at 537.

M.C.'s drug use that caused his deterioration, rather than the sexual abuse."[48] This view was echoed by the Independent Hearing Officer ("IHO") in February 2004.[49] For M.C., this distinction, with respect to causation, meant the difference between eligibility via classification as "emotionally disturbed" and exclusion via classification as "socially maladjusted."[50]

When the case finally reached the United States District Court for the Southern District of New York, the district court continued to cite drug abuse as the cause of M.C.'s problems at school.[51] While the court conceded that there was "disagreement among the various professionals who treated M.C. about the extent of his psychological problems and the role that his drug use played in his state of mind,"[52] the court nonetheless concluded that M.C. was not eligible for services under the IDEA.[53] M.C.'s case demonstrates one more way courts currently confront the complexity of causation issues in IDEA eligibility cases, even without explicit reference to the "by reason thereof" provision.

C. Making Eligibility Determinations[54]

The road to accessing special education services begins with an evaluation of the student.[55] A written request for an evaluation of the student may be made by the student's parent(s) or by a state or local education agency.[56] During the evaluation, the educational agency employs a variety of methodologies in an effort to determine whether the student is suffering from a qualifying disability and, if so, the educational

48. *Id.* at 538–39.

49. *Id.* at 539. ("In sum, IHO Kandilakis agreed with the analysis that drug use, and not sexual abuse, was the reason for M.C.'s 'downward spiral' and that a classification as emotionally disturbed was inappropriate and unnecessary.").

50. *Id.* at 545.

51. *M.C.*, 473 F. Supp. 2d at 543.

52. *Id.* at 545.

53. *Id.* at 547.

54. An in-depth examination of the process of requesting and receiving special education services under the IDEA is outside the scope of this comment. Therefore, this section will merely attempt to provide a brief overview of the process by highlighting those features most relevant to the comment's discussion of eligibility determinations in cases of mixed causation. *See* 20 U.S.C. §1414 (2008) (detailing the evaluation and eligibility process); 34 C.F.R. 300.502 (2008) (describing procedural safeguards).

55. 20 U.S.C. §1414(a)(1)(A) (2008).

56. 20 U.S.C. §1414(a)(1)(B).

needs of the student.[57] Once the evaluation is complete, a determination of eligibility is made.[58] If the party seeking special education services disagrees with the outcome of the evaluation, he or she may request an Independent Educational Evaluation ("IEE").[59] If such a request is made, the school or agency must respond either by paying for a new evaluation by an independent examiner or by showing at a due process hearing that the initial evaluation of the student reached the appropriate result.[60]

Ultimately, after exhausting the administrative remedies provided for in the IDEA, either party may file a civil action in federal district court.[61] Because federal courts lack expertise regarding the educational needs of children with disabilities, they rely on the fact-finding done by state and local education agencies during the administrative portion of the process.[62] In fact, these agencies are often given significant deference by the courts.[63] However, both the administrative proceedings and the federal court proceedings in IDEA eligibility cases can easily collapse into contests of dueling experts due to the difficulties inherent in determining the causes of many types of disabilities.[64] Nevertheless, some hearing authorities appear to be capable of reaching nuanced conclusions with respect to causation in IDEA eligibility cases.[65]

D. Special Education Services

According to the IDEA, special education consists of

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57. 20 U.S.C. §1414(b)(2)(A).

58. 20 U.S.C. §1414(b)(4).

59. 34 C.F.R. §300.502(b)(1) (2008).

60. 34 C.F.R. §300.502(b).

61. 20 U.S.C. §1415(i)(2)(A) (2008).

62. *See, e.g.*, Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989) (stating that this reliance on administrative fact-finding is necessary in order to fulfill the purposes of the IDEA) (citing Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

63. *See, e.g.*, Bd. of Educ. of Montgomery County, Md. v. S.G., 230 Fed. Appx. 330, 331 (4th Cir. 2007); P.R. v. Woodmore Local Sch. Dist., 256 Fed. Appx. 751, 753; P.R. & B.R. *ex rel.* C.R. v. Woodmore Local Sch. Dist., 2007 WL 4163857, *3 (6th Cir. 2007) (stating that "[m]ore weight is due to an agency's determination on matters for which educational expertise is relevant" (quoting Bd. of Educ. of Fayette, Ky. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007))); R.B. *ex rel.* F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 937 (9th Cir. 2007) (according due deference to the careful and thorough findings of the administrative agency).

64. *See infra* Part III.B.

65. *See infra* notes 90-91 and accompanying text.

"specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[66] The primary mechanism for delivery of these services is the Individualized Education Program ("IEP").[67] An IEP is defined in the IDEA as a written statement for each student with a disability that includes the student's present level of performance, annual goals to be met by the student, and a statement of the special education services to be provided to that student so that he or she may achieve those goals.[68] Courts, however, disagree as to the amount of modification necessary to transform general education into special education.[69]

Differing interpretations of what qualifies as "special education" play a role in IDEA eligibility determinations. For example, the Eighth Circuit has adopted the view that any modification to the general education constitutes "special education" for purposes of the IDEA.[70] Therefore, an authority applying the Eighth Circuit's approach would find a student eligible for special education services if the student could show that by reason of his qualifying disability he needed even a slight modification to the general education curriculum. On the other hand, the California State Educational Agency has held that a student who required a variety of modifications to the general education program was ineligible under the IDEA because the modifications did not constitute "special education," so long as they were "services offered within the regular instructional program."[71]

III. THE PROBLEM

A. Confronting the Problem of Mixed Causation

In A.D.'s case, the United States Court of Appeals for the Fifth Circuit emphasized the requirement of a causal link between a qualifying disability and the need for special education services in determining that A.D. was not eligible for

66. 20 U.S.C. §1401(29) (2008).
67. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 311 (1988).
68. 20 U.S.C. §1414(d) (2008).
69. Garda, *supra* note 27 at 320-21.
70. Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1374 (8th Cir. 1996).
71. Mountain Empire Unified Sch. Dist., 36 IDELR 29 (Cal. SEA 2001).

special education under the IDEA.[72] In May 2005, A.D.'s mother requested special education services for her son as well as a due process hearing with an independent hearing officer.[73] Six months later, the hearing officer concluded that A.D. qualified under the IDEA as a "child with a disability," and was therefore entitled to special education services.[74]

The school district appealed the hearing officer's decision to a federal district court that concluded that "A.D. did not need special education services *by reason of* his ADHD," and was therefore ineligible for those services.[75] On appeal, the Fifth Circuit affirmed the district court's conclusion that A.D. was not eligible for special education.[76] The court agreed with the school district's argument that "much of A.D.'s behavioral problems derived from non-ADHD related occurrences, such as alcohol abuse and the tragic death of A.D.'s brother. Thus . . . any educational need is not *by reason of* A.D.'s ADHD . . . ."[77]

Despite the emphasis placed on the "by reason thereof" requirement in A.D.'s case, the requirement has been overlooked by other authorities.[78] For example, in determining whether a student with Attention Deficit Disorder ("ADD") was entitled to special education services, the United States District Court for the Eastern District of Pennsylvania framed the issue as follows: "Acknowledging that ADD is a specifically named disability in the federal regulations, the District concedes that the remaining issue related to IDEA is whether or not [the student] needs special education."[79] In this instance, framing the issue so narrowly reduces the IDEA eligibility inquiry to a two-factor test that does not require a causal link between the two factors.

When this approach is contrasted with the approach taken by the Fifth Circuit in A.D.'s case, the inequity becomes clear.

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72. *Alvin*, 503 F.3d at 384.

73. *Id.* at 380.

74. *Id.* at 381.

75. *Id.* (emphasis added) (this conclusion appears to imply that although the district court believed that A.D. needed services, it did not believe that his need was caused by his ADHD. The court, however, did not make this point clear).

76. *Id.* at 384.

77. *Id.* (emphasis added) (In reaching this conclusion, the Fifth Circuit did not clarify how much of a role, if any, it believed ADHD had played in A.D.'s behavioral problems.).

78. *See Garda*, *supra* note 29 at 294.

79. W. Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417, 420 (E.D.Pa. 2002).

A party seeking special education services from an authority in the Eastern District of Pennsylvania would need only show that the student (1) suffers from a qualifying disability and (2) needs special education services.[80] On the other hand, the Fifth Circuit approach requires proof of a third element: the party requesting services must show that the need for special education services has been caused by the disability and not by other factors such as drug abuse, sexual abuse, or family trauma.[81]

The Ninth Circuit has noted, on at least one occasion, that the problem posed by cases like A.D.'s has already been resolved by the IDEA-implementing federal regulations.[82] In *Capistrano Unified School District v. Wartenberg*, the student at issue, Jeremy, had been diagnosed with ADD and a conduct disorder.[83] Jeremy began receiving special education services in the second grade, however, those services were provided to address an unrelated diagnosis of a visual/motor impairment.[84]

As Jeremy got older, his behavior and academic performance worsened, and he became increasingly aggressive.[85] Jeremy's physicians indicated that there were "both behavioral and neurochemical contributors" to his distractibility and impulsiveness, and that he required a highly structured learning environment.[86] An IEP was developed for Jeremy based on this information; however, Jeremy continued to fail the majority of his classes.[87] When the school responded by offering Jeremy a new IEP that actually decreased the services provided to him, his parents filed for a due process hearing.[88]

At the hearing, the school's expert psychologist disagreed with the previous diagnoses, and stated that he believed Jeremy's problems at school were the result of willful misbehavior.[89] The hearing officer, taking the expert testimony into consideration, determined that Jeremy's poor academic

80. *Id.*
81. *Alvin*, 503 F.3d at 384.
82. Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 893 (9th Cir. 1995).
83. *Id.* at 886.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 887.
88. *Capistrano*, 59 F.3d at 887.
89. *Id.* at 887–88.

performance was caused by his ADD, not willful misbehavior, but that "the two causes could not be separated out."[90] The hearing officer found that "[s]ome of Jeremy's misbehavior might be due to his conduct disorder, rather than his specific learning disability, but his deficit in attention was a substantial cause of his behavioral problems, and Jeremy's social and emotional problems could not be separated out from the symptoms associated with his specific learning disability."[91] Therefore, the hearing officer concluded that the plan offered by the school district was inappropriate.[92] The district court affirmed this conclusion.[93]

On appeal, the Ninth Circuit affirmed and held that in cases where a student's academic problems are caused by both a qualifying disability and outside factors such as willful misconduct, the IDEA-implementing federal regulations require that the student be classified as having a "specific learning disability."[94] However, that reading of the definition of "specific learning disability" has not been followed by other circuits who have dealt with this problem of mixed causation. Moreover, the Ninth Circuit's reasoning does not appear to be supported by the federal regulations, upon which the court claimed to be relying.[95]

These differing approaches, combined with the intricate web of causation requirements found both in the IDEA and the federal regulations, demonstrate the difficulty courts have had in interpreting the causal link required by the "by reason thereof" language. The courts struggle most in cases where the relationship between the student's need for services and his disability is not immediately apparent, or has been clouded by outside contributing factors like drug and/or alcohol abuse, past sexual abuse, or other problems at home.

B. What Causes a Student's Behavioral and Academic Problems?

Students with emotional disabilities, learning disabilities, and other health impairments (like ADHD) are the most likely

90. *Id.* at 888–89.
91. *Id.* at 889.
92. *Id.*
93. *Id.* at 890.
94. *Capistrano*, 59 F.3d at 893–94.
95. 34 C.F.R. §300.8(c)(10) (2008).

to be affected by the problem of dueling experts in IDEA eligibility cases because those particular disabilities, and the causes behind them, are the least readily observable and the least understood.[96] Modern psychology and psychiatry have yet to devise a method for pinpointing the exact cause of behavioral and learning disabilities.[97] Throughout the IDEA reauthorization process, members of Congress expressed concerns that the category of "specific learning disabilities" was too broad and amorphous to be properly understood and applied.[98] Based on the inability of experts to fully understand certain types of disabilities, it seems unreasonable for courts to attempt to reduce the IDEA eligibility inquiry into a search for a single cause, or to require that the disability be the only factor giving rise to the need for services. However, as demonstrated by the hearing officer's findings in *Capistrano*,[99] authorities are willing to make distinctions about the roles that various qualifying and non-qualifying causes may play in a student's behavioral and academic problems, without ultimately tying causation to any single factor.

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96. Hensel, *supra* note 18, at 1164 ("The three categories of impairment which are most intangible to the casual observer serve most often as the subject of eligibility disputes: OHI, SLD, and serious emotional disturbance"). OHI, or "other health impaired," is a classification used in the IDEA to describe a student who exhibits "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment" due to a chronic illness. *See* 34 C.F.R. §300.8(c)(9) (2008). Notably, ADHD qualifies as an "other health impairment." 34 C.F.R. §300.8(c)(9)(i). SLD, or "specific learning disability" is defined in the federal regulations 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." 34 C.F.R. §300.8(c)(10). According to the regulations, a "serious emotional disturbance" is a condition that results in a student's inability to learn, form interpersonal relationships, and behave appropriately under normal circumstances. 34 C.F.R. §300.8(c)(4).

97. Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1338 (2005) ("Although many disciplinary distinctions remain, it is fair to say that modern scholarship in both psychology and psychiatry recognizes that the nature and causes of behavioral problems not only vary from one category to the next, but also from individual to individual."). *See also*, Cynthia A. Dietrich & Christine J. Villani, *Functional Behavioral Assessment: Process Without Procedure*, 2000 BYU EDUC. & L.J. 209, 211 (2000) (stating that "[t]here is no single cause for behavioral problems" and that identical behavioral problems exhibited by different students are likely to be caused by different factors).

98. Hensel, *supra* note 18, at 1154.

99. *See supra* notes 90-91 and accompanying text.

C. What's At Stake?

The lack of clarity and uniformity with respect to both the causes of a student's problems at school, as well as the "by reason thereof" language, can have serious social consequences, especially for those students with disabilities that are less-easily understood. For example, students who are emotionally disturbed are more likely to drop out of high school and to be arrested within a few years of leaving high school.[100] Failure to identify, evaluate, and serve students with these types of disabilities may represent the loss of the critical last chance to keep them from entering the juvenile—and ultimately, the criminal—justice system.[101] While estimates vary, evidence suggests that a large percentage of incarcerated individuals suffer from an emotional disturbance, a learning disability, or both.[102] Moreover, students with emotional disabilities are "twice as likely as other students with disabilities to be living in a correctional facility, halfway house, drug treatment center or 'on the street' after leaving school."[103] This problem is termed by some as the "school-to-prison pipeline," in which students who fail to receive the services they need at school are pushed out of the public education system and into the criminal justice system.[104] The consequences demonstrate just how critical the need for a clear interpretation of the IDEA eligibility provisions is.

IV. ANALYSIS

Despite Congress's own assertion that equality of opportunity for individuals with disabilities was an important national policy driving the reauthorization of the IDEA,[105] the varying interpretations of the IDEA's eligibility provision do not further this policy. Equal opportunities for children with

100. Weithorn, *supra* note 97, at 1358.

101. *Id.* at 1359.

102. O'Neill, *supra* note 15, at 1190. *See also* DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, NAACP Legal Defense and Educational Fund, 6, *available at* http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf.

103. SPLCenter.org, Southern Poverty Law Center—Legal Action, *School-to-Prison Pipeline: Stopping the School-to-Prison Pipeline by Enforcing Special Education Law*, http://www.splcenter.org/legal/schoolhouse.jsp. (last visited Oct. 4, 2008).

104. *See supra* notes 101–102.

105. *See supra* note 22 and accompanying text.

disabilities cannot be achieved when students requesting special education services from different authorities are held to different standards.[106] The approaches advocated in this comment use principles of statutory construction and tort causation in order to bring the IDEA back in line with its legislative intent—equal educational opportunities for children with disabilities.

A. Statutory Construction

When the language of a statute is unambiguous, the words should be given their ordinary meaning.[107] The plain language of the IDEA eligibility provisions suggests some sort of a causal relationship between a student's disability and his need for services, but the precise nature of this relationship remains ambiguous, as evidenced by the varying interpretations of the "by reason thereof" language.[108] This ambiguity should be resolved by looking at the plain meaning of the words employed by Congress in the statute, in light of Congress's purpose in enacting the IDEA.[109]

Over 100 years ago, the United States Supreme Court laid down the enduring principle that, when interpreting statutory language, courts are obligated to give meaning to every word and clause of the statute.[110] The approach employed by the

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106. *See supra* Part III.A.

107. *See, e.g.*, Caminetti v. U.S., 242 U.S. 470, 485 (1917) (citing Lake County v. Rollins, 130 U.S. 662, 670–71 (1889); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 33 (1895); U.S. v. Lexington Mill & Elevator Co., 232 U.S. 399, 409 (1914); U.S. v. First Nat'l Bank, 234 U.S. 245, 258 (1914)). *See also*, Park N' Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by the Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

108. *See supra* Part III.A. *See also*, *supra* Part II.B.

109. *See*, U.S. v. American Trucking Ass'ns., 310 U.S. 534, 542 (1940); *In re* Whitaker Constr. Co., Inc., 411 F.3d 197, 204 (5th Cir. 2005) (stating that "[t]he fundamental question in all cases of statutory construction is legislative intent and the reasons that prompted the legislature to enact the law."); *In re* Charter Comm'ns, Inc., 393 F.3d 771, 782 (8th Cir. 2005) (stating that "[t]o the extent that [a statute] . . . is fairly seen to be subject to different interpretations, it is ambiguous, and any ambiguity must be resolved by looking to the intent of Congress in its enactment of the legislation.").

110. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."). This principle has been reaffirmed in more recent cases. *See, e.g.*, Miller v. U.S., 363 F.3d 999, 1008 (9th Cir. 2004) (noting that "[c]ourts must aspire to give meaning to every word of a legislative enactment . . . ."); Nutraceutical Corp. v.

United States District Court for the Eastern District of Pennsylvania,[111] for example, clearly violates that principle. That court reduced the eligibility inquiry to a two-step process by stating that once a student demonstrates that he suffers from a qualifying disability, all he must prove is a need for special education services.[112] As a matter of statutory construction, however, the "by reason thereof" language of the IDEA eligibility provision may not be ignored.

On the other hand, the approach used by the Fifth Circuit in A.D.'s case also contradicts principles of statutory construction.[113] The Fifth Circuit concluded that A.D. was not eligible for special education services under the IDEA because the court was able to identify factors other than his ADHD that contributed to his need for services.[114] In other words, the Fifth Circuit appeared to be interpreting the "by reason thereof" language to mean "*solely* by reason thereof." However, the Supreme Court has proclaimed that a court may not interpret a statute by adding its own words to it.[115]

Congress has stated that one of the driving purposes of the IDEA is to ensure that all children with disabilities are provided an equal opportunity to receive an appropriate education, designed to meet their unique needs.[116] A narrow reading of the IDEA eligibility provision that excludes those students whose needs are not caused *solely* by a qualifying disability from special education services runs contrary to this legislative purpose. Instead, courts and other hearing

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Von Eshcenbach, 459 F.3d 1033, 1039 (10th Cir. 2006) (stating that "this rule embodies the belief that Congress would not have included superfluous language."); Lowery v. Ala. Power Co., 483 F.3d 1184, 1204 (11th Cir. 2007) (citing Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 166–68 (2004); Juggernauth v. U.S. Att'y Gen., 432 F.3d 1346, 1354 (11th Cir. 2005).

111. *See supra* note 79 and accompanying text.

112. *Bruce C.*, 194 F. Supp. 2d at 420.

113. *See supra* notes 72–77 and accompanying text.

114. *Alvin*, 503 F.3d at 384.

115. 62 Cases, Etc. v. U.S., 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."). This principle has also withstood the test of time. *See, e.g.*, Eubanks v. Wilkinson, 937 F.2d 1118, 1125 (6th Cir. 1991) (stating that "[c]ourts generally do not add words of limitation to statutes because they are aware of the dangers of intruding on the legislative function."); Water Quality Ass'n Employees' Benefit Corp. v. U.S., 795 F.2d 1303, 1309 (7th Cir. 1986) (stating that "courts have no right first to determine the legislative intent of a statute and then, under the guise of interpretation, proceed to either add words to or eliminate other words from the statute's language.").

116. 20 U.S.C. §1400(d)(1)(A) (2008).

authorities faced with IDEA eligibility determinations should be more open to cases of mixed causation, while still requiring that the qualifying disability play some role in the student's need for special education services.

In order to determine how much of a role the disability must play, courts should look to tort law analyses. Tort law provides the most comprehensive understanding of the issue of causation.[117] There is no reason to believe that Congress desired the IDEA to require a stronger relationship than the basic cause-in-fact relationship. If it had, Congress would have included stronger language defining the precise relationship required by the IDEA. Moreover, principles of causation derived from tort law have been used in other contexts to interpret statutory language.[118] Therefore, in IDEA eligibility cases involving mixed causation, courts should look to traditional tort analyses of cause-in-fact to determine whether the student is eligible for special education services.

B. Tort Law Causation as Applied to the IDEA

The Restatement Second of Torts defines cause as conduct that "is a substantial factor in bringing about the harm."[119] Despite this relatively straight-forward definition, causation is described as one of the most elusive concepts in all of tort law.[120] Over time, courts have developed a variety of tests for causation to address various factual scenarios, but not all of these analytical frameworks are appropriate for use in the IDEA eligibility context. For example, while the courts developed both "cause-in-fact" and "proximate cause" as causation inquiries, the analysis in this comment focuses solely on the "cause-in-fact" question. "Proximate cause," which was developed as a means of limiting liability, has no role to play in the context of IDEA eligibility determinations, where the primary inquiry involves what is causing, as a matter of fact,

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117. *See supra* Part IV.B.

118. *See, e.g.*, Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267–68 (1992) (discussing how courts have incorporated principles of proximate causation into their interpretations of the Sherman Act as well as the civil RICO statute).

119. RESTATEMENT (SECOND) OF TORTS §431 (1965).

120. Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1737 (1985) ("[T]he causation requirement has resisted all efforts to reduce it to a useful, comprehensive formula and has been the subject of widely divergent views concerning its nature, content, scope, and significance.").

the student's need for special education services.[121]

The most common test for cause-in-fact attributes causation to an act "if and only if, but for the act, the injury would not have occurred."[122] For example, *A* runs a red light and hits *B*. If *A* had not run the red light, *B* would not have suffered the injury. Now imagine an IDEA eligibility case involving a student who suffers from ADHD and needs special education services. No outside contributing factors like drug abuse or problems at home are identified as possible causes of the student's need. The court or hearing officer determines that, without the ADHD, the student would not need services. In that case, the ADHD would be considered a "but for" cause of the student's need for special education services because, just as in the case of *A* and *B*, if the alleged cause were removed, the result would no longer exist. Applying this straightforward causation analysis, the court or hearing officer could safely conclude that the IDEA's causation requirement is met because the student needed services *by reason of* his ADHD. Therefore, the student would be considered eligible for special education services.

However, as seen in A.D.'s case, IDEA-eligibility cases often pose more complex causation problems. One such situation that tort law has dealt with is the alternative causation problem, where only one of two or more independent factors produces the result, but the plaintiff is unable to determine which one it is. This problem was famously resolved by the California Supreme Court in *Summers v. Tice*.[123] In that case, the plaintiff suffered injuries to his eye and upper lip when the two other men whom the plaintiff had been out hunting with shot in his direction.[124] Although the court determined that only one of the defendants could have caused the injury, the plaintiff was unable to identify which one of the defendants had fired the shot that wounded him.[125] Ultimately, the California Supreme Court shifted the burden to each of the defendants to prove that he was not at fault.[126] The Restatement (Second) of

121. *See*, JOSEPH W. GLANNON, THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS 130 (3d ed. 2005).

122. Wright, *supra* note 120, at 1775 ("The most widely used test of actual causation in tort adjudication is the but-for test.").

123. Summers v. Tice, 199 P.2d 1 (Cal. 1948).

124. *Id.* at 1–2.

125. *Id.* at 2–3.

126. *Id.* at 5.

Torts subsequently adopted this approach for use in similar situations.[127]

This approach, however, is not likely to be helpful in IDEA eligibility cases where a number of factors are at play and it is unclear how many of them actually contributed to a student's need for special education services.[128] The burden-shifting approach used in this type of negligence case is also not practical in IDEA eligibility cases because the court cannot literally ask the disability and other factors to prove that they have not caused the need for special education services. Although courts could employ the Restatement's approach by shifting the burden of proving causation to the party challenging the request for special education services, the Supreme Court has held that parents hold the burden of proving violations of the IDEA.[129]

Furthermore, the purposes for employing this approach are different from the purposes of the IDEA. According to the California Supreme Court in *Summers*, the burden-shifting approach is necessary in alternative causation cases in order to avoid the injustice of requiring the innocent plaintiff to prove the apportionment of liability for his injury.[130] However, the IDEA is not concerned with apportioning liability for the student's need for special education services. Instead, the IDEA recognizes that "[d]isability is a natural part of the human experience" and seeks primarily to improve academic outcomes for children with disabilities.[131] Therefore, this particular analytical framework is not applicable to IDEA eligibility cases.

The concurrent causation analysis, however, applies to cases where multiple factors have acted in concert to produce a single result.[132] The analysis for concurrent causation hinges on the sufficiency of the causes. In the case of concurrent

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127. *See*, RESTATEMENT (SECOND) OF TORTS §433B(3) (1965).

128. *See supra* note 96 and accompanying text.

129. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 51 (2005). Prior to this decision, the issue of who had the burden of proof in IDEA cases was hotly contested. For a fuller discussion of that issue, see Charles J. Russo & Allan G. Osborne, Jr., *The Supreme Court Clarifies the Burden of Proof in Special Education Due Process Hearings:* Schaffer ex rel. Schaffer v. Weast, 208 ED. L. REP. 705 (2006).

130. *Summers*, 199 P.2d at 5.

131. 20 U.S.C. §1400(c)(1) (2008).

132. *See, e.g.* Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 705 (Cal. 1989) (defining "concurrent causation" as a situation in which two separate factors "simultaneously join together to produce injury.").

dependent causes, neither of the factors would have been sufficient on its own to produce the result. For example, imagine that a student suffers from an emotional disturbance and recently began abusing alcohol. A hearing officer determines that the emotional disturbance on its own would not have caused the need for services because the student did not need services before he began abusing alcohol. The officer also concludes that the independent effects of the alcohol abuse—without taking into consideration the effects of the emotional disturbance—did not cause the need for special education services. However, now that the two conditions have combined, the student's behavior and academics are impacted in such a way that he needs special education services.

In this example, both the emotional disturbance and the alcoholism would be considered "but for" causes of the student's need for special education services. If either of those factors were subtracted from the equation, the need for services would no longer exist. Therefore, the need must be "but for" each of the factors. A court or hearing officer presented with this type of situation should conclude that the student is eligible for special education services because, although the non-qualifying condition has played a role in his need for services, the qualifying disability is a cause-in-fact of his need.

The more difficult, but perhaps more appropriate, analysis for IDEA eligibility cases involves concurrent independent causation, in which neither of the factors can be said to be a "but for" cause of the result. Consider the following example: two defendants who are unaware of each other negligently start fires. The fires simultaneously reach and destroy the plaintiff's house. In that case, neither fire would be a "but for" cause of the damage because eliminating either from the equation would not eliminate the result. If Defendant 1 had not started his fire, the plaintiff's house would nevertheless have been destroyed by the fire set by Defendant 2, and vice versa.[133] The Restatement (Second) of Torts deals with this situation by considering both fires to be "substantial factor[s]" in producing the result.[134] Because the Restatement defines legal cause as conduct that is a substantial factor in producing

133. *See* Anderson v. Minneapolis, 179 N.W. 45 (Minn. 1920) (example derived from this case).

134. *See* RESTATEMENT (SECOND) OF TORTS §432(2), illus. 3 (1965).

the result,[135] both defendants would be held liable for the plaintiff's injury.

In the IDEA eligibility context, consider a case in which a student is diagnosed with a specific learning disability and has also suffered years of sexual abuse. The court determines that even if the student did not have a learning disability, the effects of the abuse would have been severe enough on their own to have caused a need for special education services. This means that the learning disability would not be a "but for" cause of the need for services because removing it from the scenario would not eliminate the result. On the other hand, the court also determines that, had the student not been sexually abused, the student's learning disability would have independently caused a need for special education services. That means that the sexual abuse would not be a "but for" cause either.

However, a court faced with this problem should employ the analytical framework used in concurrent independent causation cases. Both the learning disability and the sexual abuse should be considered substantial factors in causing the need for special education services. Therefore, the student should be considered eligible for special education services.

These analytical frameworks, derived from tort law, provide courts and other hearing authorities faced with the problem of mixed causation in IDEA eligibility cases with a clearer basis for determining whether a student's need for special education services is "by reason of" his disability. Since principles of statutory construction require that the "by reason thereof" language be given its due effect,[136] these tort causation frameworks provide a way for courts to "show their work" with respect to that requirement. Although there will almost certainly be some cases in which the effects of a qualifying disability are so small that the student should be considered ineligible, these frameworks provide guidance for determining eligibility in cases that are too close to call.

V. CONCLUSION

Although a hearing officer had previously concluded that

135. RESTATEMENT (SECOND) OF TORTS §431.

136. *See supra* Part IV.A.

A.D. was eligible for special education services, the Fifth Circuit held that he was ineligible because his need for services was not *by reason of* his ADHD. The court, however, did not explain how it reached that particular result. Other courts and authorities, believing that the "adversely effects" requirement incorporates the "by reason thereof" requirement, completely overlook the "by reason thereof" requirement for IDEA eligibility, in violation of principles of statutory construction. These interpretations not only have serious social consequences, but they also fail to apply the IDEA in conformity with the purpose Congress intended for the Act, providing services to students who need them. However, by following the principles of statutory construction and causation discussed in this comment, courts and hearing officers can begin to interpret and apply the IDEA eligibility provision in a way that enhances the educational experience and provides adequate and appropriate opportunities for all children with disabilities.

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