2011 BIE Special Education Academy

Evaluation and Eligibility Issues

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I. Identification

A. Child Find (IDEA Regulations 34 CFR 300.111,131 and 301)

1. Each state must have policies and procedures to ensure that all children with disabilities who are in need of special education and who are residing in the state are identified, located and evaluated.

   The IDEA clarifies that the child find requirements apply to highly mobile children (such as migrant children), homeless children, children who are wards of the state and children who may have a disability and be in need of special education even though they are advancing from grade to grade.

   Note: The definition of a homeless child includes not only those children and youth who are living on the streets, cars, parks, etc., but also includes migratory children and children who are sharing housing of other persons due to loss of housing, economic hardship, or a similar reason (McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11434a, Section 725).
   In addition, the child find responsibility covers all children with disabilities, including students attending private schools placed by their parents.

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B. Early Intervening Services (34 CFR 300.226)

1. The IDEA allows a Local Education Agency (LEA) to use up to 15% of its IDEA funds under Part B to develop and implement coordinated, early intervening services (EIS) for students K-12 (with particular emphasis on students K-3) for students not currently identified as needing special education, but who need additional academic and behavioral support to succeed in general education. These general education supports should be viewed as pre-referral efforts before a child is referred for a special education evaluation. EIS is not limited to students suspected of having a specific learning disability.

2. If the LEA has been determined to have significant disproportionality problems in the identification and placement of students with disabilities, the LEA must use 15% of its IDEA Part B funds to provide comprehensive coordinated early intervening services particularly to those children who were overidentified.

3. Early intervening services include professional development for teachers and other staff to enable personnel to deliver scientifically based academic and behavior interventions including scientifically based literacy instruction. In addition EIS may include providing educational and behavioral evaluations, services and supports.

4. If the LEA uses Part B funds to provide EIS, the LEA must annually report to the SEA on: the number of students serviced with EIS, the number of the students receiving EIS who subsequently received special education services during the preceding two year period.

Regulatory Comments

- The Comments to the IDEA Regulations emphasize that the use of early intervening services may not delay an appropriate evaluation for special education although there is no specific time limit for receiving such services before an evaluation. (Federal Register,

Volume 71, No. 156, Page 46626)

- The Comments explain the early intervening services may not be used for preschoolers. (Page 46627)

C. General Education Intervention/Child Find Cases

1. The Court determined that the district complied with the IDEA when it attempted pre-referral intervention before placing a student in special education. Furthermore, state policy expected that general education interventions would be considered before referring a student for a special education evaluation Johnson v. Upland Unified School District, 36 IDELR 2, 29 Fed. Appx. 689 (United States Court of Appeals, 9th Circuit (2002)). This is an unpublished decision.

2. The Court found that the school district violated its responsibility under the child find provision of the IDEA when it did not conduct a special education evaluation of a student. The 10th grade student was referred by the school to a mental health counselor since the student failed every subject and the teachers reported that her work was "gibberish and incomprehensible", she played with dolls in class and urinated on herself in class.
Although the mental health counselor recommended a special education evaluation, the school district did not refer her for an evaluation and instead promoted her to the 11th grade. The school did finally conduct an evaluation when the parent made a referral. Compton Unified School District v. Addison 598 F.3d 1181,54 IDELR 71 (United States Court of Appeals, 9th Circuit (2010)). On Appeal to the United States Supreme Court.

3. The Court affirmed the District Court's conclusion supporting the use of a general education intervention team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student. The process did not act

as a "roadblock" to prevent the parents from requesting an evaluation at any time. In this case, the parents had never submitted a request to have their child evaluated.

Lastly, the Court concluded that the IDEA's procedural safeguards do not apply to general education interventions and therefore the parents do not have a legal right to be part of such team. The mere discussion of a possible special education referral by the team does not become a special education referral triggering the IDEA's procedural protections. A.P. v. Woodstock Board of Education 370 F.Appx. 202, 55 IDELR 61 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.

4. The Court found that the school district failed to adhere to its child find efforts under the IDEA. Based on the student's record of consecutive failures on state assessments, continuing difficulty in multiple subjects and the inability of prior accommodations under Section 504 to improve his performance, the school had reason to suspect the student had a disability.

   In addition, the Court found that when a parent requests a special education evaluation, the IDEA gives the parent a right to the evaluation and overrides local district policy which would require a general education intervention team to first consider interventions before conducting the evaluation. In those instances, the required use of the general education intervention team impedes the exercise of rights guaranteed by federal law and would violate the IDEA. El Paso Independent School District v. Richard R., 50 IDELR 256, 567 F. Supp. 2d 918 (United States District Court, Western District, Texas (2008). Appealed on other grounds.

5. The United States Department of Education issued a clarification memo that it would be inconsistent with the IDEA's evaluation procedures for a school to reject a referral for a special education evaluation from a parent and delay the provision of an initial evaluation on the basis that the student has not participated in an RTI (Response to Intervention) strategy or framework. The IDEA allows a parent to request an initial special education evaluation at any time.

   timeframe from referral for evaluation to requesting parental consent to evaluate, it is the Department's policy that the

school must seek parental consent within "a reasonable period of time" after receiving a referral. If the school does not feel a special education is warranted and denies the parent's request, the school must provide written notice of refusal to evaluate the student which is subject to a due process hearing or an administrative complaint should the parent challenge the school's decision. Memorandum to State Directors of Special Education 56 IDELR 50 (United States Department of Education, Office of Special Education Programs (2011)).

II. Initial Evaluation (34 CFR 300.301)

A. An initial evaluation shall be conducted, pursuant to a request by the parents or the public agency, before the initial provision of special education and related services to a child with a disability.

1. The IDEA regulations allow a parent to revoke consent for IEP services at any time. (See 34 CFR 300.300(b)(4)) Such revocation is not subject to a legal challenge by the school district. The Comments to the Regulations note that if a parent revokes consent for special education services, the parent may request at any time that the student be re-enrolled in special education. In such case, the request shall be treated as a request for an initial evaluation. The Comments highlight that the parent may want to consider making an evaluation request when their child has a discipline issue or in meeting graduation requirements. There is no limitation on the number of times a parent may revoke consent for special education and then subsequently request reinstatement in special education. (Federal Register, Volume 73, No. 231, Page 73014)

   If a parent makes a request for a special education evaluation, the student should be treated as any other student in the child find process. Depending on the data available the new evaluation may consist of a review of existing evaluation data. Based on a review of existing data that includes information provided by the parents, current classroom, local and/or State assessments and observations by teachers and related service providers, the IEP Team and other qualified professionals will determine what, if any, evaluation data are needed to determine whether the student qualifies for special

education and, if so, the educational needs of the student. (Federal Register, Volume 73, No. 231, Page 73015)

2. If a student with a disability on an IEP transfers to a new school district in another state and a new evaluation is required to determine whether the student is eligible for special education in the new state, the evaluation is considered a new evaluation and not a reevaluation. Letter to Champagne 53 IDELR 198 (United States Department of Education, Office of Special Education (2008)).

3. In conducting the evaluation, the LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is special education eligible and the content of the child's IEP.

4. The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability category. Also, if appropriate, members of the IEP Team and other qualified personnel review existing information to determine what additional data needs to be collected as part of the evaluation.

5. The evaluation must be completed within 60 days from the date of consent unless the State establishes a different timeframe. Exceptions are permitted in situations where the student moves to a new LEA prior to the eligibility determination (in which case the LEA and the parent must agree to a specific time when the evaluation will be completed) or if the parent fails to produce the student for the evaluation.

6. Screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not deemed an evaluation.
   Nothing in either the IDEA or its implementing regulations requires a State or local educational agency 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. In

addition, there is nothing in the IDEA that requires a State or LEA to, or prohibits a State or LEA from, developing and implementing policies that permit screening children to determine if evaluations are necessary. Letter to Torres 53 IDELR 333 (United States Department of Education, Office of Special Education Programs (2009))

7. In addition, an evaluation involving two school districts in the same academic year shall be coordinated and expeditiously completed.

B. Evaluation Contents (34 CFR 300.305)

1. Relevant functional and developmental information

2. Information from parents

3. Information related to enabling access in and progress in the general curriculum

4. Technically sound instruments that assess cognitive and behavioral factors in addition to physical and developmental factors

5. Review of existing data

6. Current classroom-based assessments and observations

7. Teacher and related service providers' observations .

8. Evaluations are to be administered in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless not feasible.

9. Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.

10. The Comments to the IDEA regulations state that the IDEA does not require an LEA to evaluate a student for other

agency purposes such as a vocational rehabilitation program, a college or other postsecondary setting. (Page 46644)

C. Notice/Consent for initial evaluation (34 CFR 300.300)

1. Written notice of initial evaluation

Prior written notice must be provided to the parents when the school is proposing to change or refusing to change the child's identification or evaluation. (300.503 (a)). A copy of the procedural safeguards must be given to the parents upon the initial referral or parent request for an evaluation. (300.504 (a)).

If the LEA does not agree with the parent's request for an initial evaluation since it does not suspect that the child has a disability and is in need of special education, the LEA may refuse to conduct the evaluation. In that instance, the LEA must provide the parents with written notice of its decision and the parents have procedural safeguards available including the right to request a due process hearing. Letter to Anonymous 19 IDELR 498 (United States Department of Education, Office of Special Education Programs (1992)).

2. Consent for initial evaluation

The LEA, after providing the parents with written notice of its proposal to conduct an initial evaluation, must obtain informed written consent from the parent before conducting the evaluation.
Parental consent is not required before reviewing existing data as part of an evaluation or administering a test/evaluation administered to all children.

The Court held that the school district could not proceed with an initial special education evaluation when one parent provided written consent for the evaluation and the other parent provided a written refusal to consent to the evaluation. Both parents had equal legal rights in this matter. The parents are free, however, to litigate any dispute regarding their relative educational decision making rights in the family court. In the Matter of J.H. v. Northfield Public School

District 52 IDELR 165 (Minnesota Court of Appeals (2009)). Note: This is an unpublished decision.

3. Refusal to consent.

If the parent does not provide consent for the initial evaluation or reevaluation, the LEA may pursue the issue through mediation or a due process hearing. The LEA does not violate its child find responsibilities if it declines to pursue the evaluation after making reasonable efforts to obtain parental consent. (300.300 (a)(3)(ii) and (c)(i))

If a parent of a student who is home schooled or parentally placed in a private school does not provide consent for the initial evaluation or reevaluation, the LEA may not use mediation or a due process hearing to override the parent's refusal. The LEA is not required to consider such child as eligible for services. (300.300 (d)(4))

4. If the child is a ward of the state (which does not include a child who has a foster parent) and not residing with a parent, reasonable efforts shall be made to obtain parent consent. No parental consent is required if the parent cannot be found, parental rights have been terminated, or a judge has appointed an individual with educational authority.

D. Evaluation Cases

1. The Court found no substantive harm when school officials and its evaluators conferred without the parents present to coordinate the drafting of an assessment report which discussed eligibility. The parent was an active participant in the final determination of eligibility N.L. v. Knox County Schools, 38 IDELR 62, 315 F.3d 688 (United States Court of Appeals, 6th Circuit (2003)).

2. The Court affirmed the school's right to conduct a medical evaluation of a student, as part of a reevaluation, in spite of the guardian's refusal to consent to such evaluation. It was found that the school articulated reasonable grounds for the necessity of the evaluation. The Court rejected the argument that the medical evaluation would violate the student's right

to privacy stating that the guardian could decline special education under the IDEA rather than to decline to have the medical evaluation. Shelby S. v. Conroe Independent School District, 45 IDELR 269, 454 F.3d 450 (United States Court of Appeals, 5th Circuit (2006)).

3. In an action raising several procedural issues under the IDEA, one claim by the parents of a student with a disability was that the school district failed to assess the student in his primary language, in particular the psychological assessment. A language interpreter was present during the verbal portions of the assessment but direct verbal cues were not given. The hearing officer agreed with the psychologist that verbal cues would have disturbed the validity of the test and therefore native language administration was not feasible.
The Court of Appeals commented that even if they disagreed and found that native language assessment was feasible, there was no evidence in the record that the results of the psychological assessment resulted in the student being denied a suitable educational opportunity Park v. Anaheim Union High School District, 45 IDELR 178, 444. F3d 1149 (United States Court of Appeals, 9th Circuit (2006)).

4. Once a test has been given to a student and has personally identifiable information (such as the student's name, social security number or school number) it becomes an educational record. Therefore, the parents must have access to the test protocol under the Family Educational Rights and Privacy Act (FERPA) Letter to Kelly 211 IDELR 240 (United States Department of Education, Office of Special Education Programs (1980)).

5. FERPA (the Buckley Amendment) requires that a school respond to reasonable requests for explanations and interpretations of education records such as test answer sheets or test protocols not accompanied by the question booklet. Thus, a school should, upon request, provide the parent an opportunity to review the test booklet by either showing the test question booklet, read the questions to the parent or provide an interpretation for the responses in some other manner adequate to inform the parent Letter to Scott City School District, 107 LRP 47713 (United States Department of Education, Family Policy Compliance Office (2007)).

6. The school, by referring a family to an evaluation center to determine whether the child with a disability was also autistic, violated its obligation under the IDEA to evaluate the student in all areas of suspected disability. The Court held that a school cannot abdicate its affirmative duties under the IDEA by simply referring the parents to an evaluation center since it would not ensure that the child is assessed. The Court concluded that such procedural deficiency denied the student a FAPE. N.B. v. Hellgate Elementary School District 50 IDELR 241, 541 F.3d 1202 (United States Court of Appeals, 9th Circuit (2008)).

7. The parents were denied reimbursement for private services obtained for their twins with autism. The Court found that the school's evaluation was timely since there was no reason to suspect the twins were autistic until the private service provider contacted the district. However, the parents were partially reimbursed for the private evaluation due to the delay in sending the parents prior written notice of the school's intent to evaluate along with a copy of the procedural safeguards. J.G. v. Douglas County School District , 51 IDELR 119, 552 F.3d 786 (United States Court of Appeals, 9th Circuit (2008)).

8. The parents alleged the school failed to properly assess the cognitive ability of their student with autism since the assessors were not able to obtain an IQ score for her. The Court rejected the allegation finding that the evidence demonstrated that the school attempted to assess her cognitive ability but was unable to do so because of her distractibility and limited ability to maintain social interaction.
The Court also held that an IQ score is not a legal prerequisite to a determination that the student is cognitively disabled. The IDEA prohibits the use of a single measure or assessment as the sole criterion for determining whether a student is eligible for IEP services or for determining an appropriate educational program for the student. K.S. v. Fremont Unified School District 56 IDELR 190 (United States Court of Appeals, 9th Circuit (2011)). Note: This is an unpublished opinion.

III. Reevaluations (34 CFR 300.303)

A. A reevaluation is required to be conducted if conditions warrant, if the child's parent or teacher requests, but at least once every three years. The three year reevaluation may be waived by agreement of the LEA and the parents. In addition, a reevaluation need not be conducted more than once per year unless the parents and the LEA both agree.

The Analysis and Comments to the Regulations state that if the parent requests a reevaluation more than once per year and the LEA does not agree that it is needed, the LEA shall provide the parents with written notice of the agency's refusal to conduct the reevaluation. (Page 46640 of the Federal Register)

B. Consent and Notice required.

1. A district may conduct the reevaluation without consent if it has taken reasonable measures to obtain consent and the parent has not responded. The IDEA requires that the agency have a record of its attempts in requesting consent for reevaluation in meeting the reasonable measure requirement.

2. If the parent does not provide consent for the reevaluation and the LEA chooses not to pursue the reevaluation by using the consent override provision (such as a due process hearing or mediation) the LEA need not continue to provide FAPE to the child if the LEA determines that based on existing data the child does not continue to meet special education eligibility criteria.
In such case, the LEA must provide the parent with prior written notice of its proposal to discontinue the provision of FAPE to the child (Questions and Answers on IEPs, Evaluations, and Reevaluations, Questions D-4 (United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS) (2010)).

3. The Court held that by imposing numerous conditions on the reevaluation (including the requirement that the parents meet with the evaluators prior to and after the evaluations prior to the submission to the Team, that all evaluations be conducted in the presence of the parent and the evaluation shall not be submitted to anyone without parent consent) the parents in

effect refused to consent. The Court ordered the parent to consent to the reevaluation and held that the parents were not entitled to an Independent Educational Evaluation at public expense. G.J. v. Muscogee County School District 54 IDELR 76 (United States District Court, Middle District, Georgia (2010).

C. Scope of Reevaluation (34 CFR 300.305)

1. If the IEP Team and "other qualified professionals" determine that no additional data is needed to confirm continued eligibility, the District shall:

   a. Provide notice to parents.

   b. Afford the right of parents to request additional assessments. The district is not required to conduct the assessment unless requested by the parents.

2. The IDEA permits the IEP Team and other qualified individuals to review the existing evaluation data to determine the scope of the evaluation without a Team meeting required.

3. There is no requirement under the IDEA that a school district conduct a reevaluation of a child with a disability or additional testing solely to satisfy the eligibility criteria established by the College Board or other testing programs to secure testing accommodations on the SAT/ACT. However, there is nothing in the IDEA that prevents a student from submitting to the College Board or other testing organization the results of testing done as part of a reevaluation. Moreover, there is nothing in the IDEA that bars a District from conducting testing to satisfy the eligibility criteria established by the College Board or other testing programs but such testing generally would not be covered by Part B of the IDEA and would have to be paid for out of an alternate funding source. Letter to Moffit 54 IDELR 130 (United States Department of Education, Office of Special Education Programs (2009))

D. Reevaluations and Exiting Special Education (34 CFR 300.305(e))

1. An LEA shall reevaluate a child with a disability before determining that the child is no longer eligible for special education services.

   A reevaluation is not required due to a termination of eligibility resulting from graduation with a regular high school diploma or exceeding the State's age eligibility for FAPE. Graduation with a regular diploma constitutes a change of placement requiring prior written notice.
   Note: The IDEA also allows parents to revoke consent for continued special education services which would also result in the student being exited from special education.

   The term regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED). (34 CFR 300.102 (a)(3)(iv))

IV. Independent Educational Evaluation (34 CFR 300.502)

A. Parents have the right to obtain an Independent Educational Evaluation (IEE). Upon requesting an IEE, the public agency shall provide to the parents information about where an IEE may be obtained and the agency criteria applicable for IEEs.

B The IEE is at public expense if the parent disagrees with the district's evaluation unless the district initiates a due process hearing. A parent is entitled to only one independent educational evaluation at public expense each time the agency conducts an evaluation with which the parent disagrees. (34 CFR 300.502 (b)(5))

1. District has the right to initiate a hearing without unnecessary delay to show that its evaluation is appropriate.

C. The IDEA allows a public agency to ask for (but not require) an explanation by the parent why he/she objects to the agency's evaluation. Such request may not unreasonably delay payment or due process.

D. The IEE at public expense must meet the same criteria as the district

uses for its evaluations.

E. The independent educational evaluation must be considered by the LEA in any decision made with respect to FAPE if the IEE meets the agency criteria. (300.502 (c)(1)

F. Independent Educational Evaluation Cases

1. The parent of a student who was diagnosed as having an attachment disorder, oppositional defiant disorder, conduct disorder and histrionic personality, obtained an IEE which concluded that the student required a residential placement. The Court found that the school failed to consider the IEE as the IDEA requires since the team did not have a staff member who had knowledge in the suspected disability. Also, the team failed to reconcile the inconsistent opinions of the IEE's conclusion with the district's position Seattle School District v. B.S. 24 IDELR 68, 82 F.3d 1493 (United States Court of Appeals, 9th Circuit (1996)).

2. When a parent requests an Independent Educational Evaluation (IEE) at public expense, the LEA must "without unnecessary delay" either comply with the request or initiate a due process hearing to show its evaluation is appropriate. The Court held that the district failed to file its due process request "without unnecessary delay" when it took almost three months from the parent's request to the filing of a due process hearing complaint. The unexplained and unnecessary delay in requesting the hearing waived the right of the LEA to contest the IEE Pajaro Valley Unified School District v. J.S. 47 IDELR 12 (United States District Court, Northern District, California (2007)).

3. When a parent requests an independent educational evaluation (IEE), the school must either pay for the IEE or request a due process hearing "without unnecessary delay". The Court held that the district's due process hearing complaint filed two months after the IEE request was timely since the parties were in continued communication trying to resolve their differences during this period and the school's winter break began almost immediately after the request was made. J.P. v. Ripon Unified School District 52 IDELR 125

(United States District Court, Eastern District, California (2009)).

4. A school district limited an independent evaluator's ability to observe the placement proposed by the IEP Team to 20 minutes per observation. The Court held that although it may be a procedural violation there was no evidence presented that the parents' ability to meaningfully participate was significantly impacted. The independent evaluator conceded that she was able to provide the parents with an informed and independent opinion which was introduced as evidence in a due process hearing. L.M. v. Capistrano Unified School District, 50 IDELR 181, 538 F.3d 1261 (United States Court of Appeals, 9th Circuit (2008)).

5. The Court held that the parents' right to have an IEE includes the right to have their private evaluator conduct an in school observation of the student. School Board of Manatee County v. L.H. 666 F.Supp.2d 1285, 53 IDELR 149 (United States District Court, Middle District, Florida (2009)).

6. The parents were entitled to payment for an Independent Educational Evaluation (IEE) since the district failed to evaluate the student when there was reason to do so. Even though the parents did not "disagree" with the school's evaluation, as required by the IDEA, since there was no evaluation to disagree with, the Court held that the parents were entitled to reimbursement based on equitable considerations Los Angeles Unified School District v. D.L., 49 IDELR 252, 548 F.Supp. 2d 815 (United States District Court, Central District, California (2008)).

V. Eligibility

A. The term 'child with a disability' means a child – (34 CFR 300.8)

1. with an intellectual disability (formerly referred to as mental retardation), hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), an orthopedic impairment, autism,

traumatic brain injury, deaf-blindness, multiple disabilities, other health impairments, or specific learning disabilities; and

2. who, by reason thereof, needs special education and related services.

   Special education is defined as specially designed instruction (adapting, as appropriate, the content, methodology, or delivery of instruction) to address the unique needs of the child that results from the disability and to ensure access to the general curriculum. Special education includes travel training and related services (if state standards include related services as special education).

B. Decisions made by a team of qualified individuals and the parent. They must consider information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendation as well as information about the child's physical condition, social or cultural background, and adaptive behavior.(34 CFR 300.306)

C. The team may not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining the appropriate educational program for the child. (34 CFR 300.304(b)(2)).

D. Copy of eligibility determination and evaluation report provided to parent. (34 CFR 300.306)

E. Not eligible if the determinant factor is the lack of instruction in math or due to the limited English proficiency of the student. In addition, a student is not eligible for special education services if it is found that the determinant factor in learning problems is the lack of appropriate instruction in reading, including essential components of reading instruction as defined by the ESEA. The ESEA defines the essential components as: phonemic awareness, phonics, vocabulary development, reading fluency including oral reading skills, and reading comprehension strategies. (34 CFR 300.306)

F. States have the discretion of using the "developmental delay" standard for determining eligibility for students ages three through nine. (34 CFR 300.8 (d))

G. States must establish policies and procedures designed to prevent inappropriate over-identification or disproportionate representation by race or ethnicity. (34 CFR 300.646)

H. Specific Learning Disabilities

1. 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.
   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 who, by reason thereof, needs special education and related services. (34 CFR 300.08 (b)(10)).

2. LEA may opt out of using the severe discrepancy part of the specific learning disabilities definition (SLD) and replace it by using a response to scientific research based intervention (RTI) model of eligibility as part of the evaluation procedures. (34 CFR 300.307)

3. States must adopt criteria for determining SLD. A State must permit a process that determines if a child responds to scientific research-based interventions and may permit the use of other alternative research based procedures. (34 CFR 300.307 (a)).

   Note: The language in the proposed regulations would have allowed a State to prohibit the use of severe discrepancy was removed from the final regulations. The Comments to the regulations state that States are "free to prohibit the use of a discrepancy model." (Federal Register, August 14, 2006, Page 46646)

United States Department of Education Guidance

- Although the U.S. Department of Education does not subscribe to a particular RTI model, they listed four characteristics that underpin all models: (1) students receive high quality research based instruction in their general education setting; (2) continuous monitoring of student performance; (3) all students are screened for academic and behavioral problems; and (4) multiple levels (tiers) of instruction that are progressively more intense, based on the student's response to instruction (Questions and Answers on Response to Intervention and Early Intervening Services, Question F-5 (OSERS (2007)).

- The definition of an SLD goes beyond a mere determination of whether the student is experiencing a "severe discrepancy" or is not successful under a RTI process model. As the comments to the IDEA regulations state, "the evaluation of a child suspected as having a disability, including an SLD, must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility" (Federal Register, Page 46646). "An RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required…" (Federal Register, Page 46648).

- If a State or LEA requires the use of RTI in identifying children with SLD, then all children suspected of having a SLD in all schools in the LEA would be required to use the process. An LEA cannot use RTI for purposes of eligibility determinations until RTI was fully implemented in the LEA. Questions and Answers on Response to Intervention and Early Intervening Services, Question F-4 (OSERS (2007)).

- In response to an inquiry clarifying the above statement, OSEP responded that if RTI is not required but permitted by the LEA, a school would not have to

wait until RTI is fully implemented in all schools in the LEA before using RTI as part of the identification of a student with SLD Letter to Cernosia (OSEP (2007)).

4. A child may be deemed to have a SLD if:

   a. the child does not achieve adequately for the child's age or does not 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:

      oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, math calculations, math problem solving

   b. the child does not make sufficient progress to meet age or State approved grade level standards when using a process based on response to scientific, research-based interventions or

   c. 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 relevant to determining a SLD using appropriate assessments. (34 CFR 300.309 (a)(1))

5. The eligibility team must consider data that prior to, or as part of the referral process, the child was provided appropriate instruction in regular education settings delivered by qualified personnel and repeated data based documented assessments of achievement at reasonable intervals, reflecting formal assessments during instruction which was reported to the parents. (300.309 (b).

Regulatory Comments

- Children may not be identified as having SLD if there is no documentation of appropriate instruction, consistent with the Act and the ESEA. (Federal Register, Page 46652)

- For students in private schools or home schools, the public school may need to get information from parents/teachers, current class based assessments and observations. Special Ed eligibility requirements do not differ by location or venue of the child's education. (Federal Register, Page 46656)

- Data based documentation refers to an objective and systematic process of documenting a student's progress. There is no definition of repeated assessments or intervals since instructional models vary. (Federal Register, Page 46657)

- The information referred to as data based documentation of repeated assessments at reasonable intervals may be collected as part of the evaluation process or may be existing information from the regular instructional program. It must be reviewed and weighed by the evaluation team. Letter to Zirkel 50 IDELR 49 (United States Department of Education, Office of Special Education Programs (2008)).

6. Parental consent must be promptly requested to evaluate if the child needs special education and related services. If the child has not made adequate progress after an appropriate period of time, a referral for a special education evaluation must be made. (300.309 (c)) The terms "promptly" and adequate" are not defined in the IDEA regulations. 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. Questions

and Answers on Response to Intervention and Early Intervening Services, Question C-5 (OSERS (2007)

The IDEA allows parents to request an evaluation at any time. If the LEA is using the RTI process and the parents request an evaluation, the LEA must conduct the evaluation or provide the parent with prior written notice of its refusal to evaluate. The parent can then request a due process hearing to resolve the dispute. Questions and Answers on Response to Intervention and Early Intervening Services, Question C-1 (OSERS (2007)).

7. The 60 day timeframe for evaluation must be adhered to unless extended by mutual written agreement. (34 CFR 300.309(c)

Note: Under the IDEA disciplinary regulations (300.534 (d)(2), if a request is made for an evaluation during the time the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner.

OSEP issued a letter applying this requirement to RTI. Following the request for the evaluation, and once parental consent has been obtained, a local educational agency may not refuse to conduct the evaluation of a child during the time period in which disciplinary measures are used because the RTI process is ongoing. Note also that, although the U.S. Department of Education has not specified a precise timeline for an expedited evaluation because the need for collecting additional information may vary, the Department's position is that the expedited evaluation "should be conducted in a shorter period of time than a typical evaluation conducted pursuant to section 614 of the Act." 71 Federal Register 46540, 46728 (August 14, 2006).

In addition, OSEP noted there may be situations where a child has not participated in an RTI process prior to the request for the evaluation under this disciplinary provision. In those instances, the LEA would need to rely on other assessment tools and strategies to ensure that the evaluation can be conducted in an expedited

manner. Letter to Combs 52 IDELR 46 (United States Department of Education, Office of Special Education Programs (2008)).

8. If RTI was used, documentation is required addressing: the instructional strategies used and the student centered data collected; parent notification of 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; strategies for increasing the child's rate of learning; and the parent's right to request an evaluation. (34 CFR 300.311 (a)(7))

I. Eligibility Cases---Existence of a Disability

1. The Court held that a student diagnosed with ADHD, PTSD, RAD and Intermittent Explosive Disorder was not eligible for special education services and, therefore, her parents were not entitled to reimbursement for their private placement. The Court concluded that the student was not emotionally disturbed since she was able to maintain satisfactory relationships and her inappropriate behavior was not to a marked degree over a long period of time. In addition, there was no adverse impact on her educational performance since her grades, tests, and teachers' reports all indicated she was performing at average or above average levels.

   Finally, although the Team that addressed her eligibility was not duly composed since the special educator on the Team never provided services to the student, the Court held it was harmless error since it did not result in a loss of educational opportunity R.B. v. Napa Valley Unified School District 48 IDELR 60, 496 F.3d. 932 (United States Court of Appeals, 9th Circuit (2007)).

2. A 9th grade student diagnosed as having a conduct disorder, bipolar disorder and ADHD was deemed eligible for IEP services under the emotionally disturbed and other health impaired categories. The Court rejected the school's argument that the student was socially maladjusted finding that the student had limited social skills, struggled to pass his classes and failed his standardized tests. In addition, the Court found that his ADHD adversely affected his educational

performance based on evidence that he had difficulty focusing during tutoring sessions. The school presented no evidence at the due process hearing relying only on the evidence presented by the parents. Hansen v. Republic R-III School District 56 IDELR 2 (United States Court of Appeals, 8th Circuit (2011)).

3. The Court affirmed the decision that a student with schizophrenia met the definition of a student with an emotional disturbance which adversely impacted her educational performance resulting in a need for special education services. Her frequent absences from school, her hearing voices, zoning out, and wanting to hurt herself were the result of the impact of her schizophrenia on her ability to cope in a public middle school environment Board of Education of Montgomery, County v. S.G., 47 IDELR 285, 230 Fed. Appx. 330 (United States Court of Appeals, 4th Circuit (2007). This is an unpublished opinion.

4. The Court, in affirming the decision that the student was not emotionally disturbed as defined in the IDEA, found that the student's maladaptive behavior occurred only on an intermittent basis. In addition, the behavior did not adversely affect educational performance which the Court said is determined, in part, by academic performance and grade progression C. J. v. Indian River County School Board, 41 IDELR 120, 107 F. Appx. 893 (United States Court of Appeals, 11th Circuit (2004)).

5. The Court upheld the Team's determination that the student `was not eligible for special education services. In so doing, the Court noted that the Hearing Officer appropriately found that the parent's refusal to allow the Team access to the student's current psychiatric treatment records denied the Team information that was essential to determine whether the student suffered from an emotional disturbance.
The parent insisted that the student should receive a new, independent psychiatric examination, apparently without the benefit of his past and current psychiatric records. The Court found that position is inexplicable, as a review of the already-existing records may have been sufficient for the Team to find that the student was emotionally disturbed, or the records may have provided a basis for additional examinations

Richardson v. District of Columbia 50 IDELR 6, 541 F.Supp. 2d. 346 (United States District Court, District of Columbia (2008)).

6. The Court upheld the Team's decision that a student, who was deemed to be a student with a disability under Section 504 was not eligible for IEP services as a student with a specific learning disability. Although the student was diagnosed as dyslexic, the Court found that the Team's determination that there was not a "severe discrepancy" between the student's achievement and ability was supported by the evidence. The State has the right to establish eligibility standards requiring that a student have a severe discrepancy as part of the eligibility determination. Michael P. v. Hawaii Department of Education Civil No. 08-00146 (United States District Court, Hawaii (2009))

   Note: In guidance from the United States Department of Education, the Department clarified that the IDEA regulations do not impose any limitation on the services to be provided a child identified as having a specific learning disability based on the areas of severe discrepancy used in making the eligibility determination. Letter to Anonymous 51 IDELR 251 (United States Department of Education, Office of Special Education Programs (2008)).

7. The school district found the student was no longer eligible as a student with a specific learning disability since there was no severe discrepancy based on the statistical formula used in a computer program that factors in a regression analysis. The Court, in overturning the decision, held that the IDEA prohibits reliance on any one test or formula for determining eligibility. M.B. v. South Orange-Maplewood Board of Education 55 IDELR 18 (United States District Court, New Jersey (2010)).

8. A 17 year old student engaged in significant behavioral problems including assault of his brother, smoking up to five marijuana joints daily and school suspension for drug possession. He often failed to attend school and was held back a grade due to his poor performance.
   The Court upheld the decision that the student was neither emotionally disturbed or learning disabled. The evidence

supported the conclusion that his poor school performance was linked to his failure to attend school and his drug use. Nguyen v. District of Columbia 681 F.Supp.2d 49, 54 IDELR 18 (United States District Court, District of Columbia (2010)).

9. A student with behavioral problems was not eligible for IEP services as a student with an emotional disturbance. The student's drug use was the root of his problems at school which is more consistent with a diagnosis of social maladjustment than an emotional disturbance. In addition, the decline in the student's grade point average was attributable to his acknowledged drug use, therefore there was no adverse effect due to a disability. Mr. and Mrs. N.C. v. Bedford Central School District 300 F.Appx. 11, 51 IDELR 149 (United States Court of Appeals, 2nd Circuit (2008)). This is an unpublished opinion.

J. Eligibility Cases—Adverse Affect on Educational Performance

1. The Court held that a student with Asperger's Syndrome is eligible for special education services in spite of the fact that she was doing well academically. The "adverse affect" on her educational performance was the impact of her disability on her social skills and communication skills since the Court found nothing in the IDEA supports the conclusion that educational performance is limited to academic performance. In addition, the Court found the IDEA term "adverse affect" does not have a qualifier such as substantial or significant. Therefore, any adverse affect meets the standard.

   Finally, the Court found that the student was in need of specialized instruction in social skills and therefore met the eligibility requirement of being in need of special education Mr. and Mrs. I v. Maine School Administrative District 55, 47 IDELR 121, 480 F. 3d 1 (United States Court of Appeals, 1st Circuit (2007)).

2. A student with an "other health impairment" was determined by the Team to be no longer eligible for special education since he was demonstrating "age expected success" in the regular education curriculum with modifications and

accommodations provided by the regular education staff. The Court, in overturning the hearing officer and district court, concluded that there was no adverse affect on the student's educational performance requiring special education. The Court clarified that the appropriate question is not whether the disability may affect educational performance but whether in reality it does. Here, the student's needs could be met through a health plan implemented in the regular class. In addition, the Court noted that the hearing officer and lower court relied in great part on the testimony of the student's physician. Although a physician's diagnosis and input is important and bears on the team's decision a "physician cannot simply prescribe special education" since they are not a trained educational professional with knowledge of the subtle distinctions that affect IDEA classifications. Marshall Joint School District No.2 v. C.D. 54 IDELR 307 (United States Court of Appeals, 7th Circuit (2010)).

3. A student was diagnosed as having ADHD and bipolar disorder. The Court upheld the Team's determination that the student was not eligible for special education. The student's grades and test results demonstrated that she continuously performed well supporting the conclusion that there was not an adverse impact on her educational performance. C.B. v. Department of Education of the City of New York 52 IDELR 121 (United States Court of Appeals, 2nd Circuit (2009) Note: This is an unpublished decision.

4. The Court found that the student qualified for special education services under the Other Health Impairment category which adversely affected his educational performance and was in need of special education. The student's inflated grades and test scores were an inaccurate assessment of the student's achievement since they were the result of extensive accommodations provided the student. W.H. v. Clovis Unified School District 52 IDELR 258 (United States District Court, Eastern District, California (2009)).

5. The Court, in affirming the hearing officer's decision, held that a student who was diagnosed as being depressed and having ADHD was eligible for special education services. The evidence (standardized tests, assessments, report cards,

observations, independent evaluations and input from home and school) supported that his disability adversely affects his educational performance since even with supports and accommodations in the regular classroom he is not able to access the general education curriculum. State of Hawaii, Department of Education v. Zachary B. 52 IDELR 213 (United States District Court, Hawaii (2009)).

6. Although a student was diagnosed with Asperger's Syndrome and an Attention Deficit Disorder, the Court upheld the determination that the student was not eligible for special education since his disability did not affect his educational performance since the student was performing at average to above average levels in the classroom and progressing academically.
The Court noted that the term "educational performance" is not defined by the IDEA. Basing its decision on other case law, the Court concluded that "educational performance" must be assessed by reference to academic performance "which appears to be the principal, if not only, guiding factor". The student's difficulties with his or her disorder, which presumably include emotional and behavioral problems, are not the proper measure of educational performance. A.J. v. Board of Education, East Islip Union Free School District 53 IDELR 327 (United States District Court, Eastern District, New York (2010)). See also Maus v. Wappingers Central School District 54 IDELR 10 (United States District Court, Southern District, New York (2010)).

Note: In a letter addressing the "adverse affect" standard for students with speech impairments, the OSEP opined that the determination cannot be conditioned on a requirement that there must be a concurrent deficit in academic performance. Letter to Lybarger 16 IDELR 82 (United States Department of Education, Office of Special Education Programs (1989)).

K. Eligibility Cases---In Need of Special Education

1. In holding that the student, who was diagnosed with ADHD, was not eligible for IEP services, The Court found the student was not "in need of special education" which is also required for eligibility determinations. The Court based its conclusion on the student's passing grades, success on the state-wide

assessments and the testimony of the teachers Alvin Independent School District v. A.D., 48 IDELR 240, 503 F.3d 378 (United States Court of Appeals, 5th Circuit (2007)).

2. In finding a student ineligible for special education as a learning disabled student, the Court held that not only a severe discrepancy between ability and achievement must be shown, but that the student also be found in need of special education. The Court, citing state code, held that the impairment must require instruction, services, or both which cannot be provided with modification of the regular school program. Norton v. Orinda Union Sch. Dist., 29 IDELR 1068 (United States Court of Appeals, 9th Circuit (1999)). Unpublished decision.

3. The Court affirmed the Team's conclusion that the student was not eligible for special education under either the Specific Learning Disability or Other Health Impairment categories. Although there was a severe discrepancy between the student's ability and achievement, the student was performing above grade level based on class work and tests. Therefore, the discrepancy could be addressed without the need for special education services Hood v. Encinitas Union School District, 107 LRP 26108, 486 F.3d 1099 (United States Court of Appeals, 9th Circuit (2007)).

4. The Court upheld the school's determination that although the student was diagnosed with ADHD, the student was not eligible for special education since there was no adverse affect on his educational performance when provided with differentiated instruction (defined as supports or strategies that the teacher would use with any student in the classroom to help them succeed). Although not defined in the law, the Court found the term "adversely affects educational performance" refers to the student's ability to perform in a regular classroom designed for students who are not disabled. The fact that the health impairment, such as ADHD, may have a minimal adverse affect does not render the student eligible. Ashli and Gordon C. v. Hawaii Department of Education, 47 IDELR 65 (United States District Court, Hawaii (2007)).

5. A student who was on a Section 504 plan to address her diabetic condition and also diagnosed as having an adjustment disorder, anxiety and depression was not eligible for IEP services. The parents offered no evidence to show that her diabetes and anxiety were related to her lack of attendance in school or her poor grades. Thus, she was not in need of special education. . Loch v. Edwardsville School District 52 IDELR 244, 327 F. Appx. 647 (United States Court of Appeals, 7th Circuit (2009)) Review denied by the United States Supreme Court.

6. A student with Juvenile Rheumatoid Arthritis and chronic pain and fatigue was found not eligible for special education. Her disability does require that she be given frequent breaks, an adjusted workload, alternate test scheduling and personalized instruction. However, the Court held that these "modifications" can be provided through Section 504 accommodations and therefore she is not in need of special education. Brado v. Weast 53 IDELR 316 (United States District Court, Maryland (2010)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.