

How to Conduct SLD Evaluations Without Discrepancy Formulas: A Legal Perspective

by

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The Modernization of LD Eligibility

When the President's Commission on Excellence in Special Education reviewed the state of high-incidence disabilities, particularly learning disabilities (LDs) in 2002, it found an antiquated, dysfunctional, and unscientific model for determining LD eligibility. Most states used a discrepancy model that compared IQ scores to norm-referenced achievement scores under a simple difference procedure. The research of LD experts, however, indicated that this model was not predictive of true LDs, led to misidentification, and provided interventions too late, precisely at a time when they were likely to be least effective. Moreover, the model allowed eligibility for students that may have been "instructional casualties" – non-disabled students that simply did not receive appropriate regular education services and additional interventions when they struggled to meet grade-level standards. To the Commission, the need for reform was clear. The Commission's report and the various commentators at congressional hearings pointed to the following possible options available to the Congress in reauthorizing the Act:

1. Move to an LD evaluation and eligibility model that focuses on assessing a student's response to early educational interventions within a school's general programs, rather than on IQ, achievement testing, and exclusionary clauses.
2. Focus on reading assessments in kindergarten and first grade to determine which students are likely to develop reading problems in later grades and to provide scientifically sound interventions at a time when they can better address the deficits.
3. Require school use of IDEA-B funding to provide scientifically sound educational intervention to students that are not currently eligible for

special education, but who show early signs of reading or other academic deficits.

4. Limit IDEA eligibility to those students whose disabilities are such that they do not respond to early intervention and require more specialized instruction within special education.

Looking back at the recommendations of the President's Commission, we can better understand the policies underlying both key provisions of IDEA 2004, the new federal regulations implementing the new IDEA, and the emergence of response-to-intervention (RtI) programs in school systems. The regulations, in particular, point a path to significant and meaningful reform of the LD evaluation and eligibility model, with reference to RtI methodology. Reform, however, implicates change, and even beneficial change can cause confusion and conflict. The new way of thinking about struggling students, regular intervention programs, pre-referral practices, and LD evaluations poses new and significant challenges, including the following:

- Child-find in an era of expanding regular education interventions
- Conducting appropriate and modern LD assessments
- Using data from high-quality research-based intervention programs
- Coordinating with regular education intervention programs
- Complying with revised state criteria on LD eligibility
- Re-evaluating existing LD-eligible students

The IDEA 2004 Provision on LD and RtI

Based on the guidance of the Commission's Report, the Congress moved to begin the reforms needed to the LD evaluation and eligibility systems. Under the IDEA (IDEA 2004), school districts cannot be required to use a discrepancy-based LD formulation, but may instead opt to use a response-to-intervention (RtI) model. Specifically, the new IDEA states that "a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability. . ." 20 U.S.C. §1414(b)(6)(A). In making the LD eligibility determination, schools "may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures . . ." §1414(b)(6)(B). Thus, states cannot require local educational agencies to use the discrepancy model. A school system is free to design and implement a response-to-intervention LD eligibility model. Although basic, the provision set firm parameters for USDOE in promulgating its regulations, and for the states in passing their own detailed

LD criteria. It set the wheels in motion for the development of a framework within which schools could make needed changes.

The USDOE's 2006 LD Regulations

After the required period of comments and hearings, on August 16, 2006, the USDOE issued a complex regulation setting forth a general framework for states to issue their own rules on LD evaluations and eligibility. 34 C.F.R. §§300.307-311. It also issued extensive commentary to accompany the final LD regulations. *See* 71 Federal Register 46,646-46,661 (August 14, 2006). The following are the final regulations (in their full form) addressing evaluation and eligibility for students with potential learning disabilities, with relevant excerpts and editorial comments culled from the USDOE commentary section:

§300.8 Child with a disability

(b)(10) *Specific learning disability*—

(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 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, or emotional disturbance, or of environmental, cultural, or economic disadvantage.

(Authority: 20 U.S.C. 1401(3); 1401(30))

- *No change in fundamental LD definition*—The actual definition of LD remains unchanged from the 1999 version of the regulations. It is not the definition of a LD that is changing, but rather the means by which schools evaluate and identify LDs.

§300.307 Specific learning disabilities.

(a) 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).**

(b) **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.**

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

- Section 300.307 sets forth the parameters that states must meet in promulgating their own detailed LD criteria. It establishes that states must have criteria for LD, and that LEAs within a state must comply with the state criteria. It also reflects the will of the Congress that no school should be forced to use the dysfunctional discrepancy model, and that schools should have the discretion to use RtI-based analysis as part of the LD evaluation process.

- *States may prohibit the discrepancy model*—As expected, the regulations take the position that IDEA allows states to prohibit the use of a discrepancy model for LD eligibility. The commentary plainly states that “[u]nder section 614(b)(6) of the Act, States are free to prohibit the use of a discrepancy model.”

- *RtI may be a component of the evaluation*—At various times in its commentary, USDOE makes clear that an RtI process cannot be the sole determinant of whether a child meets LD eligibility. “The implementation of RTI in practice, however, has included other domains. RTI is only one component of the process to identify children in need of special education and related services. Determining why a child has not responded to research-based interventions requires a comprehensive evaluation.” 71 Fed. Reg. 46,647. The commentary cites §300.304(b) as requiring that assessment of LD include a variety of assessments, rather than relying on one single criterion for determining eligibility. “The results of an RTI process may be one component of the information reviewed as part of the evaluation...” 71 Fed. Reg. 46,648. USDOE states in straightforward language that “...a child’s eligibility for special education services cannot be changed solely on the basis of data from an RTI process.” 71 Fed. Reg. 46,648.

- *The crucial role of the States and their criteria*—The commentary highlights the key role of state agencies in specifying how LD evaluation and eligibility is to be implemented in their schools. “It is up to each State to develop criteria to determine whether a child has a disability, including whether a particular child has an SLD.” 71 Fed. Reg. 46,648. The policy underpinning of the requirement on the states is the need for consistency and uniformity within a state. “The Department believes that eligibility criteria must be consistent across a State to avoid confusion among parents and school district personnel. The Department also believes that requiring LEAs to use State criteria for identifying children with disabilities is consistent with the State’s responsibility under section 612(a)(3) of the Act to locate, identify, and evaluate all eligible children with disabilities in the State.” 71 Fed. Reg. 46,649.

Note—That most states LD criteria still allow reliance on the discrepancy analysis as part of the LD evaluation tells us that we are only at the onset of true reform. States may be moving cautiously toward modernizing LD evaluations because of concerns over whether schools are ready to implement high-quality research-based interventions that can support the RtI analysis, or over concerns about whether schools are ready to make major changes in their assessment practices. That reform may take place gradually, however, is not necessarily a bad thing. Change that implicates both system and attitudinal reform may best be made in an incremental fashion.

§300.309 Determining the existence of a specific learning disability.

- (a) **The group described in §300.306 may determine that a child has a specific learning disability, as defined in §300.8(c)(10), if —**
 - (1) **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.**

- (2)(i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child's response to scientific, research-based intervention; or
 - (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; and
- (3) 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.
- (b) 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.
- (c) 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 and 300.303, 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) and (b)(2) of this section; and
- (2) Whenever a child is referred for an evaluation.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6))

- Section 300.309 is the major LD provision in the 2006 final regulations. It sets forth the fundamental elements and requirements of a current LD evaluation under the IDEA. It is also a regulation that only sets forth a broad framework within which states can develop their own LD models.

A Big Picture Overview of the LD Regulation

At its core, §300.309 envisions a four-element system:

1. A determination that the child is not achieving adequately for their age or to meet state standards;
2. Either (A) a determination that the child is not making sufficient progress to meet age or state standards using an RtI process, or (B) a determination that the child exhibits a pattern of strengths and weaknesses relative to age, state standards, or IQ, using appropriate assessments;
3. A determination that the team's findings on the above are not primarily the result of visual, motor, or hearing disabilities, MR, ED, or cultural, environmental, economic disadvantage, or limited English proficiency; and
4. A consideration, as part of the evaluation, of data that demonstrates that prior to evaluation, the child was provided appropriate instruction in regular settings, including data-based documentation of repeated assessments of achievement at reasonable intervals, which is shared with parents.

The regulation leaves to the states the job of establishing the nature of the data to be collected under an RtI model, as well as the amount of data needed. In addition, it appears that states will need policies on the types of general education services that can support the RtI option. States may also decide to establish a completely alternative means of determining LD, as long as it is "research-based." The states, moreover, will likely have to add clarity and specificity to the rather amorphous "strengths and

weaknesses” option, which implies a movement to more modern and sophisticated use of assessment instruments and interpretation techniques.

Key Provisions of the Regulation, with Commentary

The most extensive portion of the commentary on the LD regulations involved §300.309, which is the key regulation setting forth a framework for determining the existence of a LD. This regulation, with its length and complexity, requires close study.

(a)(1) 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.**

- *The threshold finding of lack of achievement*—Commenting on the first step of LD eligibility, as expressed in §300.309(a)(1)(inadequate achievement), USDOE states that “[t]he first element in identifying a child with SLD should be a child’s mastery of grade-level content appropriate for the child’s age or in relation to State-approved grade-level standards, not abilities. This emphasis is consistent with the focus in the ESEA [NCLB] on the attainment of State-approved grade-level standards for all children.” 71 Fed. Reg. 46,652. “The reference to ‘State-approved grade-level standards’ is intended to emphasize the alignment of the Act and the ESEA [NCLB], as well as to cover children who have been retained in a grade, since age level expectations may not be appropriate for these children.” *Id.*

Why age?—Obviously, the need to add an age reference is required in order to avoid creating an incentive to grade retention. Moreover, the Department is reemphasizing the policy, embodied in NCLB, that the ultimate goal is student attainment of state-mandated regular curriculum standards to the greatest degree possible. “Accelerated growth toward, and mastery of State-approved grade-level standards are goals of special education.” 71 Fed. Reg. 46,653.

Is failing a statewide test “failure to achieve”?—On one point the commentary is crystal clear—failing a statewide assessment is not enough, in and of itself, to qualify a student as LD. “We agree that failing a State assessment alone is not sufficient to determine whether a child has an SLD. However, failing a State assessment may be one factor in an evaluation considered by the eligibility group.” 71 Fed. Reg. 46,652. This guidance likely was intended to prevent referrals to special education based solely on a child’s failure to pass a statewide assessment, under the argument that such failure means the child is “not achieving adequately” on state grade-level standards under §300.309(a)(1).

(a)(2)(i) The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child’s response to scientific, research-based intervention; or

- *RtI makes its entrance*—After the step of determining that the student is not achieving adequately, subsection (a)(2) of the regulation offers a choice—either (1) determine that the student has not made “sufficient progress to meet” state standards by use of an RtI process (i.e., assess a student’s level of response to high-quality scientifically sound regular interventions), or (2) proceed to the “strength-and-weaknesses” pattern assessment option (see below).

- *Fundamental unanswered questions*—How much progress is necessary in regular intervention programs for the team to determine that a child is not LD based on their response to the interventions? The language of the regulations is susceptible to contrary interpretations. One could argue that “sufficient progress to meet” state standards means that the student has actually reached age-level performance (i.e., on chronologically appropriate grade level). Or, one could argue that the point is whether the child appears to be making sufficient progress with regular interventions to be moving toward meeting standards. The fact that the language mixes terms of “progress” with terms of “meet” state standards—two unequal terms—means we will inevitably require caselaw determinations to understand the concept fully.

Note—In light of the potential for differing interpretations on the above questions, it is telling that there appear to be no reported cases at this time involving disputes over the results of pure RtI-based LD evaluations and eligibility determinations. As schools use RtI-analysis as part of LD evaluations, we can expect that some of these evaluations will lead to determinations that the child has “responded” to interventions, which, together with other evaluation components, signals that the child is not LD. These situations can lead to hearing requests alleging inappropriate evaluation and eligibility determination. That

there are no reported cases on this likely dispute scenario may indicate that not many schools, at this time, are engaging in the RtI analysis of data from high-quality interventions as part of the evaluation process.

- *RtI model up to LEAs*—OSEP letters have indicated that the type of RtI program or model to be implemented is entirely up to individual LEAs. “The LEA may choose the RTI model it wishes to implement.” *Letter to Clarke*, 108 LRP 65824 (OSEP 2008). In addition, the LEA also has discretion to determine the roles and responsibilities of staff implementing and overseeing the intervention programs, including its training components, data gathering, and communications with parents.
- *Will the RtI option create disputes?*—USDOE resists clarifying any overall guidelines for the RtI option, beyond confirming that it is available, per the mandate of the Act. One commentator worried that without clear guidance from the Department, schools would be faced with more and more complex failure-to-identify claims associated with disputes over implementation of RtI processes. Sticking by its guns, the commentary shifts the debate to the state agencies’ rule-making duties, stating only that “[w]e do not believe more clarity in the requirements for RTI models is necessary. States can avoid disputes over eligibility determinations by developing clear criteria, consistent with the regulatory parameters, and providing staff with the necessary guidance and support to implement the criteria.” 71 Fed. Reg. 46,653.
- *Must states develop RtI policies, in addition to LD criteria?*—Apparently so. Section 300.311(a)(7) states that schools must inform parents, as part of eligibility reports on LD, of state policies regarding the amount and nature of data that would be collected, as well as the general education services that would be provided. OSEP has stated that “the Part B regulations require state special education policy concerning identification of SLD through an RTI process to address the amount and nature of student performance data that would be collected and the general education services that would be provided in the RTI process.” *Letter to Zirkel*, 50 IDELR 49 (OSEP 2008).
- *Can school districts gradually adopt RtI programs and LD models?*—OSEP says yes, as long as the LEA makes clear that the RtI model is permissive, rather than mandatory. *Letter to Massanari*, 108 LRP 2644 (OSEP 2007); see also *Letter to Anonymous*, 49 IDELR 106 (OSEP 2007). “Nothing in the final Part B regulations would prohibit an LEA, if consistent with State criteria, from using multiple methods of identifying a child with an SLD, as part of a full and individual evaluation or re-evaluation, across schools or across levels (e.g., elementary school, middle school, or high school.” Thus, schools are free to use RtI-based LD evaluations in elementary schools first, if they are equipped with the necessary underlying intervention programs, while those programs are put into place at the middle and high school levels.

- *What about RtI in areas other than LD?*—OSEP has stated that “the Part B regulations do not address the use of an RTI model for children suspected of having other disabilities.” *Letter to Clarke*, 108 LRP 65284 (OSEP 2008). Of course, nothing in IDEA would prohibit a school from undertaking screening and other pre-referral activities for students struggling in the classroom for reasons other than academics, such as students with behavioral or emotional problems.

(a)(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; and

- *Standardized assessment instruments still front and center*—The USDOE commentary makes clear that its position is that, RtI-based reforms notwithstanding, standardized testing has a place in determining LD eligibility. It states that “[n]othing in the Act or these regulations would preclude the eligibility group from considering results from standardized tests when making eligibility determinations.” 71 Fed. Reg. 46,651.

Although RtI experts generally contend that standardized testing is not necessary to implement an LD eligibility process based on RtI, the USDOE did not go so far as to exclude consideration of standardized tests. Indeed, the option other than RtI, what we can call the “strengths and weaknesses” option, is plainly built upon IQ and achievement test results. Thus, for schools and states not on the RtI bandwagon at this time, an eligibility process based on test scores is still available, although with some reforms, as seen below.

- *The reason for the assessment alternative to RtI analysis*—In the second part of §300.309’s process, schools may use an assessment-based alternative to the RtI analysis. We can ask ourselves the following question: if an RtI analysis is the preferred method for determining LD, why would the USDOE permit use of alternative assessment-based methods? First, USDOE recognized that many school systems across the U.S. were not ready for an RtI-based model because they had not yet fully installed and implemented the high-quality research-based interventions that would be needed to support an RtI-based analysis. “Research indicates that implementation of any process, across any system, is most effective when accomplished systematically, in an incremental manner, over time.” *Letter to Cernosia*, 108 LRP 2652 (OSEP 2007). Second, experts on LD broadly envision a role for assessment instruments when used and interpreted appropriately.

- *The “strengths-and-weaknesses” pattern assessment option* – As an alternative to the RtI process option, “§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.” 71 Fed. Reg. 46,651. This is the “strengths-and-weaknesses” option, which is the assessment-based alternative to analyzing progress data from high-quality research-based regular interventions (i.e., the RtI option).

Questions on the “strengths-and-weaknesses” option – What are the “patterns” to look for? Is there consensus in the educational testing community on that point? Is there consensus on which patterns are “relevant” to LD determinations? In fact, consensus is emerging among experts on assessment and learning disabilities. But, without more clarity and definition in state criteria, the fear is that this option is subject to widely differing views of the same data, which in turn will lead to eligibility disputes. States may wish to consider adding more definition to what appears to be a broad outline to determine LD eligibility under this option. If not, it will be up to hearing officers and courts to better define this option, albeit on a piecemeal and likely inconsistent basis.

- Some states retain the discrepancy formulation as an option, but allow for the use of RtI analysis, as well. In California, for example, the state model allows use of an RtI model or, alternatively, a discrepancy analysis (with use of other assessments to determine presence of basic disorder in psychological processes). See, e.g., *Tracy Joint Unified Sch. Dist.*, 107 LRP 69372 (SEA CA 2007)(school used various alternative discrepancy calculation options, including standard regression and correlation coefficient); *High Tech Media Arts School and Desert Mountain SELPA*, 47 IDELR 114 (SEA CA 2007).
- *Can use of a pure discrepancy analysis as the primary determinant of LD eligibility run afoul of §300.309?* – In the case of *Ector County Ind. Sch. Dist.*, 107 LRP 64220 (SEA TX 2007), the hearing officer held that a school’s use of a simple difference discrepancy analysis, without addressing all the components of LD eligibility required under §300.309 was inappropriate. In the case, a student failed to pass parts of the statewide assessment, but did not show a simple difference discrepancy between IQ and achievement. The school therefore did not qualify the student as LD, although the evaluation apparently did no more than address the discrepancy question. The hearing officer wrote that “the questions of LD eligibility determination under §300.309 apply and must be addressed regardless of which permissible assessment methodology LEAs may use. In other words, factors spelled out under §300.309 must be examined to determine if the student satisfies the definition of §300.8(c)(10) regardless of whether the

LEA used a discrepancy model, responsiveness to intervention, or another scientifically-based determination regarding a pattern of strength and weaknesses.”

Note—Both the case above, and the language of §300.309(a)(2)(ii) (the strength and weaknesses provision) appear to agree that the strength and weaknesses assessment option represents and requires more than a “reheated” discrepancy formulation. It requires a more sophisticated use and interpretation of assessment instruments to look for patterns of scores, either between tests or within tests, that are indicative of LDs. *See below.*

- *RtI or discrepancy?*—The question presents a false choice—the options are not either continued use of an admittedly-flawed discrepancy formulation, or analysis of student response to high-quality research-based interventions. The use of assessments must lead to a determination of whether analysis of the scores indicates patterns of strength and weakness that are particularly indicative of the presence of LD under modern LD theoretical frameworks. But the “RtI or discrepancy” misconception is persistent. In *High Tech Middle Media Arts School and Desert Mountain SELPA*, 47 IDELR 114 (SEA CA 2007), the hearing officer states that “there are two current methods for determining whether a child has an SLD: the ‘severe discrepancy’ method and the response to intervention (RTI) method.” Both the regulations and USDOE guidance make clear that is not the case—if an RtI analysis is used, the evaluation must still comply with the remaining three elements of §300.309. And, the alternative to the second element of §300.309 requires use of assessment instruments to determine if there is a pattern of strength and weaknesses indicative of LD. While the use of a discrepancy procedure could be a part of the procedures used to determine patterns of strength and weakness, it may be inappropriate to rely solely on that procedure to fulfill the requirements of the second element of §300.309, as discussed above.
- *Researching modern use of assessment instruments*—Schools would be well-advised to research modern approaches to using assessment instruments, both cognitive and achievement, in order to help determine the presence of an LD, or make a finding that some other condition is at work. For example, the work of researchers Dawn Flanagan and Salomon Ortiz of St. Johns University on cross-battery assessment techniques is advancing our knowledge of how to use cognitive and achievement testing not only to determine eligibility, but also to help plan individualized interventions. *See, e.g., FLANAGAN, ORTIZ, ALFONSO, MASCOLO, “Essentials of Cross-Battery Assessment” (2007).*
- *Should the patterns of strength and weakness corroborate the failure to achieve in the classroom?*—Some states feel that is the case. In Texas, for example, the state education agency has issued guidance stating that “in conducting an evaluation, schools are encouraged to include criterion-referenced or curriculum-based measures to more

accurately identify patterns of strengths and weaknesses and link eligibility determinations to instruction. In evaluating specific areas of cognitive functioning to determine a pattern of strengths and weaknesses, schools should take into consideration the federal definition of SLD as ‘a disorder in one or more of the basic psychological processes involved in understanding or in using language’ (CFR §300.8(c)(10)). An identified pattern of strengths and weaknesses should be linked to the failure to achieve adequately as described above when used as a determination of SLD.” See TEA website, Commissioner’s Rules, Guidance document. Thus, to some states, the pattern of weaknesses revealed in assessment scores, either from cognitive or achievement testing or both, should link to the student’s areas of difficulties in the classroom.

- *The modern role of cognitive testing*—In the past, cognitive testing was used primarily to derive an overall idea of intellectual functioning, usually in the form of a full-scale IQ, to compare statistically with standard scores on norm-referenced achievement tests. In fact, experts on LD assessment believe this to be a misuse of today’s highly advanced cognitive tests. Modern cognitive tests are made of subtests that are aligned to specific areas of cognitive processing, which in turn are linked to specific areas of academic achievement. Thus, modern IQ tests can provide quite specific data to assist in finding patterns of strength and weakness that may be indicative of LDs, and can therefore represent an important component in determining SLD.

Note—Modern LD research relies on an empirically-based multiple-factor view of intelligence (broad and narrow abilities) developed by Raymond Cattell, John Horn, and John Carroll. The “CHC” theory of learning disabilities breaks down intelligence into seven areas of cognitive processing:

Crystallized Intelligence (*Gc*)
Fluid Reasoning (*Gf*)
Long-term Retrieval (*Glr*)
Short-Term Memory (*Gsm*)
Visual Processing (*Gv*)
Auditory Processing (*Ga*)
Processing Speed (*Gs*)

Modern cognitive assessments are aligned to some or all of the “G’s” of cognitive processing, which in turn are associated with certain academic skills. Thus, modern IQ tests can examine for patterns of processing weakness, and compare these areas to achievement test scores and classroom performance data, to help ascertain the presence of a LD, or determine if some other factor is at play in the

student's academic difficulties.

- *Can evaluations use data from both RtI interventions and assessments?*—Nothing in the regulations appears to prohibit schools from making use of both data from regular education interventions *and* assessments as parts of the LD evaluation. Indeed, assessment data may help corroborate information from RtI programs and assist in eventual development of individualized strategies and special education services.

(a)(3) 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.**

- *Application of traditional exclusionary clauses*—As in prior versions of IDEA, a determination of LD requires that the assessment team rule out that their findings are not primarily the result of another disability or a non-disability factor. The final regulations, however, offer no new ideas or guidance as to how to properly apply and document this determination. The question is particularly difficult with respect to ascertaining the effect of cultural factors, and environmental or economic disadvantage. How is the team to determine whether a student's economic disadvantage is the "primary" cause of depressed academic achievement as opposed to only a contributing factor?

Note—Addressing the effect of cultural differences on LD eligibility, the commentary to the regulations concedes that "the identification 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. 46,655 (emphasis added). In sum, the question of effect of cultural, environmental, or economic disadvantage involves a pure subjective judgment call on the part of the assessment group, based only on information gleaned from the social/home history component of the evaluation. Schools, therefore, will continue to wrestle with this corner of LD evaluations as they always have. What is becoming clear is that without real guidance on quantifying the effects of these exclusionary factors to make the determination more objective, their mere consideration will not be meaningful.

- (b) 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.

- *Ruling out lack of appropriate instruction*—To USDOE, the key point is that “[c]hildren should not be identified as having a disability before concluding that their performance deficits are not the result of a lack of appropriate instruction.” 71 Fed. Reg. 46,656. Moreover, the determination of “whether a child has received ‘appropriate instruction’ is appropriately left to State and local officials to determine. 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.” Id. “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.” The commentary cautions, however, that “[e]vidence of appropriate instruction, including instruction delivered in an RTI model, is not a substitute for a complete assessment of all of the areas of suspected need.” Id.

Notice, moreover, that this step is required even if the school does not opt for the RTI process. This step, rather, serves to help ensure that the “instructional casualties” that the President’s Commission referred to are not misidentified as students with disabilities.

- *Does the regulation examine the right things?*—You may notice that this provision of the regulation purports to address the appropriateness of the instruction provided to the student, but does not examine teacher credentials, experience, test scores of all the teachers’ students in comparison.