

EDUCATION OPINION FOR CUSTODY EVALUATORS, COURTS, AND ATTORNEYS: A STANDARD FOR EXPERTS TO FOLLOW

Mark A. Burdick, Ph.D. and Jonathan W. Gould, Ph.D.

Abstract: Attorneys, Guardians Ad Litem, and agencies involved in educational choices for children look to family court to decide what meets the standard of the *best interests of the child*. However, courts are left without a legitimate guideline to follow in meeting the best interests mandate in school matters; and often side-step any such determination, leaving it to the ill-prepared to make the decisions. This article proposes a standard and a framework for courts and court professionals searching for sound, qualified opinion in school choice matters.

The guiding star in child custody determinations is the *best interests of the child* standard. Forty states have lists or identified factors included in their statutes or codes. Six states have a list of factors derived from judicial decisions and four states assign to the judge the responsibility of identifying and considering all relevant factors.

Many states have codified best interest factors that courts are required to consider in their determination of parenting plan development and custodial placement. Not all states, however, have identified factors to be considered when deliberating about best interest of the child. Among states that have identified specific best interest criteria, few, if any, provide definitions of each best interest criterion.

INDETERMINANT NATURE OF BEST INTEREST OF THE CHILD STANDARD

Much has been written about the usefulness of the indeterminant nature of the best interests of the child (1, 2). The lack of uniform statutory definition of the *best interests of the child*, therefore, provides the court with great freedom in its determination of what is best for a particular child in a particular family system (3).

The flexibility afforded the court by the indeterminant nature of the best interest criteria is often frustrating to child custody evaluators

who seek clearer definition. Despite there being no consensus definition of the *best interests of the child*, the standard has stood the test of time.

One of the criticisms of the best interest standard is its lack of definition, leading to confusion among child custody evaluators about what factors are supposed to be evaluated in an assessment. “The vagueness and indeterminacy of the standard make outcomes uncertain and give judges broad discretion to consider almost any factor thought to be relevant to the custody decision” (2).

VALUE OF A CHILD CUSTODY EVALUATION

The intention of a court-ordered child custody evaluation is to assist the court by providing relevant psychological information about family functioning. Several professional practice guidelines have been developed to guide custody evaluators (4, 5). Most guidelines offer general guidance, but identify define few, if any, specific factors to be assessed. For example, the American Psychological Association’s Guidelines for Child Custody Evaluations in Family Law Proceedings (4) identify three general areas of investigation. Evaluators are to investigate parenting attributes, the psychological needs of the child, and the fit between the parent’s attributes and the needs of the child. No further definition of the terms is provided, leaving it to the evaluator to determine which parenting attributes and which psychological needs of the child are most relevant to assess in a particular evaluation. There is no guidance in the child custody literature or in the custody guidelines regarding how to assess the parent-child fit.

Child custody evaluations are intended to assist the court by providing reliable and relevant information about a variety of factors affecting the psychological *best interests of the child* (3, 6-8). There is, however, no consensus definition of psychological factors to be assessed in a best interests analysis conducted during a child custody evaluation.

In the world of child custody assessment, defining a specific factor to be investigated leads to identification of assessment tools useful in measuring the factor. Without defining a factor to be assessed, it is not possible to identify an assessment procedure. Without using a reliable assessment, it is not possible to gather a set of reliable and relevant information upon which to base an expert opinion (7).

IMPORTANCE OF SPECIFIC QUESTIONS TO GUIDE CHILD CUSTODY INVESTIGATION

For more than 20 years, Gould has argued about the importance of defining specific questions at the beginning of a custody evaluation to guide the investigative process (9-11). By including specific questions in court orders or stipulations, judges and attorneys increase the likelihood that evaluators will stay on course, investigate the issues of concern, and, in preparing their reports, provide information that bears directly upon the issues before the court. Additionally, the availability of specific questions to which evaluators can refer will lower the risk of investigative intrusion into areas of a parent's or child's life that are not directly tied to the issues in dispute before the court (9).

Gould and Martindale have argued that forensic examiners who are appointed by the court to conduct child custody investigations often do not query the court or the attorneys about the substantial concerns that led to the decision to order evaluations. Under the presumption that forensic examiners are best able to define the nature and scope of their evaluations, judges and attorneys often provide little guidance about what specific relevant variables need to be assessed and why. When judges fail to translate the issues in dispute into specific psycholegal questions that may be answered by child custody evaluators, they handicap their appointed experts. When court orders do not contain specific questions, it falls to the attorneys to craft these questions for forensic examiners to investigate. Attorneys who do not provide forensic examiners with questions to

guide their investigations increase the likelihood that psycholegal issues in dispute will not be directly addressed. When forensic examiners receive court orders to begin evaluations and do not seek specific questions to guide their investigations, the forensic examiners are engaging in improper practice.

Identification of specific questions to guide the evaluation process allows forensic examiners to choose relevant and reliable tests. If evaluators do not know the specific questions to be investigated, they are unable to choose appropriate tests. Similarly, if evaluators do not know the specific questions to be investigated, they are unable to conduct focused interviews with parents, children, and collateral informants about those areas of concern. Finally, if evaluators do not know the specific questions to be investigated, they are less likely to be able to separate the wheat from the chaff as information and test data are reviewed.

SPECIFIC QUESTIONS LEAD TO GATHERING RELEVANT EVIDENCE

According to the U.S. Federal Rules of Evidence, relevant evidence is that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (Rule 401). Expert testimony is intended to assist judges in understanding the evidence or determining facts in issue (Rule 702). Relevant expert testimony should be based on opinions drawn from interpretations of reliable data and gathered through the correct application of reliable scientific procedures.

FORENSIC ASSESSMENT OF SCHOOL PLACEMENT WITHIN THE CONTEXT OF CHILD CUSTODY ASSESSMENTS

One *best interest* factor identified in most state statutes, code, or judicial decision pertains to the child's adjustment to school including educational needs. Little guidance is currently provided to child custody evaluators in guiding either assessment of the child's school adjustment or child's educational needs.

We propose a model that defines educational needs and school adjustment and identifies salient factors to consider when evaluating the educational needs and school adjustment of a child. In addition, we promote an evaluation protocol to be employed when child custody evaluators are asked to assess the educational needs and school adjustment of a child.

THROUGH THE EYES OF CHILDREN

Investigating information about children *from* the children is critical in child custody reports because of the tendency for evaluators (and attorneys and judges) to view the psychological *best interests of the child* through the parents' perspective.

A series of studies have found how different the experiences of the "same" divorce were for parent and child (12, 13). "Even the most caring parent could find it very difficult to see divorce from the standpoint of his or her child" (12, p. 308). These studies revealed how children's accounts of family life frequently were overshadowed by their parents' interpretations of family events. Children and their parents often offered vastly different accounts of many aspects of family experiences. When evaluators focus primarily on each parent's understanding of their children's experiences, research findings have shown how parents often project on to their children memories of their own childhoods. Parents hear children's stories as reconstructions of their own childhoods, recalled through many layers of personal history and it is these stories about the children's experiences that are often communicated by parents to evaluators.

Evaluators need to be aware of the need for reflection and sensitivity to children's stories. Seeing children's experience through their eyes rather than through the stories told by their parents about their children's experiences provides a more accurate set of information about children's experiences with each parent and living in each home.

Viewing children’s educational needs and aptitudes through their eyes provides a basis of information and understanding of potential educational needs and school placement fit that might differ significantly from that of their parents. The model we discuss below incorporates a child-centered approach to gathering information about educational needs and school placement decisions from children and educators as well as from parents.

GUIDELINES AND PROTOCOL

No analyses can go forward without cooperation from all parties using the following basic guidelines and protocol for the expert (evaluator):

1. It is imperative that the attorney specifically lists the request for school placement/educational option investigations within the court order.
2. The court uses instructive language to notify all parties of the requirement to cooperate with the expert assigned in their duty to meet the obligation of *best interest of the child*.
3. The expert (a.k.a. evaluator)¹ obtains information from each parent providing an accurate historical accounting of the child’s learning needs, educational interventions, and personal ambitions to better appreciate the child’s interests. This is best accomplished through the use of interviews and survey forms.
4. The expert approaches the school(s) with the objective of the evaluation of student learning and school fit. Access to school records is obtained, as needed, under the Family Education Rights and Privacy Act (FERPA).

¹ The terms expert and evaluator are used interchangeably depending upon the type of setting: For court use, expert is employed and for school use, evaluator is used.

5. The expert employs professional standard assessment tools to assist in the investigation to meet expectations of court analysis. The expert prepares a report that enumerates the educational options considered, based on both the student profile and school(s) profile with an opinion on the best option(s), given the choices. Any cautions or concerns are voiced within the report to help support the court's elimination of bias.

SCHOOL ADJUSTMENT OR "FIT"

Predicting a child's school adjustment or "fit" cannot be done without first establishing a student profile; that is, how a student learns and performs within, primarily, an educational setting and, secondarily, across connected domains (e.g., home(s), recreation, sports, clubs, etc.). Evaluators need to gather data about the particular child and factors associated with educational success. The evaluator needs to gather data addressing the child's weaknesses, strengths, character and personality, motivation(s), and history of education.

In addition, collateral information sources help inform the evaluator about the child's history of educational successes and challenges. The evaluator gathers information by communicating with administrative and teaching staff at the target schools and visiting the schools to obtain first-hand knowledge of the school's culture. This is done with the necessary permissions from parents and court.

There is an obvious need to review student materials and academic records for objectivity. Information gathered only from parents engaged in a child custody dispute may present things in a more favorable light. A *faking good* bias might influence the other parent's perception of the child's educational experience.

Parents may not appreciate intrusion into their personal space, or allow others (e.g., teachers, principals, staff) to be interviewed regarding their children. Thus, at the beginning of the evaluation, it is

imperative to get the parents' mutual buy-in through individual interviews and gathering of information that the parents currently have in their possession (i.e., transcripts, health records, outside psychoeducational evaluations, school educational evaluations and standardized testing, teacher, tutor and coach reports). Behavior is seen as most problematic for children of high-conflict divorce families within schools (14). Obtaining parents' buy-in might help reduce conflict by defining a commonly agreed upon goal that will help their child.

Again, the court must initially make clear to all parties the importance of affording the investigative professional the opportunity to "know the child" by a) furnishing the history of past and present schooling, and b) identifying strengths, weaknesses, talents, and impairments (i.e., special education, physical, learning, intellectual) to help make recommendations on programming decision.²

In working with either parent or school personnel, the evaluator should outline how the evaluation may facilitate the development of recommendations that promote the child's general success in school, including academics, emotional and behavioral needs (15). Alternative hypotheses may also be included in the report for the court per standards of the Association of Family and Conciliation Courts (AFCC) (16).

The evaluator may obtain directly from the school information about the child's academic potential, teacher evaluations, report cards, end of grade reports, and any previously administered standardized test results. Unless the child has qualified for special education services, it is unlikely that the school will have files of individualized intelligence, processing, and developmental or adaptive behavior testing. The evaluator might also need updated achievement tests to

² This process establishes a practice that stands contrary to those child custody evaluators who entrust the mother or father to "know best" their own children and avoid the topic of school or program placement in part, or in whole, as part of the school adjustment discussion. However, for one half (180+) of the 365 days of the year, close to one third of the child's waking day is spent in school removed from the parent. Teachers familiar with the child's learning "know best" the child's ability to learn and perform.

gauge the child's current educational needs. The evaluator/expert should also:

- Consider the child's aptitude, specific capabilities (or deficits) and levels of motivation against the peer population and the type of education program.
- Interview the necessary school personnel to determine the profile of a student who thrives within their community versus one who does not.

Depending on whether an in-depth understanding of the child's needs is discovered, the question of *best fit* regarding educational programming can be helped by collaborative support from a qualified learning specialist (e.g., school psychologist, educational psychologist, learning specialist). It is not enough for parents to propose that their child needs an "understanding" teacher, someone who works well with kids who think outside the box, or that they just need more attention. Through more systematic, objective and comprehensive data gathering and analysis, the evaluator can develop reasonable hypotheses (including alternative hypotheses) regarding a particular child's educational options and school placement.

EDUCATIONAL OPTIONS AND SCHOOL PLACEMENT

Reliable expert opinions that address the educational options and school placement needs of a child must include information about the school. One should consider visiting the school and researching the school, its philosophy and education planning. Mental health professionals engaged in child custody assessment may be ill-prepared to investigate how schools are organized, structured, and functioning (18).

The school profile is analyzed by the expert school professional, using direct and indirect questioning techniques. In the case of a public school, information pertinent to the question of fit and education options is usually available through local, district, and state-run websites, as well as materials available to the general public at the local school.

This information is largely in the form of local, district, and state data that schools are required to present to the general public regarding performance indicators (standardized tests and across school years' comparative measures), as well as discipline data (i.e., suspensions and expulsions).

In higher education levels, there is an interesting change in the availability of data. Teachers often provide fewer direct observations of pupil progress and are often less available to evaluators for conferences. School administrators can dodge questions around classrooms, as higher education gives more authority to teachers on classroom curriculum and behavior management. Data from standardized tests take the place of observational data.

Educational options and school placement decision-making, however, include other variables associated with children's academic success. Evaluators need to gather data about how the child interacts with other children and with authority, and how motivated the child is to pursue school and interests (19). Answers to these questions are critical to understanding the child's functioning in areas that contribute to school success. Data from these factors is important in designing an ecological model of the fit between the various educational options, school placements and the specific needs and talents of the child.

For example, in developing a workable timeshare school schedule, evaluators need to know how the school day is structured. For example, is the school day based on a block scheduling or a traditional scheduling paradigm? Not all children do well in 90-120-minute block schedules of class work; some children function better in a more traditional 50-minute schedule. Other children function best when classes are spread over the weekend. For those working within the field of education, these equations and knowledge base of "who works best" under certain schedules are child's play and so it is imperative that the evaluator speaks with the teachers for any pertinent information in this regard.

In a recent case in which one of the authors (MB) was involved, the primary supervising parent asked the court to keep twins at the same school. In referring the case to this educational psychologist, the investigation pointed clearly toward the needs of one twin with exceptional needs. In researching the school of choice, it became even clearer that this school could not meet this particular child's needs and a consult to find a better school fit made sense to offer the parents. After initial resistance, the "difficult" parent acquiesced in light of the evidence that their school choice was not the best, and a school suggested by the expert was right in meeting the "best needs of the child."

ADDITIONAL FACTORS

Opinions are data driven and come from a variety of sources. Questions regularly emerge around transportation to and from school, types of outdoor/recreational options available, before and after school activities, level of supervision and site safety, food quality and allergies. Safety data is available through local and state education portals, some can be obtained without permission, and some cannot. Data on expulsions, suspensions, transfers, standardized testing, number of special education students and services can be found searching school district or state department of education websites.

In searching private school data, one finds out quickly that the above information (outside of grades and some standardized tests) is often unavailable because it is not published. Independent school disciplinary action, for example, may not be published and may only be available through interviewing staff. Private schools often do not receive federal funds, and therefore FERPA (Family Education Rights and Privacy Act) law may not apply (20). However, private companies (e.g., GreatSchools, Niche, SchoolDiggers) offer online comparison for families moving into new geographical areas (21).

A complete listing of special education services may not be available on site. Some private schools might coordinate special education services with the local public schools. Knowing whether the school

district provides transportation to and from special education services or whether such transportation is the responsibility of the private school or parent are important considerations.

Parochial and religious or faith-based schools may provide little evidence of academic achievement, or support for learning differences, and focus more on character formation and moral development. In these cases, it is important for parents to align their thinking of what “the best interest of the child” means against a shared moral background.

In summary, significant information is developed through an on-site school visit. The evaluator gathers personal knowledge from observing the staff in action, and assembles details on class size, student to teacher ratio, discipline procedures, and method of instruction.

APPLICATION

For court matters, relocation or “move away” cases are a majority of referrals positioned for forensic educational case study. At the end of the education psychological analysis, an expert will likely opine on the comparison of two schools—one offered by each parent—in providing a comparative study for the child’s best interest.

In some cases, more than one school (or even home school, in which some creative thought comes into play to meet the court’s inquiry into best interest of the child) is offered. In the event of multiple schools, it may be to the advantage of the parents to hire independent education advisors to investigate the school choices and narrow these multiples down to one or two options. Otherwise, the options become fragmented and the lack of cohesiveness makes recommending a single placement more difficult. The educational psychologist works with the court in illuminating the pluses and minuses of a school choice. Judges are known to welcome the clarity brought about by consultants working on behalf of families in high conflict custody cases (22).

Child custody disputes often include conflict over school choice and school placement. To remedy such disputes, the court needs to

consider the opinion of the evaluator/expert on their knowledge of the demographic and student information available.

To date, the child custody assessment literature has been silent about a conceptual framework useful in gathering data that would generate reliable data to be used as a basis for expert opinions about school choice and school placement. This article offers guidelines and a protocol to be used in child custody disputes regarding school choice and placement.

REFERENCES

1. Mnookin R: Child custody adjudication: judicial functions in the face of indeterminacy. *Law and Contemporary Problems* 1975; 39:226-293
2. Scott ES, Emery RE: Gender politics and child custody: the puzzling persistence of the best-interests standard. *Law and Contemporary Problems* 2014; 77:69-108
3. Ackerman MJ, Kane AW, Gould JW: *Psychological Experts in Divorce Actions* (7th ed.). New York, Aspen, 2019
4. American Psychological Association: Guidelines for Child Custody Evaluations in Family Law Proceedings. *American Psychologist* 2010; 65:9:863–867
5. Association of Family and Conciliation Courts, Task Force for Model Standards of Practice for Child Custody Evaluations: Model standards of practice for child custody evaluations. *Family Court Review* 2007; 45:1:70–91
6. Gould JW: *Conducting Scientifically Crafted Child Custody Evaluations* (2nd edition). Sarasota, FL, Professional Resource Press, 2006
7. Gould JW, Martindale DA: *The Art and Science of Child Custody Evaluations*. New York, Guilford Press, 2007

8. Stahl PM: *Conducting Child Custody Evaluations: From Basic to Complex Issues*. Thousand Oaks, CA, Sage, 2010
9. Gould JW, Martindale DA: Specific questions guide to child custody investigations. *The Matrimonial Strategist* 2009; 1-3
10. Gould JW: A model for interdisciplinary collaboration in the development of psycholegal questions guiding court ordered child custody evaluations. *Family and Conciliation Courts Review* 1999; 37:1:64-73
11. Gould JW: Professional interdisciplinary collaboration and the development of psycholegal questions guiding court ordered child custody evaluations. *Juvenile and Family Court Journal* 1999; 50:1:43-52
12. Smart C: From children's shoes to children's voices. *Family Court Review* 2002; 40:307-319
13. Smart C, Neale B: It's my life, too—Children's perspectives on post-divorce parenting. *Family Law* 2000; 30:163-169
14. Heckel LD, Clarke AR, Barry RJ, McCarthy R, Selikowitz M: The relationship between divorce and children with AD/HD of different subtypes and comorbidity: results from a clinically referred sample. *Journal of Divorce and Remarriage* 2009; 50:6:427-443. doi: 10.1080/10502550902766324
15. Newton S: Obtaining and analyzing school-related data in a child custody evaluation. *Journal of Child Custody: Research, Issues, and Practices* 2011; 8:189-211
16. Association of Family and Conciliation Courts: *Model Standards of Practice for Child Custody Evaluation*. Madison, WI, Association of Family and Conciliation Courts, 2006
17. National Center for Education Statistics: (2008). *Schools and Staffing Survey (SASS)*. Retrieved from https://nces.ed.gov/surveys/sass/tables/sass0708_035_s1s.asp

18. Samir H, Choate LH: Conducting child custody evaluations: best practices for mental health counselors who are court-appointed as child custody evaluators. *Journal of Mental Health Counseling* 2014; 36:1:18-30
19. VanDerHeyden AM, Witt JC: Best practices in can't do/won't do assessment, in *Best Practices in School Psychology, V*. Edited by Thomas A, Grimes J. Bethesda, MD, National Association of School Psychologists, 2008; 131–139
20. U.S. Department of Education: (2007). Parents' Guide to the Family Educational Rights and Privacy Act: Rights Regarding Children's Education Records. Retrieved from <https://www2.ed.gov/policy/gen/guid/fpco/brochures/parents.html>
21. GreatSchools. Retrieved from <https://www.greatschools.org>
22. Bow JN, Gottlieb MC, Gould-Saltman HD: Attorney's beliefs and opinions about child custody evaluations. *Family Court Review* 2011; 49, 301-312. doi: 10.1111/j. 17441617.2011.01372.x

ABOUT THE AUTHORS

Mark A. Burdick, Ph.D., AFBsS is an international expert in education and psychological matters before courts in the U.S. and U.K. He provides consult and litigation support in both private and public school matters. He is past Chair of California Board of Behavioral Sciences (BBS).

Jonathan W. Gould, Ph.D., ABPP is a board certified forensic psychologist who provides consultation, work-product review, litigation support, and other forensic psychological activities to attorneys across the country.