

DETERMINING THE PRESENCE OF A SPECIFIC LEARNING DISABILITY

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DEFINITIONS

1. How is “child with a disability” defined?

“Child with a disability” means:

[A] child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. §300.8(a)(1); see also, 20 U.S.C. §1401(3)(A).

2. How do the federal regulations define “specific learning disability”?

That definition is also the same as the definition in the former regulations:

- (i) General. Specific learning disability means 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, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.
- (ii) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 34 C.F.R. §300.8(c)(10)(ii).

3. Do the federal regulations define response to intervention (RTI)?

The regulations do not define RTI. They leave that up to the states. However, the National Association of State Directors of Special Education (NASDSE) has identified from the research the following essential components:

RTI is the practice of (1) providing high-quality instruction/intervention matched to student needs and (2) using learning rate over time and level of performance to (3) make important educational decisions. These three components of RTI are essential. *Response to Intervention Policy Considerations and Implementation*, NASDSE, Inc. (2005).

4. How do the federal regulations shape RTI?

The regulations incorporate principles of RTI in the determinant factor analysis; require states to include RTI as one method of determining LD eligibility; provide procedures to be followed when using RTI as a method of determining LD eligibility; and include documentation requirements when using RTI as a method of determining LD eligibility.

5. Why was RTI included in the IDEA?

This question was addressed by the U.S. Department of Education in a Question and Answer document as follows:

The reports of both the House and Senate Committees accompanying the IDEA reauthorization bills reflect the Committees concerns with models of identification of SLD that use IQ tests, and their recognition that a growing body of scientific research supports methods, such as RTI, that more accurately distinguish between children who truly have SLD from those whose learning

difficulties could be resolved with more specific, scientifically based, general education interventions. Similarly, the President's Commission on Excellence in Special Education recommended that the identification process for SLD incorporate an RTI approach. *OSERS Q & A on Response to Intervention and Early Intervening Services*, 47 IDELR 196 (January 1, 2007).

RTI addresses the concerns identified by the President's Commission in its final report on Excellence in Special Education:

The current model guiding special education focuses on waiting for a child to fail, not on early intervention to prevent failure. Reforms must move the system toward early identification and swift intervention, using scientifically based instruction and teaching methods. This will require changes in the nation's elementary and secondary schools as well as reforms in teacher preparation, recruitment, and support. U.S. Department of Education Office of Special Education and Rehabilitative Services, *A New Era: Revitalizing Special Education for Children and Their Families*, Washington, DC, 2002, page 8.

6. How does RTI serve the goals of the No Child Left Behind Act?

RTI is a tool for helping struggling learners succeed in general education. The National Association of State Directors of Special Education (NASDSE) and the Council of Administrators of Special Education (CASE) described the relationship this way:

Just as NCLB has had a profound impact on special education and educational practices to improve outcomes for students with disabilities, RtI – initially identified as a strategy through IDEA – has the potential to have a similar impact on NCLB and the education of all students. Remember that RtI is a strategy for meeting the goals of NCLB. NCLB is a promise – it sets high goals for all students and school districts, but does not tell them precisely how to achieve those goals. RtI can help states and school districts meet those goals by identifying struggling learners early in order to improve their educational outcomes. *Response to Intervention: NASDSE and CASE White Paper on RTI* (May 2006), page 7.

SCREENING

7. Does IDEA define screening?

The IDEA 2004 describes screening as follows:

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. 34 C.F.R. § 300.302; see also, 20 U.S.C. § 1414(a)(1)(E).

8. Does the IDEA 2004 require parental consent to screen individual students?

No. The USDE commentary on the final IDEA 2004 regulations makes it clear that consent is not required for screening:

Section 300.302, consistent with section 614(a)(1)(E) of the Act, states that the screening of a child by a teacher or specialist to determine appropriate instructional strategies is not considered an evaluation for purposes of determining eligibility for special education and related services. This applies to a child with a disability, as well as a child who has not been identified as a child with a disability. Such screening, therefore, could occur without obtaining informed parental consent for screening. 71 Fed. Reg. 46639.

9. What distinguishes the two activities?

The USDE explains the difference as follows:

An “evaluation” as used in the Act, refers to an individual assessment to determine eligibility for special education and related services, consistent with the evaluation procedures in §§300.301 through 300.311. “Screening,” as used in §300.302 and section 614(a)(1)(E) of the Act refers to a process that a teacher or specialist uses to determine appropriate instructional strategies. 71 Fed. Reg. 46639.

What distinguishes screening from evaluation is not who is conducting the screening, whether the child is being singled out, or where the screening is taking place, but why the activity is taking place or why the instrument is being administered. In a recent letter from the Office of Special Education Programs (OSEP), OSEP was asked whether consent was needed for a speech and language pathologist to remove a child from the regular education classroom to conduct screening of that child. OSEP responded as follows:

Nothing in either the IDEA or its implementing regulations requires a State or local educational agency (LEA) to, or prohibits a State or LEA from, developing and implementing policies to temporarily remove a student from his or her classroom for purposes of administering screening instruments to determine appropriate instructional strategies for the student. *OSEP Letter to Torres*, 53 IDELR 333 (April 7, 2009).

REFERRAL

10. How does RTI impact our child find duty?

The IDEA requires each state to have policies and procedures in effect to ensure that--

- (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and
- (ii) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services. 34 C.F.R. § 300.111(a)(1); see also, 20 U.S.C. § 1412(a)(3)(A).

The child find language did not change in 2004. However, Congress expressly states that one of its goals of IDEA 2004 is “to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children.” 20 U.S.C. § 1400(5)(F).

When determining whether a school district has met its child find duty, a court will examine whether the district had a reason to suspect a disability and a need for special education services. In *E.M. v. Pajaro Valley Unified School District*, 53 IDELR 41 (N.D. Cal. 2009), the court concluded that the district had satisfied its child find duty, examining each of the relevant years as follows:

The District was required to initiate its own referral within a reasonable time after it had knowledge of facts tending to establish a disability and the need for special education services. The evidence established that [the] District had no knowledge of facts tending to establish that [E.M.] had a disability during the 2002-2003 school year. [E.M.] presented as a child with some weaknesses, including distractibility, focus, problems working independently and efficiently, and difficulty completing all of his assignments. In hindsight, these may appear to have been suspected disabilities. However, at the time in question, despite these weaknesses, [E.M.]'s report card reflects that he fared “well” in reading and math, and his writing skills improved during the school year. Moreover, without special education or related services, [E.M.] progressed in the general education curriculum sufficiently to advance to the next grade.

In contrast to his experience in the third grade, E.M.'s “performance declined considerably during the fourth grade. [He] received marks of 'C' and 'D' in reading, 'D' in writing, 'B' in listening and speaking and 'C' in mathematics. [E.M.] was designated as 'at risk for retention' because of his poor classroom performance. [He] was easily distractible and frequently failed to turn in homework.” ... At some point early in the second semester, an intervention plan was implemented, which apparently was standard procedure for students at risk of retention. ... In the spring of 2004, E.M. scored at the basic level in English-language skills and just below basic in math in the standardized tests. ... The

results of the intervention are not evident from the grade report in the record, as it appears that the report was for the third quarter. ... (the last entry being dated March 3, 2004). In addition, from an IEP referral form signed by Ms. Audet in August 2004, which presumably was generated while PVUSD was in the process of responding to Dr. Wright's report ... it appears that the interventions produced largely "limited" results. ... If the grade report and IEP referral form are viewed in isolation, PVUSD may have had reason to suspect a learning disability by the second half of E.M.'s fourth grade year, thereby triggering a duty to assess. However, the record also contains extensive testimony from Ms. Audet, and this testimony paints a different picture. The ALJ appears to have rested his decision on this testimony:

Susan Audet did not suspect that [E.M.] had a learning disability and did not refer him for an assessment. Ms. Audet believed that [E.M.] was a "passive" learner and that he generally lacked motivation. [E.M.] was in the average range as compared to the other thirty-one to thirty-three students in her fourth-grade class. [E.M.] did not fail to complete his homework because he was unable to complete the assignments. Rather, [E.M.] played video games after school in lieu of completing his homework. Overall, [E.M.]'s classroom participation was average. He did well in geometry, a subject he enjoyed. [E.M.] did not have difficulty understanding multiple directions, and although he as distractible, he was not more distractible than numerous other Students in his general education fourth-grade class, including some children who were receiving special education and related services.

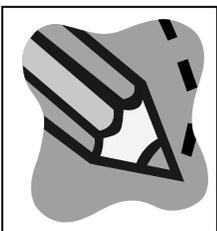
11. Will RTI cause more students to be referred for special education?

As stated above, the U.S. Department of Education does not think so:

We do not believe that eligibility criteria based on RTI models will result in dramatic increases in referrals and special education placements. Well-implemented RTI models and models that identify problems early and promote intervention have reduced, not increased, the number of children identified as eligible for special education services and have helped raise achievement levels for all children in a school. 71 Fed. Reg. 46652.

12. If a school district uses response to intervention as part of its general education program, how does this impact an evaluation for a possible learning disability?

Federal regulation 34 C.F.R. §300.311(a)(7) states:



If the child has participated in a process that assesses the child's response to scientific, research-based intervention [the documentation of the determination of a specific learning disability must include a statement of]—

- (i) The instructional strategies used and the student-centered data collected; and
- (ii) The documentation that the child’s parents were notified about—
 - (A) The State’s policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;
 - (B) Strategies for increasing the child’s rate of learning; and
 - (C) The parents’ right to request an evaluation.

13. What are the timelines for referral and evaluation?

Federal regulation 34 C.F.R. §300.309(c) states:

The public agency must *promptly request* parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 [within 60 days of receiving parental consent for an initial evaluation] and 300.303 [at least once every 3 years unless the parent and school agree that a reevaluation is unnecessary], *unless extended by mutual written agreement of the child’s parents and a group of qualified professionals*, as described in §300.306(a)(1)—

- (1) *If, prior to a referral, a child has not made adequate progress after an appropriate period of time* when provided instruction, as described in paragraphs (b)(1) [appropriate instruction in regular education settings, delivered by qualified personnel] and (b)(2) [repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction] of this section; *and*
- (2) *Whenever a child is referred for an evaluation.* (Emphasis added.)

14. What is meant by “an appropriate period of time” and “promptly”?

This question was addressed by the U.S. Department of Education in a Question and Answer document as follows:

The Federal regulations under 34 CFR § 300.309(c) require that if a child has not made adequate progress after an appropriate period of time, a referral for an evaluation must be made. However, the regulations do not specify a timeline for using RTI or define adequate progress. As required in 34 CFR § 300.301(c), an initial evaluation must be conducted within 60 days of receiving consent for an evaluation (or if the State establishes a timeframe within which the evaluation must be completed, within that timeframe). Models based on RTI typically evaluate a child's response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child's achievement, including observation data. A State may choose to establish a specific timeline that would require an LEA to seek parental consent for an evaluation if a student has not made progress that the district deemed adequate.

We do not believe it is necessary to define the phrase promptly because the meaning will vary depending on the specific circumstances in each case. There may be legitimate reasons for varying timeframes for seeking parental consent to conduct an evaluation. However, the child find requirements in 34 CFR § 300.111 and section 612(a)(3)(A) of the Act require that all children with disabilities in the State who are in need of special education and related services be identified, located, and evaluated. Therefore, it generally would not be acceptable for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability. If it is determined through the monitoring efforts of the Department or a State that there is a pattern or practice within a particular State or LEA of not conducting evaluations and making eligibility determinations in a timely manner, this could raise questions as to whether the State or LEA is in compliance with the Act.

OSERS Q & A on Response to Intervention and Early Intervening Services, 47 IDELR 196 (January 1, 2007).

In *A.P. v. Woodstock Board of Education*, 572 F.Supp.2d 221, 50 IDELR 275 (D.C.Conn. 2008), the court held that the district did not violate its child find duty. The student made progress in regular education with interventions designed by the Child Study Team. Eventually, the school determined that the student was eligible for special education, but the parent complained that this came too late. The parents argued that the school's routine use of the CST as a "pre-referral" process was a "per se violation of the IDEA." The court rejected that argument. The court noted state laws that require the use of regular education interventions prior to a referral for special education testing, and in the case of A.P., those interventions were working:

According to the evidence in the record, Mrs. Powers and Mrs. Fulco, A.P.'s fourth-grade teacher, were in regular contact about A.P.'s progress throughout the year. Far from ignoring A.P.'s difficulties, Mrs. Fulco was proactive in identifying him as a child in need of additional teacher assistance. Mrs. Fulco testified that she used special interventions with A.P. in order to help him with inattention and handwriting. With the benefit of Mrs. Fulco's assistance, A.P. received A's, B's, and C's on his report card, and he performed on goal on the Connecticut Mastery Tests, which he took without any special accommodations.

15. What if the parent requests a special education evaluation?

This question was addressed by the U.S. Department of Education in a Question and Answer document as follows:

If the LEA agrees with the parent that the child may be a child who is eligible for special education services, the LEA must evaluate the child. The Federal regulations at 34 CFR § 300.301(b) allow a parent to request an evaluation at any

time. If an LEA declines the parent's request for an evaluation, the LEA must issue a prior written notice as required under 34 CFR § 300.503(a)(2) which states, written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The parent can challenge this decision by requesting a due process hearing to resolve the dispute regarding the child's need for an evaluation. *OSERS Q & A on Response to Intervention and Early Intervening Services*, 47 IDELR 196 (January 1, 2007).

ALTERNATIVE MODELS FOR IDENTIFYING CHILDREN WITH SPECIFIC LEARNING DISABILITIES

16. What are the alternative models for identifying a learning disability?

The regulation states:

General. A State must adopt, consistent with §300.309, criteria for determining whether a child has a specific learning disability as defined in §300.8(c)(10). In addition, the criteria adopted by the State—

- (1) Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in §300.8(c)(10);
- (2) Must permit the use of a process based on the child's response to scientific, research-based intervention; and
- (3) May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in §300.8(c)(10). 34 C.F.R. §300.307(a).

17. Is the State required to adopt an RTI model for identifying an SLD?

Yes. The regulation says the State must adopt criteria for determining whether a child has an SLD, and the criteria must permit the use of an RTI process. As the USDE acknowledges, the State has several models from which to choose:

There are many RTI models and the regulations are written to accommodate the many different models that are currently in use. The Department does not mandate or endorse any particular model. Rather, **the regulations provide States with the flexibility to adopt criteria that best meet local needs.** Language that is more specific or prescriptive would not be appropriate [in the federal regulations]. For example, while we recognize that rate of learning is often a key variable in assessing a child's response to intervention, it would not be appropriate for the [federal] regulations to set a standard for responsiveness or improvement in the rate of learning. 71 Fed. Reg. 46653 (emphasis added).

18. Are school districts required to use the State's criteria?

Yes. The regulation says:

Consistency with State criteria. A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability. 34 C.F.R. §300.307(b).

19. Can a school district use a combination method?

As acknowledged in *OSEP Letter to Zirkel*, 48 IDELR 192 (August 15, 2007), many states do permit school districts to use a combination:

In the scenario presented in your question, the State permits the use of a severe discrepancy, the child's response to scientific, research-based intervention and/or the use of other alternative research-based procedures for determining whether a child has a specific learning disability. Under those State-adopted criteria, LEAs in that State would be permitted to use any of the three available options/models, or any combination of those options/models, as part of a comprehensive evaluation under 34 CFR §§ 300.301-300.311 to determine the presence of a specific learning disability.

20. What is the process for identifying children with specific learning disabilities?

1. It is a group determination.
2. There must be an observation.
3. The group must make and document the following seven major determinations:
 - a. The child is not achieving adequately in one or more areas for the child's age or grade level based on State-approved standards;
 - b. The child meets the additional criteria for determining the existence of an SLD based on a response to intervention model **or** the State's pattern of strength and weaknesses model;
 - c. The group's finding of an SLD is not primarily the result of one of the exclusionary factors: a visual, hearing or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency;
 - d. The child's lack of adequate achievement is not due to one of the determinant factors;

- e. The child has a specific learning disability (disorder in one or more of the basic psychological processes);
- f. The specific learning disability adversely affects educational performance; and
- g. By reason of the specific learning disability, the child needs special education services.

The procedures for identifying children with specific learning disabilities are discussed step by step below. When the evaluation is complete, the ARD committee including the child's parent will meet to determine whether the child is eligible for special education services due to a specific learning disability.

GROUP DETERMINATION

21. Who are the members of the group?

The members of the group are the same as what was prescribed under the IDEA 97 regulations:

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in §300.8, must be made by the child's parents and a team of qualified professionals, which must include—

- (a)
 - (1) The child's regular teacher; or
 - (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
 - (3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and
- (b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. 34 C.F.R. §300.308.

22. How do you select the group members?

The determination should be made on a case-by-case basis based on the child and his or her presenting concerns. The USDE stresses flexibility, taking into account the child:

We believe this [flexibility under §300.308(b)] allows decisions about the specific qualifications of the members to be made at the local level, so that the composition of the group may vary depending on the nature of the child's suspected disability, the expertise of local staff, and other relevant factors. For example, for a child suspected of having an SLD in the area of reading, it might be important to include a reading specialist as part of the eligibility group. However, for a child suspected of having an SLD in the area of listening comprehension, it might be appropriate for the group to include a speech-

language pathologist with expertise in auditory processing disorders. 71 Fed. Reg. 46650.

23. Must a speech-language pathologist be part of an RTI model?

OSEP responded to this question in a letter as follows:

The IDEA and the Part B regulations do not address the role of SLPs, or other qualified professionals, in an RTI model. As you know, under 34 CFR § 300.307(a)(2), state criteria for determining whether a child has an SLD, as defined in 34 CFR § 300.8(c)(10), must permit the use of a process based on the child's response to scientific, research-based intervention. If a local educational agency (LEA) chooses to use an RTI model as one part of the full and individual evaluation required under 34 CFR §§ 300.304-300.311, the LEA may choose the RTI model it wishes to implement. It would then be the responsibility of the LEA to determine the roles and responsibilities of the various staff members to be involved in that particular model, or which staff members the LEA chooses to involve in its RTI model. The individuals involved in the RTI model could vary for a number of reasons, such as the nature of the child's suspected disability, the expertise of Local staff, and other relevant factors. The U.S. Department of Education (Department) does not prescribe the models LEAs must use, or how they will utilize their staff in implementing a selected model. Such determinations are left to state educational agencies (SEAs) and LEAs under the statute and regulations. *OSEP Letter to Clarke*, 51 IDELR 223 (May 28, 2008).

OBSERVATION

24. Do the regulations still require an observation?

Yes. The regulations at 34 C.F.R. §300.310(a) state:

The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

25. When should the observation be done?

The new regulation offers flexibility in terms of what observation is used. Specifically, the regulation allows the multi-disciplinary team to use an observation obtained before the child was referred for an evaluation or after the child was referred and consent was obtained:

The group described in §300.306(a)(1), in determining whether a child has a specific learning disability, must decide to—

- (1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or

- (2) Have at least one member of the group described in §300.306(a)(1) conduct an observation of the child’s academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with §300.300(a), is obtained. 34 C.F.R. §300.310(b)(1) and (2).

26. Why the flexibility?

The USDE tells us it is to eliminate redundancy:

The person conducting the observation should be a member of the eligibility group because information from the observation will be used in making the eligibility determination. If information is available from an observation conducted as part of routine classroom instruction that is important for the eligibility group to consider, the eligibility group should include the person who conducted that routine classroom [observation]. This will eliminate redundant observations and save time and resources. Parental consent is not required for observations conducted as part of routine classroom instruction and monitoring of the child’s performance before the child is referred for an evaluation....Parental consent is required for observations conducted after the child is suspected of having a disability and is referred for an evaluation. 71 Fed. Reg. 46659.

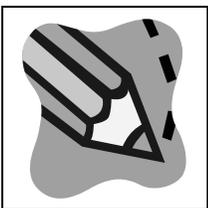
27. What about a child who is less than school age?

The setting for a child who is less than school age is different:

In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age. 34 C.F.R. §300.310(c).

28. Do you have to document the observation?

Yes. The documentation must include the following:



For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in §300.306(a)(2), must contain a statement of—...The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child’s academic functioning[.] 34 C.F.R. § 300.311(a)(3).

ACHIEVEMENT DEFICITS IN ONE OR MORE OF THE SPECIFIED AREAS

29. To be learning disabled, does the child have to have achievement deficits?

Yes. Whether you are using an RTI model or a pattern of strengths and weaknesses model for determining the presence of a learning disability, the group must find and document achievement deficits in one or more of the specified areas, as follows:

The group described in §300.306 may determine that a child has a specific learning disability, as defined in §300.8(c)(10), if—...The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards:

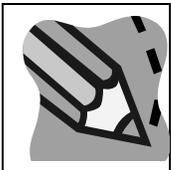
- (i) Oral expression.
- (ii) Listening comprehension.
- (iii) Written expression.
- (iv) Basic reading skill.
- (v) Reading fluency skills.
- (vi) Reading comprehension.
- (vii) Mathematics calculation.
- (viii) Mathematics problem solving.

34 C.F.R. § 300.309(a)(1); *see also*, 19 T.A.C. §89.1040(c)(9)(B)(ii).

30. These specified areas seem a little bit different from the IDEA 97 areas of learning disability.

Yes, they are. The final regulations add the NCLB category of “reading fluency skills” as one type of learning disability and change “mathematics reasoning” to “mathematics problem solving.”

31. Must the finding of achievement deficits be documented?



Yes, under the federal regulations, the documentation of a specific learning disability must include a statement of whether “the child does not achieve adequately for the child’s age or to meet state-approved grade-level standards consistent with §300.309(a)(1).” 34 C.F.R. §300.311(a)(5)(i).

32. Once achievement deficits are established, then what?

Using either an RTI model or a pattern of strengths and weaknesses model, the group must determine whether the achievement deficits are the result of a specific learning disability.

RESPONSE TO INTERVENTION MODEL

33. **Must the group document the child's rate of learning?**



Yes. In addition to finding achievement deficits, when using RTI to identify a specific learning disability, the group must find and document an insufficient learning rate:

For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in §300.306(a)(2), must contain a statement of...whether...the child does not make sufficient progress to meet age or State-approved grade-level standards consistent with §300.309(a)(2)(i)[.] 34 C.F.R. §300.311(a)(5)(ii).

34. **Does this mean we could determine eligibility based on existing data and not obtain parental consent?**

When using RTI as a way of determining LD eligibility, it must be done in the context of a full and individual evaluation. The USDE in its discussion of the regulations reminds us:

An RTI process does not replace the need for a comprehensive evaluation, and a child's eligibility for special education services cannot be changed solely on the basis of data from an RTI process. 71 Fed. Reg. 46648.

In *OSEP Letter to Copenhaver*, 108 LRP 16368 (October 19, 2007), OSEP elaborates:

Therefore, we do not believe that an RTI process alone would relieve a public agency of the obligation to conduct a comprehensive, individual, initial evaluation of a child, for which parental consent would be required.

Under 34 CFR § 300.304, any initial evaluation or reevaluation must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability under 34 CFR § 300.8 and the content of the child's IEP. In addition, the public agency may not use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR § 300.304(b)(1)-(2).

...

Based on these evaluation requirements, we believe that only in limited circumstances could a public agency conduct an initial evaluation only through review of existing data on the child, and that, in most instances, review of existing evaluation data on the child generally would be insufficient for a team to

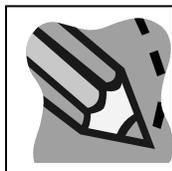
determine whether a child qualifies as a child with a disability and the nature and extent of the child's educational needs.

35. I'm confused.

It is confusing, but we think that the USDE is simply reminding us that the evaluation and reevaluation procedures contained in 34 C.F.R. §§300.301-300.305 must be followed, and that the determination of eligibility requirements of 34 C.F.R. §300.306 must be met, including:

In interpreting evaluation data for the purpose of determining if a child is a child with a disability under §300.8, and the educational needs of the child, each public agency must—

- (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- (ii) Ensure that information obtained from all of these sources is documented and carefully considered. 34 C.F.R. §300.306(c)(1).



PATTERN OF STRENGTHS AND WEAKNESSES MODEL

36. Do the federal regulations address the use of a discrepancy?

No. The State must develop the criteria for determining the presence of a learning disability. See 34 C.F.R. § 300.307(a). As previously stated, the criteria must include an RTI method, and may include other methods. 34 C.F.R. § 300.307(a).

OSEP explains that “pattern of strengths and weaknesses” is an alternative model to RTI, as follows:

34 CFR § 300.309(a)(2)(i) specifically applies to failure of a child to make sufficient progress when using a RTI process. Therefore, 34 CFR § 300.309(a)(2)(ii), which references a child exhibiting a pattern of strengths and weaknesses, would apply to all other permissible methods of identifying a child with a specific learning disability. *OSEP Letter to Zirkel*, 50 IDELR 49 (April 8, 2008).

37. Does pattern of strengths and weaknesses encompass the discrepancy model?

It appears to encompass discrepancy models. However, the U.S. Department of Education, in its discussion of a discrepancy model, does make some interesting comments (cautionary statements) regarding discrepancy models:

There is a substantial research base summarized in several recent consensus reports [citations omitted] that does not support the hypothesis that a discrepancy

model by itself can differentiate children with disabilities and children with general low achievement. 71 Fed. Reg. 46650.

Intellectual development is included in §300.309(a)(2)(ii) as one of three standards of comparison, along with age and State-approved grade-level standards. The reference to ‘intellectual development’ in this provision means that the child exhibits a pattern of strengths and weaknesses in performance relative to a standard of intellectual development such as commonly measured by IQ tests. Use of the term is consistent with the discretion provided in the Act in allowing the continued use of discrepancy models. 71 Fed. Reg. 46651.

The Department does not believe that an assessment of psychological or cognitive processing should be required in determining whether a child has an SLD. There is no current evidence that such assessments are necessary or sufficient for identifying SLD. Further, in many cases, these assessments have not been used to make appropriate intervention decisions. However, §300.309(a)(2)(ii) permits, but does not require, consideration of a pattern of strengths or weaknesses, or both, relative to intellectual development, **if the evaluation group considers that information relevant to an identification of SLD.** In many cases, though, assessments of cognitive processes simply add to the testing burden and do not contribute to interventions. 71 Fed. Reg. 46651 (emphasis added).

[A]n assessment of intra-individual differences in cognitive functions does not contribute to identification and intervention decisions for children suspected of having an SLD. The regulations, however, allow for the assessment of intra-individual differences in achievement as part of an identification model for SLD. The regulations also allow for the assessment of discrepancies in intellectual development and achievement. 71 Fed. Reg. 46651.

38. What do the IDEA regulations say about the use of a pattern of strengths and weaknesses for determining an SLD?

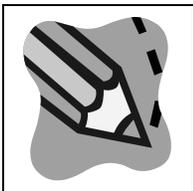
The regulations allow States to authorize the continued use of a discrepancy for determining an SLD under the following standard:

The group described in §300.306 may determine that a child has a specific learning disability, as defined in §300.8(c)(10), if—

...(2)...(ii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§300.304 and 300.305[.] 34 C.F.R. § 300.309(a).

39. What must be documented regarding a pattern of strengths and weaknesses?

The federal regulations require:



For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in §300.306(a)(2), must contain a statement of—

...(5) Whether—

- (i) The child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with §300.309(a)(1); and...
- (ii)...(B) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development consistent with §300.309(a)(2)(ii)[.] 34 C.F.R. §300.311(a).

40. What will happen to a child who has been eligible under the old discrepancy model but no longer qualifies when reevaluated using an RTI model or the current pattern of strengths and weaknesses model?

Regarding a child determined eligible under a discrepancy model and reevaluated under an RTI model, the U.S. Department of Education had this to say:

States that change their eligibility criteria for SLD may want to carefully consider the reevaluation of children found eligible for special education services using prior procedures. States should consider the effect of exiting a child from special education who has received special education and related services for many years and how the removal of such supports will affect the child's educational progress, particularly for a child who is in the final year(s) of high school. Obviously, the group should consider whether the child's instruction and overall special education program have been appropriate as part of this process. If the special education instruction has been appropriate and the child has not been able to exit special education, this would be strong evidence that the child's eligibility needs to be maintained. 71 Fed. Reg. 46648.

EXCLUSIONARY FACTORS

41. After applying either the RTI model or the pattern of strengths and weaknesses model, what is the next step?

The group must consider and exclude several other possible causes of the child's lack of adequate achievement:

The group described in §300.306 may determine that a child has a specific learning disability, as defined in §300.8(c)(10), if—...The group determines that its findings under paragraphs (a)(1) and (2) of this section are not primarily the result of—

- (i) A visual, hearing, or motor disability;
- (ii) Mental retardation;
- (iii) Emotional disturbance;
- (iv) Cultural factors;
- (v) Environmental or economic disadvantage; or
- (vi) Limited English proficiency. 34 C.F.R. §300.309(a)(3).

42. What must the documentation include regarding the exclusionary factors?

The regulations require:



For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in §300.306(a)(2), must contain a statement of—

... (6) The determination of the group concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child’s achievement level[.] 34 C.F.R. §300.311(a)(6).

The exclusionary factors and the documentation requirements remind us again that no single model for identifying a SLD can substitute for a full and individual evaluation that includes comprehensive information from a wide variety of sources.

43. Is there any guidance on how to assess the impact of culture?

In response to a request for guidance, the USDE in its comments to the regulations states:

The identification of the effect of cultural factors on a child’s performance is a judgment made by the eligibility group based on multiple sources of information, including the home environment, language proficiency, and other contextual factors gathered in the evaluation. 71 Fed. Reg. 46655.

The USDE discussion continues further with a statement regarding RTI:

The Department believes that the identification of children with SLD will improve with models based on systematic assessments of a child’s response to appropriate instruction, the results of which are one part of the information reviewed during the evaluation process to determine eligibility for special education and related services. States and public agencies must follow the evaluation procedures in §§300.304 and 300.305 and section 614(b) of the Act, including using assessments and other evaluation materials that do not discriminate on a racial or cultural basis, consistent with §300.304(c)(1)(i) and section 614(b)(3)(A)(i) of the Act. 71 Fed. Reg. 46655.

One resource is the National Center for Culturally Responsive Educational Systems (NCCREST), funded by the USDE and located at: <http://www.nccrest.org/>.

DETERMINANT FACTOR ANALYSIS

44. What is the determinant factor analysis?

It is the analysis that ensures that school districts do not identify a child as disabled due to culture, language or non-disability related educational reasons. IDEA 2004 strengthened the determinant factor analysis. The regulations go even further.

45. What do the regulations say?

The regulations at 34 C.F.R. §300.306(b) provide as follows:

Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part—

- (1) If the determinant factor for that determination is—
 - (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
 - (ii) Lack of appropriate instruction in math; or
 - (iii) Limited English proficiency; and
- (2) If the child does not otherwise meet the eligibility criteria under §300.8(a). 34 C.F.R. §300.306(b).

46. How do the regulations change the analysis?

IDEA 2004 added the determination of whether the child has received “appropriate” instruction in reading, including the essential components of reading instruction. The regulations added the determination of whether the child has received “appropriate” instruction in math.

47. What are the essential components of reading instruction?

The essential components of reading instruction referenced in both IDEA 2004 and the regulations are from the No Child Left Behind Act (NCLB):

The term ‘essential components of reading instruction’ means explicit and systematic instruction in—

- (A) phonemic awareness;
- (B) phonics;
- (C) vocabulary development;
- (D) reading fluency, including oral reading skills; and

(E) reading comprehension strategies. 20 U.S.C. §6368(3).

48. Many reading programs claim to be research-based, but lack credible evidence of the program’s effectiveness.

That’s exactly what one commenter told the U.S. Department of Education. The USDE responded as follows:

Programs that claim to be research-based, but which are not based on sound scientific research, should not be considered research-based instruction by a State or LEA. 71 Fed. Reg. 46656.

49. Why was the requirement for “appropriate” instruction in math added?

The USDE in its discussion of the regulations provides the following explanation:

We believe it is equally important that a child not be determined to be a child with a disability if the determinant factor is the lack of “appropriate” instruction in math. Therefore, we will revise §300.306(b)(1) to make this clear. 71 Fed. Reg. 46646.

50. Is there a simpler way of stating the analysis?

The USDE informally describes it as “if a child’s low achievement is a result of ” lack of appropriate instruction in reading, lack of appropriate instruction in math, or limited English proficiency, then “the child must not be determined to be a child with a disability....” 71 Fed. Reg. 46646. Elsewhere the USDE reiterates that “this means evidence that lack of appropriate instruction was [not] the source of underachievement.” 71 Fed. Reg. 46656.

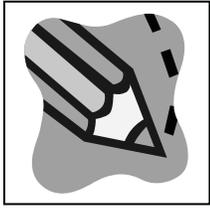
51. Is the determinant factor analysis required for any disability category?

Yes. The analysis is required before you can qualify a child under any IDEA disability category. However, for a learning disability, the analysis is more prescriptive.

52. How is the determinant factor analysis for a learning disability more prescriptive?

When determining the presence of a learning disability, the regulations specify what type of data the group of qualified professionals must consider, as follows:

To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§300.304 through 300.306—



- (1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
- (2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. 34 C.F.R. §300.309(b).

53. What data can be used to satisfy this federal requirement?

The USDE tells us:

Schools should have current, data-based evidence to indicate whether a child responds to appropriate instruction before determining that a child is a child with a disability. Children should not be identified as having a disability before concluding that their performance deficits are not the result of lack of appropriate instruction. 71 Fed. Reg. 46656.

Data-based documentation refers to an objective and systematic process of documenting a child's progress. This type of assessment is a feature of strong instruction in reading and math and is consistent with §300.306(b)(1)(i) and (ii) and section 614(b)(5)(A) and (B) of the Act, that children cannot be identified for special education if an achievement problem is due to lack of appropriate instruction in reading or math. 71 Fed. Reg. 46657.

54. Does this mean that continuous progress monitoring is required regardless of whether RTI is used as a means of determining SLD?

OSEP addressed this question in *OSEP Letter to Zirkel*, 50 IDELR 49 (April 8, 2008), as follows:

The eligibility group referenced above, under 34 CFR § 300.309(b)(2), must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. The regulation does not use the term "continuous progress monitoring."

The information referred to in 34 CFR § 300.309(b)(2) may be collected as a part of the evaluation process, or may be existing information from the regular instructional program of a school or LEA. It must be reviewed and weighed by the evaluation group. As we noted in the Analysis of Comments and Changes for the final IDEA Part B regulations, Federal Register, Vol. 71, No. 56, Monday, August 14, 2006, 71 Fed Reg. 46540, 46657, "[a] critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected

and analyzed and that parents are kept informed of the child's progress." We believe that this information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction.

55. Is it possible to find a learning disability if the child has not received appropriate instruction?

The USDE considers receipt of appropriate instruction to be a prerequisite to determining a child is LD:

Eligibility is contingent on the ability of the LEA to provide appropriate instruction. Determining the basis of low achievement when a child has been given appropriate instruction is the responsibility of the eligibility group. 71 Fed. Reg. 46656.

56. How does the group make the determination?

The USDE in its discussion of the regulations tell us: "Whether a child has received 'appropriate instruction' is appropriately left to State and local officials to determine." 71 Fed. Reg. 46656. The discussion suggests two fundamental elements: (1) access to State content standards; and (2) instruction delivered by qualified personnel:

We agree that a child should not be determined to be a child with a disability if the determinant factor is lack of access to State content standards.... 71 Fed. Reg. 46646.

As part of the evaluation, the eligibility group must consider whether the child received appropriate instruction from qualified personnel. 71 Fed. Reg. 46656.

57. How much historical information do we have to gather?

The USDE in its discussion of the regulations equivocates on that issue:

While information regarding the quality of instruction a child received in the past may be helpful in determining whether a child is eligible for special education services, it is not essential. Schools, however, must ensure that the determinant factor in deciding that a child is a child with a disability is not lack of appropriate instruction in reading and math. 71 Fed. Reg. 46646.

58. What do we do when the child has been home schooled or private schooled and there is little information available about the quality of instruction the child has received?

The USDE states:

As part of the evaluation, the eligibility group must consider whether the child received appropriate instruction from qualified personnel. For children who attend private schools or charter schools or who are home schooled, it may be necessary to obtain information from parents and teachers about the curricula used and the child's progress with various teaching strategies. The eligibility group also may need to use information from current classroom-based assessments or classroom observations. On the basis of the available information, the eligibility group may identify other information that is needed to determine whether the child's low achievement is due to a disability, and not primarily the result of lack of appropriate instruction. The requirements for special education eligibility or the expectations for the quality of teachers or instructional programs are not affected, and do not differ, by the location or venue of a child's instruction. 71 Fed. Reg. 46656.

59. What happens if we do not have adequate data?

The regulations and discussion of the regulations indicate that the school can deliver appropriate instruction as part of the referral process and use the data gathered during that period. The determinant factor regulation allows such data to be gathered "prior to, or as part of, the referral process." 34 C.F.R. §300.309(b)(1). The USDE further explains:

What is important is that the group making the eligibility decision has the information that it needs to rule out that the child's underachievement is a result of a lack of appropriate instruction. That could include evidence that the child was provided appropriate instruction either before, or as a part of, the referral process. 71 Fed. Red. 46656.

60. Why are the regulations more specific when it comes to a learning disability?

The USDE in its discussion of the regulations explains it as follows:

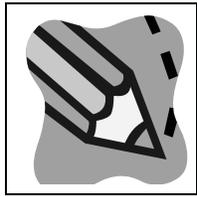
Sections 300.306(b)(1)(i) and (ii), consistent with section 614(b)(5)(A) and (B) of the Act, specifically state that children should not be identified for special education if the achievement problem is due to lack of appropriate instruction in reading or mathematics. This issue is especially relevant to SLD because lack of appropriate instruction in these areas most commonly leads to identifying a child as having an SLD. All children should be provided with appropriate instruction provided by qualified personnel. This is an important tenet of the Act and the ESEA. Both the Act and the ESEA focus on doing what works as evidenced by

scientific research and providing children with appropriate instruction delivered by qualified teachers. 71 Fed. Reg. 46655.

ADDITIONAL REQUIREMENTS

61. What else must the group's report include?

In addition to the specific documentation requirements discussed above, the report of the group of qualified professionals must include the following:



(a) For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in §300.306(a)(2), must contain a statement of—

- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination, including an assurance that the determination has been made in accordance with §300.306(c)(1) [see Question 35];
- ...(4) The educationally relevant medical findings, if any;

(b) Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.

62. Who determines if the child is eligible for special education?

Remember that the presence of a specific learning disability (or any disability that is covered under the IDEA) does not automatically qualify a child for special education services. The group of qualified professionals and the child's parent must also determine that the child needs special education and related services because of the disability. It is up to a duly constituted group that includes the child's parent to make that determination after considering the evaluation report. See 34 C.F.R. §§300.306 and 300.309.

In *Hood v. Encinitas Union School District*, 47 IDELR 213, 486 F.3d 1099 (9th Cir. 2007), the court held that the student was not eligible due to a specific learning disability or an other health impairment, because there was no need for specially designed instruction. As to a learning disability, the court held that the student failed to show that her disability could not be "corrected through regular or categorical services within the regular instructional program." California had a rule that stated that students were not eligible for special education if their learning problems were "correctable" through the provision of other services. The case was about what "correctable" means. The parents argued that "correctable" means that the services provided would cause the discrepancy between achievement and potential to narrow—i.e., that the learning disability would be lessened or cured. The court said that the parents' brief "offers no case law in support" of that standard. Instead, the

court ruled that the proper standard was the *Rowley* standard of educational benefit. Since the student was receiving an educational benefit from the services provided in the regular classroom, any learning disability that she had was “correctable.” Likewise, her ADD condition did not require special education.

63. What if the child has responded to regular education interventions such as differentiated instruction, but the Team believes the child is learning disabled?

It is important to keep in mind that to be eligible for services under the IDEA, it is not enough to have a disability. By reason of the child’s disability, the child must need special education and related services, as set forth below:

Child with a disability means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deafblindness, or multiple disabilities, **and who, by reason thereof, needs special education and related services.** 34 C.F.R. § 300.8(a)(1)(emphasis added).

“Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including— (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education.” 34 C.F.R. § 300.39(a)(1).

“Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—(i) To address the unique needs of the child that result from the child’s disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” 34 C.F.R. § 300.39(b)(e).

In *Ashli and Gordon C. v. State of Hawaii DOE*, 47 IDELR 65 (D.Hawaii 2007), the court held that the student was not eligible despite having ADHD and receiving “differentiated instruction.”

Key Quotes:

Regarding the “adversely affects” standard: “If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services.”

Importantly, the court ruled that “differentiated instruction” is not “specially designed instruction”: “[T]here is nothing in either the IDEA or in the state or federal

implementing regulations to indicate that a student would qualify as a ‘student with a disability’ when the school voluntarily modifies the regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level.”

The court approved the analysis of the special education hearing officer:

The Hearing Officer found that Sidney received “differentiated instruction” in the classroom such as additional time highlighting and taking tests, being moved closer to the teacher during tests, and having the teacher read the test directions to him, but that “differentiated instruction such as this is available to all children in [Sidney’s] classroom and is not an accommodation or different method of teaching, as special education or Section 504 modifications or accommodations would be.”

64. Finally, what if the parents disagree with the eligibility determination?

The USDE explains:

The eligibility group should work toward consensus, but under §300.306, the public agency has the ultimate responsibility to determine whether the child is a child with a disability. Parents and school personnel are encouraged to work together in making the eligibility determination. If the parent disagrees with the public agency’s determination, under §300.503, the public agency must provide the parent with prior written notice and the parent’s right to seek resolution of any disagreement through an impartial due process hearing, consistent with the requirements in §300.503 and section 615(b)(3) of the Act. 71 Fed. Reg. 46661.

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