



**Council of Parent Attorneys and Advocates  
13<sup>th</sup> Annual Conference  
San Antonio, TX**

**“Understanding, Navigating & Challenging  
New Approaches to Identification of  
Specific Learning Disabilities”**

***Presenters***

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**Edward Schultz, Ph.D.**

# Session Agenda

- **PART I: Kurt Hulett, Ed.D.**  
*Review of IDEA 2004 statutory and regulatory language regarding SLD identification.*
- **PART II: Edward Schultz, Ph.D.**  
*Review of states' various SLD identification criteria, including RTI.*
- **PART III: Allison Hertog, Esq., M.A.**  
*Review of some recent litigation and strategies for working with contemporary approaches to identification and eligibility*

## Specific Learning Disabilities (SLD) Identification :: Ten Year Trend

| Year | # SLD (Ages 6-21) | % SLD of SPED |
|------|-------------------|---------------|
| 2000 | 2,887,217         | 50.0          |
| 2001 | 2,878,315         | 49.1          |
| 2002 | 2,878,146         | 48.3          |
| 2003 | 2,866,908         | 47.5          |
| 2004 | 2,839,694         | 46.4          |
| 2005 | 2,780,218         | 45.5          |
| 2006 | 2,710,476         | 44.6          |
| 2007 | 2,620,240         | 43.6          |
| 2008 | 2,522,735         | 42.9          |
| 2009 | 2,486,419         | 42.3          |

# Specific Learning Disabilities (SLD) Identification

Range of state percent of  
total IDEA-eligible students (ages 6-21)

**LOW:** Kentucky ..... 15%

**HIGH:** Iowa ..... 60%\*

*\*Early adopter of RTI*

# Review of IDEA 2004 statutory and 2006 regulatory language regarding SLD\* identification.

## Reasons for changing SLD provisions in federal law and regulations:

- Over-identification/Instructional, not disability issue (President's Commission, Reid Lyon, etc.)
- Severe discrepancy approach called "Wait-to-Fail"
- Severe discrepancy criticized as inaccurate method of deciding if students had SLD

*\*NOTE: Definition of SLD left unchanged in statute and regulation.*

# IDEA 2004 statutory language regarding SLD identification :: 20 U.S.C. §1414 (b)

## (6) SPECIFIC LEARNING DISABILITIES.—

(A) **IN GENERAL.**--Notwithstanding section 1407(b), when determining whether a child has a specific learning disability as defined in section 1401, a local educational agency **shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability** in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) **ADDITIONAL AUTHORITY.**--In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).

# Key changes to “Additional Procedures for Identifying Children With Specific Learning Disabilities” made by 2006 Federal Regulations

- Require states to adopt criteria for determining whether a child has a specific learning disability.
- Add an eighth enumerated area—“reading fluency skills.”
- 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.”
- Define the severe-discrepancy alternative as “a pattern of strengths and weaknesses (PSW) 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]

# Key changes to “Additional Procedures for Identifying Children With Specific Learning Disabilities” made by 2006 Federal Regulations

- Add limited English proficiency to the list of exclusions, i.e., other specified conditions primarily accounting for the child’s inadequate achievement.
- 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,” 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.”

# Key changes to “Additional Procedures for Identifying Children With Specific Learning Disabilities” made by 2006 Federal Regulations

- Observation of the child is still required but the context is broadened to “the child’s learning environment (including the regular classroom setting)
- IEP/Eligibility Team membership unchanged, 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.
- 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”
  - 2. when the district refers the child for an eligibility evaluation.
- Continue the requirement of a written evaluation report but adds to the report’s required elements documentation in line with the specific approach used—i.e., the aforementioned “pattern” approach or RTI.



# Approaches

**I. Discrepancy approaches: Prior to the IDEA regulatory changes in 2006, mathematical approaches, specifically the discrepancy model, have been the primary approach to identification of specific learning disabilities. (Baer, 2000; Dombrowski, Kamphaus, & Reynolds, 2004; Frankenberger & Fronzaglio, 1991; Kavale, 2002; Meyer, 2000).**

# RTI/MTSS

- **Response-to-intervention (RTI)(MTSS): and problem solving approaches: Response-to-Intervention (RTI)** is a multi-tiered prevention model of support that delivers interventions and services at increasing levels of intensity based on the response of the student (Bradley,Danielson, & Doolittle, 2007).

# RTI/MTSS

- Many benefits when used as prevention/pre-referral/service delivery model/prior to and part of SLD Diagnosis

## SLD Diagnosis

- Diagnosis by “treatment responsiveness”
- Dual Discrepancy
- Gap Analysis

# RTI Only Approaches: Issues

- Does not consider “psychological processes”
- Implementation: takes 3-5 years, approaches, resources
- Focus on reading
- Paucity of research at the secondary level
- No agreed upon teacher training standards or supervision methods to ensure interventions are carried out with integrity;
- RTI has no mechanism for differential diagnosis of SLD and other disorders;

# Processing Deficit Approaches

- Identification based on processing deficits approaches have primarily focused operationalizing the federal definition of SLD and the processes linked to reading such as “phonological processing.”
- Integrated Models (Idaho) and PSW Models
- Views RTI as complementary/not competing
- Requires an integrative approach of data analysis (IDA; Curran & Hussong, 2010).
- LDA White paper

# Sample States

- Texas
- Idaho
- illinois

# Must Reads

- **National Joint Committee on Learning Disabilities: Comprehensive Assessment and Evaluation of Students With Learning Disabilities**
- **LDA White Paper on IDEA Evaluation Criteria for Specific Learning Disabilities!**  
(<http://www.ldanatl.org/>)
- **A Response to the Learning Disabilities Association of America (LDA) White Paper on Specific Learning Disabilities (SLD) Identification**  
<http://www.rtinetwork.org/learn/ld>

# Review of Recent Litigation

- **Summary – The courts may only be beginning to understand the changes made to the SLD eligibility rules under IDEA 2004. In a majority of the cases, LEAs are unsuccessfully using Rtl as a defense to Child Find due process claims. However, in nearly every case more than two years of inadequate general education interventions elapsed before the parents filed due process. Courts appear willing to forgive delays in identification if “progress” is shown using general ed interventions and the child already has an IEP.**

- D.B. v. Bedford Cnty. Sch. Bd. (W.D. VA, April 23, 2010) 54 IDELR 190, stay den'd 55 IDELR 42 (August 23, 2010).

The Court awarded the parents private tuition reimbursement finding that the LEA failed to sufficiently evaluate, address and place the child for a specific learning disability, though the child had an IEP with the classification of OHI (ADHD). For over four years the child had been unable to read near grade level, yet was promoted every year. The LEA had considered and rejected an M.R. classification but the record showed that the LEA had not undertaken any evaluation process for SLD, including Rtl, under IDEA 2004.

# Review of Recent Litigation cont.

- W.H. v. Clovis Unified School District (E.D. Cal, June 8, 2009) 52 IDELR 258, *rmnd wdrw'n due to settlement*, 53 IDELR 293 (December 22, 2009).

The court found that the LEA failed its Child Find obligations over about a two year period by denying eligibility based on an OHI classification (ADHD). Court acknowledged that child has discrepant deficits in written expression, but did not find the child eligible for SLD because under IDEA 2004 the “discrepancy model is no longer required.” The court did not address the question of whether Child Find was violated because the LEA evidently did not implement Rtl or an alternative.

- El Paso Indpt. Sch. Dist. v. RICHARD R. (W.D. TX, July 14, 2008) 50 IDELR 256, 53 IDELR 175 (Dec. 16, 2009) *vacating the award of atty's fees, cert. den'd on issue of atty's fees* 130 S.Ct. 3467 (June 21, 2010).

The court found that the LEA violated its Child Find obligations by repeatedly referring ADHD student for “interventions” over a three year period (i.e., 504 accommodations, public school tutoring, and assistance for the state standardized assessment) despite his lack of academic improvement. The court found that LEA should have evaluated the student, who failed the state standardized assessment three times, and considered him for special education. Court does not appear to address the question of whether or not child was ever suspected of having SLD, and whether Rtl was even appropriate/legal for a student with ADHD.

## Review of Recent Litigation cont.

- A.P. v. Woodstock Bd. of Ed. (D. Conn. 2008) 50 IDELR 275, aff'd. 55 IDELR 61 (2<sup>nd</sup> Cir., March 23, 2010).

The LEA did not err in failing to more quickly refer for an evaluation an elementary school student with a NonVerbal Learning Disorder, though in sixth grade the child was made eligible for the classification of SLD, because the child made adequate progress with the use of general education interventions. The court agreed with the LEA that it met its obligation to collect data to measure the child's progress. *See, also, Dowington Area Sch. Dist.* (SEA PA 2007) 107 LRP 63155 (July 20, 2007).

## Recent Litigation cont.

- **Summary of Rtl Behavior Litigation** - Many school districts appear to be also using 2004 SLD eligibility rules as a defense in cases of students with behavior problems. This is a bit curious given that IDEA 2004 offers Rtl as an alternative to evaluations only in cases of students suspected as having SLD, though, of course the research supports using positive research-based interventions for behavior problems, and the recent OSEP memo alludes to that.
  - Jackson v. Northwest Local Sch. Dist., 55 IDELR 71 (S.D. Ohio, August 3, 2010), magis. decision adopt'd. 55 IDELR 104. (Sept. 1, 2010)

The court found that the LEA should have initiated a special education evaluation when the behavior of a third grade child escalated and increasingly impacted her academic performance. The child had a history of behavior problems over a two year period which had been previously managed by general education interventions, but when the effectiveness of those interventions waned over a period of a few months, the LEA referred the child to a mental health agency but failed to initiate an evaluation. The following month the district suspended and expelled the student for threatening behavior, and the court found that the child was then entitled to a Manifestation Determination because the LEA should have suspected that the student was disabled.

# Recent Additional Texas Litigation

- Kileen Indpt. Sch. Dist. (TX DP 247-SE-0510, August 31, 2010) 55 IDELR 239. Court found that LEA illegally denied an evaluation for child with history of physical aggression and uneven school performance.
- Austin Indpt. Sch. Dist. (TX DP 139-SE-0210, July 19, 2010) 110 LRP 49317. Court found that the LEA's duty to evaluate overrides the LEA's policy of requiring Rtl.
- Dallas Indpt. Sch. Dist. (TX DP 268-SE-0708, April 20, 2010) 109 LRP 72830. Court found that LEA failed to timely evaluate child. More than 1 calendar year elapsed btwn guardian request for eval. LEA's finding of SLD eligibility.

# Strategies for Working with Contemporary Approaches to Identification and Eligibility

- **Two Main Ways to Work with Rtl**
  - Challenge SEA/LEA Rule/Implementation
  - Use as Advocacy (and litigation) Tools
  - Challenge SEA/LEA Implementation
    - Federal Law Violations
      - Does SEA/LEA Implementation Violate IDEA?
        - » Child Find – delays/denials of identification
        - » Districts using Rtl as Defense to Child Find claims
          - Rebuttal Arguments
            - Bogus “Rtl”
            - Illegal Denial of Parent Request for Initial Evaluation

OSEP Memo to State Directors. of Special Ed., No. 11-07, dated 1/21/11

# Strategies – Federal Law cont.

## OSEP Memo 1/21/2011

- OSEP “Definition” of RtI Models
  - “ A schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and interventions within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. “ . . . schools must “adjust the intensity and nature of those interventions depending upon a student’s responsiveness.”
- “Core Characteristics”
  - “High quality research-based instruction” in gen. ed.
  - “Continuous” monitoring of student performance
  - All students screened for academic and behavioral probs.
  - Multiple levels of instruction that are “progressively more intense,” based on the students response to instruction

# OSEP Memo 1/21/11 cont.

- Parental Request for Initial Evaluation:
  - May be requested “any time to determine if the child is a child with a disability”
  - “Use of RtI strategies cannot be used to delay or deny the provision of a full and individual evaluation to a child suspected of having a disability”
  - If the LEA agrees with a parent that the child “may be a child who is eligible for special education and related services, the LEA must evaluate the child.”
  - If LEA does “not suspect that the child has a disability,” and denies the parental request, LEA must provide written notice explaining why they refuse and the information used as basis for their decision.
  - **LEA cannot reject a referral or delay initial evaluation on basis that child has not participated in RtI.**

# Strategies – Federal Law Cont.

## – Does SEA Law/Guidelines (itself) Violate IDEA?

- » Can't challenge under IDEA for failure to implement adequate RtI framework.
- » State illegally mandates discrepancy model
- » State has RtI law/guidelines but they don't require or recommend core characteristics of RtI
- » Examples
  - N.J. law does not explicitly or implicitly require tiers of progressive interventions or universal screening.
  - F.L. state rule mandates of RtI for Speech/Language Impairment identification, not only SLD identification
  - A.Z., N.Y., F.L. recommend that Tier 2 and T3 can last up to 30 weeks each.
- » Suit against St. DOE in Federal Court
- » State Complaint
- » OCR Complaint that discriminates vs. class of disabled

# Strategies – State Law

- LEA Violates State Law/Guideline
  - Failure to implement RtI as required by State
    - » Examples
      - State explicitly requires continuous progress monitoring but LEA only monitors using standardized assessments 2x/year.
        - But – this can be fudged by the LEA in court
      - State explicitly requires multiple tiers of progressively more intense instruction, but that's not happening.
    - » State Complaint vs. LEA
    - » Child Find due process complaint

# Strategies – Rtl as Advocacy (and litigation) Tools

- Finally , “high quality” or “scientific” research-based instruction and continuous progress monitoring is mandated for struggling learners.
  - At SST or IEP meetings, demand:
    - » What tier of Rtl is child in?
    - » To see the progress monitoring data.
    - » To see the research supporting an intervention’s validity for the learning needs of the child.
    - » To know how often the child receives the intervention.
    - » If child in Tier 2 or Tier 3, that intervention should be progressively increasing in intensity. Ask for that data.

# Questions and Answers