



SLD Eligibility: A Users' Guide to the New Regulations

October 2006

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Students with specific learning disability (“SLD”) account for approximately half of all students that districts have determined to be eligible for special education under the Individuals with Disabilities Education Act (“IDEA”).¹ Since the late 1970s, the IDEA regulations have required states to use severe discrepancy—based on a comparison of the child’s academic achievement, typically based on a standardized test, with the child’s intellectual ability, typically based on an IQ test—as the primary but not exclusive criterion for determining SLD. The new regulations, issued in August 2006 to implement the 2004 amendments to the IDEA, provide significant changes in the determination of SLD eligibility. One of the new provisions concerns responsiveness to intervention (“RTI”), which is an alternate approach that starts with scientific, research-based instruction in general education and offers increasing levels of intervention based on continuous progress monitoring.²

Legal Building Blocks

Law, as a set of rules, fits in three basic categories—1) mandatory (i.e., thou shall), 2) permissive (i.e., thou may), and 3) prohibited (i.e., thou shall not).

As a general matter, special education law consists of a four-step process. First, federal legislation, which comes from Congress, provides the basic framework. Next, federal regulations, which come from the U.S. Department of Education, provide additional details to fill in the gaps. Third, states have the option to add to, but not subtract from, the federal foundation via their own state laws, whether in the form of legislation or regulations. Finally, case law, which comes from published hearing/review officer and court decisions, interprets and applies these federal and state laws. Separately, published commentary and guidance of the U.S. Department of Education and state education agencies provides nonbinding interpretations, to which hearing/review officers and courts may, but not must, accord deference.

Currently, we are between the second and third steps in this process. More specifically, in December 2004, Congress amended IDEA via the Individuals with Disabilities Education Improvement Act, effective July 1, 2005. Next, on August 14, 2006, the U.S. Department of Education issued the final regulations for these new amendments, officially effective on October 14, 2006.

Pending new state laws and published case law, this overview provides a user-friend-

1 See, e.g., Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for Special Education Eligibility* (2006) (available from the Council for Exceptional Children).

2 See, e.g., George Batsche et al. *Response to Intervention: Policy Considerations and Implementation* (2005) (available from the National Association of State Directors of Special Education); National Joint Committee on Learning Disabilities, *Responsiveness to Intervention and Learning Disabilities* (June 2003) (available at <http://www.ldonline.org/njcd>).

ly guide to the provisions in the 2004 amendments and the new IDEA regulations pertinent to SLD eligibility, including the role of RTI. This site provides a link to the final version of the regulations, which is prefaced by the U.S. Department of Education's commentary.

IDEA Amendments

In the legislation effective July 1, 2005, Congress made the following changes pertinent to SLD eligibility:

- revised the severe discrepancy approach from mandatory to nonmandatory status
- in doing so, indirectly elevated the status of the enumerated areas of SLD (i.e., oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematics calculation, and mathematics problem solving) from the former regulations to the amended legislation
- expressly permitted RTI, or what Congress called “a process which determines if a child responds to scientific, research-based intervention”
- provided for the use of up to 15 percent of IDEA funds for “early intervening services,” which may include RTI, on a permissive basis (except mandatory if the district has engaged in significant over-identification of minority students)³

IDEA Regulations: Criteria

First, the new regulations require each state to adopt criteria determining SLD eligibility that 1) may no longer require districts to use severe discrepancy, 2) must permit them to use RTI, and 3) may permit them to use other research-based alternatives. For the first option, in its interpretive comments accompanying the regulations, the U.S. Department of Education explained that, although it removed the proposed regulation that expressly

allowed for prohibition and “does not believe it is appropriate to add language in the regulations discouraging the use of discrepancy models to identify children with SLD,” in its view, “States are free to prohibit the use of a discrepancy model.” For the second option, the department clarified that “[t]here are many RTI models and the regulations are written to accommodate the many different models that are currently in use,” declining to endorse or elaborate any particular model and leaving the matter—including the extent of involvement of interested parties, including parent groups, and the specifics for professional development—to state and local discretion.⁴ For the third option, the department provided an example and also suggested the possibility of an eclectic approach:

For example, a State could choose to identify children based on absolute low achievement and consideration of exclusionary factors as one criterion for eligibility. Other alternatives might combine features of different models for identification.

Finally, although seeking consistency within each state, the department clarified: “There is nothing in the Act that would require a State to use one model of identification to identify a child with an SLD.”

Second, the new regulations add an eighth enumerated area—“reading fluency skills.”

Third, the new regulations change the focus for achievement in the enumerated areas from the child's intellectual ability to “the child's age or to meet State-approved grade-level standards.” The department's interpretive comments clarified that the primary purpose for this standards-based lan-

3 Advocating the use of these monies for RTI, the organizations representing state and local leaders in special education called for an integrated approach whereby “RTI and a structured, systematic model of problem-solving are based in general education and . . . are not special education initiatives.” NASDSE & CASE, *Response to Intervention: A Joint Paper by the National Association of State Directors of Special Education and the Council of Administrators of Special Education 2* (May 2006) (available at www.nasdse.org).

4 The commentary added this information: OSEP plans to develop and disseminate an RTI resource kit and devote additional resources to technical assistance providers to assist States in implementing RTI models. OSEP will also continue to identify and develop model RTI implementation sites and evaluate SLD identification models in math and reading. In addition, the Comprehensive Center on Instruction, jointly funded by OSEP and the Office of Elementary and Secondary Education (OESE), will provide technical assistance to States on RTI implementation.

guage is alignment with the No Child Left Behind Act.⁵

Fourth, the new regulations effectively define the severe-discrepancy alternative as “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 [SLD].”⁶

Fifth, the new regulations add limited English proficiency to the list of exclusions, i.e., other specified conditions primarily accounting for the child’s inadequate achievement.

Sixth, the new regulations require the team to “consider” as part of the eligibility evaluation the following two forms of information to assure that the child’s underachievement was not due to lack of appropriate instruction in reading or math:

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,”⁷ 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.”⁸

IDEA Regulation: Procedures

The eligibility team membership requirements

remain unchanged from the previous regulations, including, for example, the child’s parent, general education teacher, and “at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist”

An observation of the child is still required but the context is broadened to “the child’s learning environment (including the regular classroom setting).”⁹ In addition, the eligibility team has the choice of conducting and using either a pre-referral observation of the child’s performance in routine classroom instruction or a post-referral observation with parental consent by a member of the eligibility team.¹⁰

To assure timeliness of identification, however, the new regulations require the district to promptly request parental consent for an SLD eligibility evaluation and to adhere to the prescribed period for completing the evaluation (“unless extended by mutual written agreement”) in the following circumstances:

1. when the child has not made adequate progress “after an appropriate period of time” upon meeting both #1 and #2 listed above under Criteria¹¹
2. when the district refers the child for an eligibility evaluation

Finally, the new regulations continue the requirement of a written evaluation report but they add to the report’s required elements documentation in line with the specific approach used—i.e., the aforementioned “pattern” approach or RTI.

Conclusion

The scene of legal activity is now at the state and local levels. First, interested individuals should check the latest literature concerning the approaches for determining SLD eligibility. Next, they should get involved with the pertinent policymaking in their states in terms of the state legislation or regulations corresponding to IDEA. Finally, they

5 Pointing to the “or,” the department also agreed with the interpretation that “a child could meet State standards and still be identified as a child with an SLD.”

6 Similarly but less significantly, the regulations—in contrast to the legislation—refer to RTI as “a process based on the child’s response to scientific, research-based intervention.”

7 The department removed the more ambitious language of the proposed regulations, explaining that “we agree that the requirement for high quality, research-based instruction exceeds statutory authority.”

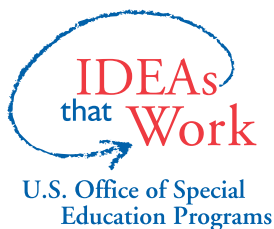
8 In its interpretive comments, the department defined data-based documentation as “an objective and systematic process of documenting a child’s progress.” At the same time, the department clarified that “relying exclusively on data from Statewide assessments under [NCLB] would likely not meet the requirement for repeated assessments at ‘reasonable intervals.’”

9 The department dropped the proposed regulations’ requirement for training in observation, explaining that it was unclear.

10 In its comments, the department interpreted IDEA as requiring parental consent for post-referral but not for pre-referral observations.

11 The department interpreted “appropriate” in this context as synonymous with “reasonable.”

should get active in the local process of implementing the new IDEA and related state requirements for proper determination of which students are identified as SLD.



NRCLD is a joint project of researchers at Vanderbilt University and the University of Kansas. This document was produced under U.S. Department of Education Grant No. H324U010004. Renee Bradley served as the project officer. The views expressed herein do not necessarily represent the positions or policies of the Department of Education. No official endorsement by the U.S. Department of Education of any product, commodity, service or enterprise mentioned in this publication is intended or should be inferred.

Zirkel, P.A. (2006). SLD eligibility: A users' guide to the new regulations. Lawrence, KS: National Research Center on Learning Disabilities.