

UNDERSTANDING THE BLURRED LINE BETWEEN “SPECIALLY DESIGNED INSTRUCTION” & REGULAR EDUCATION INTERVENTION

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A note about these materials: These materials are not intended as a comprehensive review of all case law, rules and regulations on the topic, but as an overview of the issues, concerns, and dynamics created by the gradual shift in intervention strategy to a more robust regular education response, and the impact of that movement on the IDEA eligibility requirement that a student need special education and related services. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation.

Overview: IDEA eligibility requires that the student have an impairment that meets the criteria of one or more of the disability categories and “by reason thereof, needs special education and related services.” 20 U.S.C. §1402(3)(ii); 34 C.F.R. §300.8(a)(1). As regular education increases its efforts to individualize instruction and provide ever-earlier access to serious interventions for struggling students, an important question will arise: **What is “special education” in the world of Early Intervention (EI) and RTI?** In other words, where regular education is individualizing education and providing a higher level of services and supports, at what point is the student no longer receiving good regular education or §504 services, and instead is receiving “special education?” The problem is created by an antiquated definition of “specially designed instruction” that has not responded to significant changes in the law around it. We begin with a brief examination of the regular education-special education relationship.

I. A Cardinal Principle of Special Education: All students are regular education students first.

The President’s Commission Report on Excellence in Special Education, titled “A New Era: Revitalizing Special Education for Children and Their Families” [hereinafter “President’s Commission Report”], July 1, 2002, summarized the appropriate regular education/special education relationship quite nicely.

“Children placed in special education are general education children first. Despite this basic fact, educators and policy-makers think about the two systems as separate and tally the cost of special education as a separate program, not as additional services with resultant add-on expense. In such a system, children with disabilities are often treated not as children who are general education students and whose instructional needs can be met with scientifically based approaches; they are considered separately with unique costs — **creating incentives for misidentification and academic isolation** — preventing the pooling of available resources and learning. General education and special education share responsibilities for children with disabilities. They are not separable at any level — cost, instruction or identification.” *President’s Commission Report at 7.*

Sharing responsibility. The same thinking that causes referral to special education before regular education has been given a chance also complicates services to students once in special education. Unfortunately, some schools have yet to grasp the notion of explaining why the regular education curriculum is not appropriate for a particular student, even when provided with appropriate special education and related services to assist him in accessing that curriculum. Just as regular education has a large part to play prior to special education referral (as per the new IDEA), so too must it share in the services provided once a student is determined eligible. The shared responsibilities for the IDEA eligible-

student's success continue. Without that sharing, AYP is at risk. **In short, the IDEA and §504 supplement, but do not supplant regular education efforts.** IDEA services (and by analogy, §504 accommodations) are in addition to the good things provided by regular education. As a result, as regular education expands its range and quality of educational offerings, IDEA & §504 will naturally feel the impact.

Curricular LRE. Schools too frequently think of LRE as a presumption of education with nondisabled students, and neglect the subject matter presumption of regular education curriculum that Congress requires through both the IDEA and NCLB. Congress created and continues to maintain the presumption of participation by IDEA eligible students in the regular education curriculum in the mainstream classroom, and in nonacademic and extracurricular activities. IDEA's default position is that the student with a disability participates fully in these mainstream pursuits, and any restriction or deviation from the default must be justified. IDEA 2004 reaffirmed the rule, requiring "an explanation of the extent, if any, to which the child *will not* participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc)[.]" 20 U.S.C. §1414(d)(1)(a)(1)(V) (emphasis added). The commentary to the regulations on Free Appropriate Public Education makes the point. "Sections 300.114 through 300.118, consistent with section §1412(a)(5) of the Act, implement the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports.... special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 71 Federal Register No. 156, August 14, 2006, p. 46,580. Consequently, barriers preventing the student's attendance in that regular education classroom must be addressed through supplementary aids and services before some alternative can be considered appropriate. In short, IDEA through LRE (and NCLB through AYP) both reinforce the strong presumption of grade level curriculum for the IDEA-eligible student. When the student, with appropriate supplementary aids and services cannot be educated in the regular classroom, a more restrictive setting is possible—but not until data supports the move.

The Myth of One-Size-Fits-All Education. There was a time in public education when, with few exceptions, the common practice was to teach all students in the same way. There was little widespread recognition of the need to appeal to different learning styles or the possibility that perhaps a particular student's needs could not be met in a classroom environment where many of his peers succeeded. Section §504's requirements of equal benefit and equal participation for students with disabilities changed that thinking, as schools and others discovered that sometimes equal treatment does not convey equal benefit or equal participation. Sometimes, disability prevents a student from receiving the same benefits that the student's nondisabled peers receive from education. Sometimes, the student with a disability needs what everyone else receives, plus something a little extra or perhaps something different in order to level the playing field. Congress recognized again in IDEA that not all students benefit from equal treatment. Specifically, in its introduction to the IDEA (20 U.S.C. §1400, *et. seq.*), Congress made clear its desire that public schools provide an *appropriate* public education to children suffering from severe disabilities. The legislation was required by two problems. The Fifth Circuit explained: "Before passage of the Act, as the Supreme Court has noted, many handicapped children suffered under one of two equally ineffective approaches to their educational needs: either they were excluded entirely from public education or they were deposited in regular education classrooms with no assistance, left to fend for themselves in an environment inappropriate for their needs." *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1038 (5th Cir. 1989). IDEA, through evaluation data, determines both the student's particular needs as well as the individualized educational services that will populate his or her IEP. Intervention takes place one student at a time.

State education codes and administrative rules give additional support to this view of the regular education-special education relationship. The following is a sampling of state efforts to follow the

logical progression of this view of the relationship-- to encourage and require regular education to do its part through expanded interventions prior to referral.

Interventions prior to referral. By Administrative Rule in Texas, for example, school districts are required to incorporate special education referrals into the broader early intervention system utilized by the district.

“Referral of students for a full and individual initial evaluation for possible special education services shall be a part of the district's overall, general education referral or screening system. **Prior to referral, students experiencing difficulty in the general classroom should be considered for all support services available to all students, such as tutorial; remedial; compensatory; response to scientific, research-based intervention; and other academic or behavior support services.** If the student continues to experience difficulty in the general classroom after the provision of interventions, district personnel must refer the student for a full and individual initial evaluation. This referral for a full and individual initial evaluation may be initiated by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student.” 19 T.A.C. §89.1011 (Referral for Full and Individual Initial Evaluation)(emphasis added).

Clear from the Texas Administrative Rule is the message that special education interventions are not for all students, but for those who, due to disability, need the more intensive services that special education provides. In other words, if regular education interventions work, special education referral and evaluation is not necessary.

California asks “Is it ‘correctable’ in regular education?” *Hood v. Encinitas Union School District*, 486 F. 3d 1099, 107 LRP 26108 (9th Cir. 2007). As part of special education eligibility for students with a specific learning disability, California law includes a provision which limits eligibility to situations where the student’s “discrepancy cannot be corrected through other regular or categorical services offered within the regular instruction program.” Put differently, if the services and opportunities available in regular education are sufficient to meet the student’s educational needs, there is no need for special education. “Thus even assuming the existence of a severe discrepancy, the law does not entitle [the student] to special education if we find that her discrepancy can be corrected in the regular classroom.” The question for the Ninth Circuit was how can one tell if regular education was getting the job done? What does “correctable” look like? Put differently, what is the test for determining when special education must be pursued for a student who is receiving regular education interventions?

“Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, **it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard.** Accordingly, the district court used the correct standard of review when it considered the benefit Anna received in the regular classroom as part of its eligibility analysis....

Application of this benefit standard to the facts presented in this case indicates that Anna does not qualify for special education due to a ‘specific learning disability’ because any existing severe discrepancy between ability and achievement appears correctable in the regular classroom. As the hearing officer noted, ‘[i]t [is] virtually undisputed in this case that **Anna has been progressing in the general curriculum along with her peers.**’ She received nearly uniformly average or above average grades. At the hearing, Michelle Dennis, Anna's

fourth grade teacher, testified that Anna was a highly proficient student. According to the hearing officer, Dennis ‘was adamant that she would not have considered referring Anna for special education because **she was working at or above grade level.**’ Sidney Sickels, Anna’s teacher for approximately a month immediately preceding her withdrawal from the school district, testified that **Anna was capable of producing work at grade level** and that he did not believe that Anna needed to be referred to special education. Dennis Rota, Anna’s fifth grade science teacher, agreed. Dr. Beverly Barrett, director of pupil personnel services for the school district, testified that the IEP team did not feel that Anna’s conditions had a significant impact on her performance necessitating special education, as she was not performing below grade level. According to this evidence, it appears that the hearing officer was justified in concluding that Anna is receiving the requisite benefit from her education such that the school district is in compliance with the law.” (Emphasis added).

Arguments that the student may qualify as OHI were rejected on the same grounds as California law includes similar provisions to the “correctable” requirement for all disability categories. “Additionally, as with all eligibility categories, the child’s ‘other health impairment’ must require instruction, services, or both, which cannot be provided with modification of the regular school program per California Education Code §56026(b).”

A little commentary: California nicely articulates the “needs special education” standard, and adds a twist. It identifies “what is special education” by looking to services not available in regular education. Presumably, if services are available both in regular education and special education, the correctable standard would result in no eligibility. The rule is a practical articulation of the regular education/special education relationship.

A nondiscrimination flavor. Finally, the Hawaii Administrative Rules reflect the concern that the existence of special programs may cause some campuses to ignore or short-change regular education interventions in favor of the more intensive and coordinated §504 and special education services under federal law. For example, the special education child find rule under Chapter 56 provides that “Identification and referral procedures under this chapter to determine if a student has a disability and is in need of special education and related services shall not be construed to limit those school site activities designed to address learning difficulties in general, including the consideration and utilization of the resources of the regular education program.” §8-56-4(c)(Child find). A virtually identical provision in Chapter 53 applies the same standard to Section 504 (see §8-53-5(c)(Child find). These provisions are consistent with Hawaii’s longstanding efforts to promote early intervention for struggling students in regular education pursuant to CSSS (discussed below). Of course, as regular education expands its offerings, the line between early intervention services and “specially designed instruction” becomes very complex, as described below.

“Wait to fail” is a horrible way to serve children. A long-standing criticism of the IDEA is that the statute requires a wait-to-fail approach to intervention. Unless a student has reached a fairly high level of need for educational services (as recognized by the eligibility requirement that the student needs special education and related services as opposed to lesser interventions), IDEA does nothing, but wait for things to get worse. This is a major criticism of IDEA from the President’s Commission Report on Excellence in Special Education.

“The current system uses an antiquated model that waits for a child to fail, instead of a model based on prevention and intervention. **Too little emphasis is put on prevention,** early and accurate identification of learning and behavior problems and aggressive intervention using research-based approaches. This means students with disabilities do not get help early when that help can be most effective. **Special education should be for those who do not respond to**

strong and appropriate instruction and methods provided in regular education.”
President’s Commission Report. p. 7.

With a skill as fundamental to education as reading, the strategy of “Wait to Fail” makes even less sense. “Reading is the fundamental skill upon which all formal education depends. Research now shows that a child who doesn’t learn the reading basics early is unlikely to learn them at all. Any child who doesn’t learn to read early and well will not easily master other skills and knowledge, and is unlikely to ever flourish in school or life.” L.C. Moats, “Teaching reading IS rocket science: What expert teachers should know and be able to do. Washington D.C.: American Federation of Teachers (*as quoted in The Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders* Texas Education Agency, February 2007, p. ii.). The President’s Commission Report supported this belief, recognizing the value of early intervention as a means to reduce inappropriate reliance on special education. **“The Commission finds that locally driven, universal screening of young children is associated with better outcomes and results for all children. Effective and reliable screening of young children can identify those at risk for later achievement and behavioral problems, including those most likely to be referred and placed in special education.”**
President’s Commission Report, p. 22.

So what does all this mean? In quick summary, special education was created at a time when individualized instruction was not a major consideration in public education. Special education was intended to supplement rather than supplant regular education. The thinking was to add those services required by the student’s disability to make the regular education classroom appropriate. Only when the disabled student’s needs cannot be met there, even with supplementary aids and services, is a more restrictive setting permissible. The regular education-special education relationship reveals a logical and critical give and take. When regular education services and flexibility increase, there is less for special education to add. That does not mean that special education disappears when regular education does more. Instead, special education will refocus on those very disabled, very needy students that require what only special education can provide. For all other struggling students, expanding interventions in regular education and Section 504 (as appropriate for qualifying students with disabilities) will meet the need.

II. Congress reinforces the appropriate regular education-special education relationship

A. NCLB & accountability for students left behind (even those with no qualifying disability)

While No Child Left Behind (NCLB) is a massive piece of complex legislation, it has a fairly simple stated purpose, as provided by Congress in the opening paragraphs of the law. 20 U.S.C. §6301. A few pertinent pieces of the language are reproduced below.

“The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments. This purpose can be accomplished by:

- (1) ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;
- (2) meeting the educational needs of low-achieving children in our Nation’s highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance;

(3) closing the achievement gap between high- and low performing children, especially the achievement gaps between minority and non-minority students, and between disadvantaged children and their more advantaged peers;

* * *

(8) providing children an enriched and accelerated educational program, including the use of schoolwide programs or additional services that increase the amount and quality of instructional time[.]”

NCLB’s stated goal of success for all students could not be more clear. NCLB takes the basic premise of §504 and IDEA– one-size-fits-all education does not benefit all students– and applies the premise to a larger group of students “left behind” in traditional education. Whatever the reason for the student’s struggles, the school must meet the need by doing something more or doing something different to help him progress. The accountability requirements of NCLB seem to demand individualized attention and services for students not on grade level. And of course, very clear from NCLB are the unpleasant realities that await schools which fail to effectively address student needs and make Adequate Yearly Progress–school choice, supplementary educational services and school reorganization (or worse).

NCLB adds standards of progress and school accountability for all students. In summary, the law’s expectation is that all students are performing at grade level. Only a very few special education students are expected (and permitted for AYP purposes) to be tested “off-level” or with anything other than a test based on chronological grade level standards. Importantly, Congress (through changes in IDEA 2004) and the U.S. Department of Education continue to re-emphasize that the majority of special education students should be receiving grade level instruction in the statewide curriculum and should be taking the regular state assessment at chronological grade level. **“Being in special education does not mean that a student cannot learn and reach grade level standards. In fact, the majority of students with disabilities should be able to meet those standards.”** *Working Together for Students with Disabilities: IDEA & NCLB*, USDE FAQ, December 2005, p. 5.

B. A Regular Education Intervention (EI) Process.

In response to the demands of NCLB, state laws requiring individualized assistance for groups of struggling learners, and the practical realization that individualized instruction is necessary for some struggling students, many if not most schools now have in place an early intervention process of some kind. **Early intervention is based on the notion that by targeting struggling students earlier, and by making solid interventions available sooner, academic, social and behavioral struggles can be addressed more successfully, at less cost, and in less time.** Whether performed by core teams, SAT, SIT, STAT, or SWAT teams, this early intervention process can be a very effective means to determine the source of student struggles and address those issues through individualized planning and provision of educational services. These committees act as a clearinghouse or resource to help teachers meet the needs of struggling students. These committees may include a variety of professional staff including teachers, counselors, administrators and sometimes the child’s parents. These committees typically review a student’s performance and provide assistance by way of suggested teaching strategies, changes to the classroom environment, behavior management techniques, as well as suggestions as to other district resources or programs (mentoring, tutoring, chapter programs, remedial programs, dyslexia, §504, special education, etc.) from which the child may benefit. **If the work of RTI is going to happen on a campus, this is the process in which the work will occur.**

What is “Early Intervention?” Congress attached this label to the regular education intervention process in 2004. This moniker is far more appealing than the traditional “pre-referral” label used to describe the process. **Let’s not call it “pre-referral.”** Traditionally, the phrase “pre-referral” has been used to describe this process. While certainly descriptive of this as a regular education effort, the phrase is misleading. “Pre-referral” seems to imply that the process must be entirely completed before a referral to special education is possible and that students who go through pre-referral will ultimately end up in special education. Both implications are problematic– not every student who needs help will eventually become special education eligible (especially since students struggle for reasons other than disability) and not every student who needs special education will spend time in early intervention (consider the need of a student with a traumatic brain injury to go through regular ed intervention first). For the sake of simplicity, the process of regular education intervention will be described throughout these materials as “early intervention” and the group that accomplishes early intervention will be cleverly labeled the “Early Intervention Team” or “EIT.”

Early Intervention as part of IDEA 2004. With an early intervention process, services and resources are available to address student struggles without having to force the student into a program for which he is not qualified or convince a team that he has failed sufficiently for the team to intervene. That means that some of the pressure to over-identify or to force students into special education who are not eligible decreases when early intervention is available. In IDEA 2004, Congress decided to let local school districts experiment with some of their federal IDEA dollars, and produce data to support the theory that better regular education now means less special education later.

The details of early intervention under IDEA 2004. Local educational agencies are permitted to spend “not more than 15 percent of the amount” they receive under the IDEA for a given fiscal year. The amount available for permissive use is also subject to the school wide program requirements at §1413(a)(2)(D). The use of IDEA monies is limited to “coordinated, early intervention services” for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education and related services but who need additional academic and behavioral support to succeed in a regular education environment.” §1413(f)(1). With these funds, together with other monies, Congress envisions the provision of “academic and behavioral evaluations, services and supports, including scientifically based literacy instruction.” §1413(f)(2)(B). The monies can be used to determine why the student is not progressing and to provide educational services (tutoring, counseling, etc) and supports (pencil grips, taped text, instructional supplies, etc) to meet the student’s needs. Early intervention activities also include professional development for teachers and other staff designed to enable them to deliver “scientifically based academic instruction and behavioral interventions, including scientifically based literacy instruction.” **Finally, no FAPE duty flows to students who participate in early intervention activities.** The IDEA FAPE duty does not follow the money, but results from a student meeting eligibility requirements. §1413(f)(3).

The basic idea is very simple. If intervention occurs early, it can be less elaborate, less intrusive, and less time consuming. Providing additional literacy instruction to a 1st grader who is struggling a little can be imminently cheaper and much more effective than waiting until the student is in middle school and in danger of failing. And of course, in an early intervention process, the campus can deliver resources and assistance regardless of the cause of the student’s struggle. Congress clearly identifies the early intervention process as one method of addressing student needs to improve performance under NCLB, and suggests that the permissive use of IDEA funds may be used to carry out coordinated early intervention

activities funded through NCLB. A note of warning, the permissive use of IDEA funds should not be used to supplant or replace NCLB monies, but to supplement them. §1413(f)(5).

This is an experiment. Built into the new provision is the gathering of data that will assist in determining whether early intervention is working. Congress requires that each school that utilizes funds pursuant to this provision to develop early intervention services must annually report to the state education agency the number of students served by this program, and the number of students served under this program who subsequently receive special education and related services during the preceding two year period. §1413(f)(4). OSEP explains the potential benefit. “[A]llowing schools to use some Part B funds for CEIS has the potential to benefit both special education and general education. **CEIS can benefit general education by reducing academic and behavioral problems in the general education environment. LEIS can also benefit special education by ensuring that students are appropriately referred to special education,** which would reduce referrals for special education and related services for needs that could have been addressed with relatively simple general education interventions.” *Memorandum to Chief State School Officers and State Directors of Special Education*, 108 LRP 47904 (OSEP 2008)(emphasis added).

C. How do you know a student needs special education if regular education wasn't given a chance (or didn't take the opportunity to try)?

Congress in IDEA 2004 allowed school districts to substitute a “response to intervention” model for purposes of specific learning disability (SLD) eligibility. The move was backed by the President’s Commission Report, which found that due to the failure of the discrepancy model, “thousands of children are misidentified every year, while many others are not identified early enough or at all.” *President’s Commission Report*, p. 8. Under the new SLD eligibility model, a learning disability cannot be found without looking at data to rule out lack of appropriate instruction in reading and math as the cause of the student’s unexpected lack of educational progress. §300.309(b). Note that a similar provision was also added to the eligibility determination for all special education disability categories. §300.306(b). The rationale is simple.

“The Commission recommends that the identification process for children with high-incidence disabilities be simplified. Assessments that reflect learning and behavior in the classroom are encouraged, with less reliance on the assessment of IQ that is now predominant. A key component of the identification process, especially to establish education need and make this decision less subjective, should be a careful evaluation of the child’s response to instruction. **Children should not be identified for special education without documenting what methods have been used to facilitate the child’s learning and adaptation to the general education classroom.** The child’s response to scientifically based interventions attempted in the context of general education should be evaluated with performance measures, such as pre- and post-administration of norm-referenced tests and progress monitoring. **In the absence of this documentation, the Commission finds that many children who are placed into special education are essentially instructional casualties and not students with disabilities.”** *Id.*, at 26 (emphasis added).

The problem with the discrepancy model is that, in too many cases, educational failure, rather than disability, has resulted in IDEA-eligibility. “Of those with ‘specific learning disabilities,’ 80 percent are there simply because they haven’t learned how to read. Thus, many children receiving special education— up to 40 percent— are there because they weren’t taught to read.... Sadly, few children placed in special education close the achievement gap to a point where they can read and learn like their peers.” *Id.*, at 3. Students who are struggling, even for reasons other than disability, are too

easily misidentified under the current system. “The lack of consistently applied diagnostic criteria for SLD makes it possible to diagnose almost any low- or under-achieving child as SLD depending on resources and other local considerations.” *Id.*, at 25.

In the 2004 Re-authorization of IDEA, Congress allowed schools to abandon the discrepancy model and move to RTI or choose another system (strengths and weaknesses, for example). Response to Intervention, or RTI, is the alternative model of SLD eligibility garnering the most attention. Under RTI, the IEP Team determines the child SLD eligible when the “child does not make sufficient progress to meet age or State approved grade-level standards” in one or more of the following areas (listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, mathematics problem solving) “when using a process based on the child’s response to scientific, research-based intervention[.]” §300.309(a)(2)(I). In other words, the child fails to respond to scientific, research based instruction, and other non-disability factors have been screened out. Built into RTI is a stronger version of the educational need component of IDEA eligibility. In the past, in addition to demonstrating the discrepancy, a student also needed to demonstrate he or she “needs special education and related services” in order to benefit from education. That requirement remains, but note that RTI requires a stronger showing of attempted and failed regular education. That regular education provide more and better services first makes sense in light of the instructional casualty problem highlighted previously.

Under federal law, school districts are allowed to move to RTI at their discretion. Schools can continue to use the state discrepancy model for SLD eligibility purposes as long as the state continues to allow that model. An element of RTI, however, is added to discrepancy analysis under the new regulations. In addition to discrepancy data on IQ and achievement, LEAs using the discrepancy model are also required to look at “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[.]” §300.309(b)(1). Under IDEA 2004, the failure of good regular education efforts to improve student performance must be documented to justify special education eligibility, even in districts that choose to use the old discrepancy model.

By the way, why does over-identification matter? Students who should be on grade level curriculum in the regular classroom (the “instructional casualties”) are too often made special education eligible, and placed in resource classes. In too many cases, special education testing led to findings of SLD eligibility and IEP goals and objectives based on the child’s functional academic levels as shown in the student’s assessments. Thus, for many IDEA students, special education eligibility translated to below-grade-level instruction. Given that they were provided below-grade-level instruction, many special education students were exempted from the statewide assessment, and instead provided a below-grade-level assessment to match their instructional level. Once in resource classes, and provided below grade level curriculum, inertia keeps them in resource, and they drift further and further away from grade level curriculum. That dynamic clearly undermines a school’s ability to move students toward grade-level curriculum, and frustrates efforts to improve AYP under NCLB.

Other repercussions are less obvious, but no less problematic. For example, as students are over-identified into IDEA, precious educational resources are stretched to provide for more students, potentially endangering the provision of services necessary for FAPE for real special education students. At the same time, IDEA eligibility means that decisions with respect to the student’s identification, evaluation and placement must be made pursuant to IDEA rules, and schools must provide the extra procedural protections, making the administrative burdens of serving the faux special education student higher due to his improper identification as IDEA-eligible. Finally, the procedural protections afforded to IDEA students include powerful parent rights to due process, resulting in potential legal liability that the school has created for itself (and

legal rights that neither the parent nor student are actually entitled to possess or use). In short, over-identification into special education can frustrate AYP efforts, deprive real special education students of necessary services through dilution of resources, make provision of services more complex than necessary and can result in unnecessary legal liability and expense.

Don't misunderstand. The author does not advocate removing eligible students from special education because of these concerns, nor does he advocate refusing to identify students for these programs when the students, in fact, are eligible. The author's concern is extending protections of federal law to students who do not meet eligibility criteria. That, of course, was also Congress' concern in IDEA 2004.

A Quick Summary: The motivation behind both early intervention and RTI is (1) to provide real interventions to students in a timely way, without the long delay of waiting for special education eligibility or the lesser delay of waiting for the disability to substantially limit the student under §504 (or perhaps, contrived eligibility to get the nondisabled student to those services), and (2) the recognition that Section 504 and special education interventions are not for all students, but for those who, due to disability, need the more intensive, coordinated services that those federal disability programs provide because regular education and early intervention are insufficient to meet these students' educational needs.

III. An antiquated border: the “need” requirement for special education eligibility.

A. Special education eligibility requires both disability and a need arising from the disability for special education and related services.

Disability is required. Under IDEA, “children with disabilities” are those who have been formally evaluated in accordance with the statute's requirements and have been found to have one or more of the recognized disabling conditions (mental retardation, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, multiple disabilities, and developmental delay). 34 C.F.R. §300.8(a)(1). Each disabling condition then has certain eligibility criteria that must be fulfilled in order for a child to qualify for IDEA services as a result of that condition. 34 C.F.R. §300.8(b)(1-13).

NCLB reminds us that students struggle for reasons other than disability. A cardinal principle of IDEA eligibility, as well as §504, is that students qualify because of disability. To that end, IEP Teams and §504 Committees are required to screen out non-disability reasons for student performance problems. For example, the federal regulations exclude from the definition of specific learning disability learning problems that result from environmental, cultural or economic disadvantage. 34 C.F.R. §300.8(c)(10)(ii). While clearly not disabilities, the impact of environmental, cultural or economic disadvantage on a child's performance at school can easily be mistaken for disability. Federal regulations recognize that student performance may be impacted by things other than disability. As a practical matter, any number of non-disability issues can cause a student's classroom performance to deteriorate: death or prolonged illness or other absence of a close family member; divorce or separation of the parents; student disinterest in school; poor instruction; peer pressure; lack of educational opportunity; poverty; the student's responsibility for siblings or his or her own child; lack of attendance; homelessness— the list is quite lengthy. Nevertheless, eligibility under IDEA and §504 is limited to qualifying disability-related struggles. Unfortunately, sometimes in the rush to provide services not otherwise available, “why” the student struggles gets forgotten. *See, for example, Alvin ISD v. A.D.*, 48 IDELR 240 (5th Cir. 2007)(Student with ADHD, good grades and passing scores on the statewide assessment was determined ineligible for special education despite disciplinary concerns that

peaked in eighth grade, (coinciding with the death of a baby brother, a strained relationship with his stepfather, and the beginning of alcohol abuse). The school argued that any educational need is not by reason of the disability, as required by the statute. The Fifth Circuit agreed, and the denial of IDEA eligibility by the district court was upheld.)

Need for special education and related services. Students eligible under the IDEA, by definition, must need special education and related services because of their qualifying impairment. 34 C.F.R. §300.8(a)(1). “Students whose educational needs can be appropriately served outside special education should be served outside special education.” *Vincent S. b/n/f Brenda S. v. Pasadena ISD*, Docket No. 324-SE-699 (SEA TEX. 1999). “When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.” *Hendrik Hudson District Bd. of Education v. Rowley*, 458 U.S. 176, 207 fn. 28 (1982). Where the child is already passing his classes and advancing from grade to grade with his peers (without special education services) that success is good evidence that he is receiving educational benefit and in no need of §504 or IDEA services. “By definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn.... A student who is already succeeding in regular education would not need special education to obtain this level of benefit and, thus, would not meet the standards established for LD eligibility.” *Saginaw City (MI) School District*, EHLR 352:413 (OCR 1987).

Success, of course, is not just measured in grades and promotion, but also reflects behavioral and emotional progress. *See, for example, Mr. I. v. Maine School Administrative District No. 55*, 480 F. 3d. 1, 47 IDELR 121 (1st Cir. 2007)(“[D]espite LI’s above-average academic performance, ‘many of [her] social and communication deficits, including her isolation, inflexibility, and self-mutilation during schooltime, are precisely in the content areas and skills that Maine mandates educationally.’ *Id.* at 163. This finding, the district court reasoned, compelled the conclusion that LI’s disability had exerted an adverse effect on her educational performance under the governing standard....”); *See also, Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 24 IDELR 68 (9th Cir. 1996)(“Everyone agrees that A.S. is exceptionally bright and thus was able to test appropriately on standardized tests. This is not the sine qua non of ‘educational benefit,’ however. ‘[T]he term “unique educational needs” [shall] be broadly construed to include the handicapped child’s academic, social, health, emotional, communicative, physical and vocational needs.”).

IDEA’s Child Find duty provides additional clarity. School districts have “an affirmative duty to identify, locate and evaluate *all* children with disabilities who need special educational services within the jurisdictional boundary of the school district.” *Nicholas B. b/n/f Michael B. v. Houston ISD*, Docket No. 329-SE-500 (SEA TEX. 2000); 34 C.F.R. §300.125. The duty to evaluate is triggered “at the time a school district has *reason to believe* that the student has a disability and suspects that special education services may be needed to address that disability.” *Id.*, *Davonne B. Houston ISD*, Docket No. 327-SE-596 (SEA TEX.1997); *See also, Robert D. v. Dickinson ISD*, Docket No. 166-SE-198 (SEA TEX. 1998)(“The IDEA provides that a referral of a student for special education services is appropriate when the school district suspects that the student may have one or more of the disabilities recognized by the IDEA and needs special education and related services.”).

B. What is “special education?” Specially designed instruction.

The federal regulations at 34 C.F.R. §300.39 define “special education” as follows:

§ 300.39 Special education.

(a) General.

(1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

- (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (ii) Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

- (i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;
- (ii) Travel training; and
- (iii) Vocational education.

(b) *Individual special education terms defined.* The terms in this definition are defined as follows:

* * *

(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

C. The Problem: If that is the test, isn't *any* individualized education in response to disability "special education?"

Does that mean that any time a student needs a modification to the "content, methodology or delivery of instruction" he needs special education? Put more simply, is shortened assignment or preferential seating "specialized instruction" when done for a student with a disability, qualifying him as special ed? The plain language of the rule seems to confirm that result. An old OSEP letter appears to agree as well. "Modifications required by a student with a physical impairment may be as subtle as altering the regular class curriculum or methods of instruction in order to accommodate the student's impairment. If such modifications are considered 'specially designed instruction' because they constitute individualized instruction planned for a particular student, they could be deemed special education." *Letter to Pawlisch*, 24 IDELR 959 (OSEP 1996).

A little commentary: The only saving grace in this position is the language indicating that subtle changes "could be" determined to be special education. Note that since 1996 when this letter was written, Early Intervention teams have increased dramatically, and Congress' calls for regular education to do more for all students under NCLB, and to look at a student's response to intervention prior to SLD eligibility results in a complex dynamic that this letter does not begin to address.

A more modern, but complicated, approach. A Pennsylvania appeals panel had a more sensible idea. **"The line between regular education and special education is admittedly fuzzy, particularly in this era of 'inclusion' under the IDEA.** Nevertheless, for policy reasons that focus the limited extra resources under the IDEA to a relatively small proportion of children with severe needs unaddressed in regular education, a diagnosis of ADD and the salutary efforts of the district to provide classroom accommodations should not translate into IDEA eligibility." *West Chester Area School District*, 35 IDELR 235, 959 (SEA PA. 2001)(emphasis added). In other words, IDEA does not exist to provide eligibility and services to all students with disability, but focuses resources on the students with the greatest need (those for whom regular education interventions will not suffice). The panel went on to provide a multi-factor test. "The IDEA regulations merely define 'special education' in terms of specially designed instruction to meet the child's unique needs.... [T]he IDEA's intent and these various sources would seem to suggest that the accommodations, supports, services, activities— or whatever

other imprecise term is used– must be: 1) adaptations in content, methodology, or delivery; 2) truly necessary, rather than merely beneficial, for the child; 3) designed or implemented by certified special education personnel; and 4) not available regularly in general education. This multi-factor test is cumulative and not necessarily exhaustive.” *Id.*

A little commentary: Note that neither the review panel nor OSEP had the benefit of knowing that regular education intervention would expand dramatically, and aids, services and opportunities once unique to special education would become commonplace in regular education.

D. The logic of tiered intervention, early intervening services, and the special education child find rule must inform “specially designed instruction.”

To summarize a bit of the preceding analysis, special education was intended to supplement, not supplant regular education. Consequently, when the student’s educational needs can be met through regular education (early intervention and scientific, research-based interventions), there is no special education eligibility. The student’s needs have been met at a lower-level or tier of intervention. The expansion of regular education services does not change the rules, but does change the eligibility result when the rules are applied to some students. Strangely, OSEP (in the same year it provided the *Letter to Pawlisch* summarized previously) took a more enlightened view of the border asking, in essence, is the service, program, or help available in regular education or §504? If the answer is yes, and the student does not need special education eligibility to get the service, the student is not deemed “in need of special education.” OSEP described the border in this roundabout way.

“While IDEA’s definition of FAPE includes the provision of special education and related services in conformity with an IEP, an ‘appropriate education,’ which is part of FAPE under Section 504 consists of a program of regular and special education and related aids and services that satisfies the procedures in the Section 504 regulations.... There may be instances where students have an impairment that affects a major life activity, e.g., learning, but who do not need special education and related services because of that impairment. One such example is certain children with Attention Deficit Disorder (ADD) who have been determined not to be eligible for services under IDEA because they do not need special education and related services in accordance with IDEA. In meeting their obligations to provide FAPE to such students under Section 504, school districts could require the provision of regular education and related aids and services, such as notetakers or interpreters, as determined appropriate for the student. School districts are not required to meet their obligation to provide FAPE to disabled students covered by Section 504 through provision of special education, unless they determine that the provision of special education is the appropriate means of meeting their obligations to provide FAPE to a particular student.” *Letter to Pollo*, 21 IDELR 1132, 1133-34 (OSEP 1994).

1. Are regular education early intervention activities considered “special education”? No. In light of Congress’ efforts to encourage schools to implement early intervening services, commenters to the proposed IDEA regulations expected that the definition of “special education” in IDEA would be changed to reflect the difference between these regular education efforts and special education. The expectation arises from the long-standing definition of special education reprinted previously. Unfortunately, “specially designed instruction” is so broadly defined that it could easily include the efforts of regular education to adapt to struggling students through changes in the delivery of curriculum or methodology. The problem is more than academic, as the second part of IDEA eligibility is a finding that the student needs special education and related services. In short, if the student meets the disability portion of the definition, but only requires the types of changes or services available through regular education, does the child need special education? Is the child IDEA-eligible?

A comment to the proposed federal regulations framed the question nicely. “One commenter requested modifying the definition of *special education* to distinguish special education from other forms of education, such as remedial programming, flexible grouping, and alternative education programming. The commenter stated that flexible grouping, diagnostic and prescriptive teaching, and remedial programming have expanded in the general curriculum in regular classrooms and the expansion of such instruction will only be encouraged with the implementation of early intervening services under the Act.” The U.S. Department of Education’s response was almost too simple: **“We do not believe it is necessary to change the definition to distinguish special education from the other forms of education mentioned by the commenter.”** 71 Federal Register No. 156 p. 46,577 (emphasis added). What the response suggests is that if regular education utilizes these interventions or implements these services, the services and interventions are not unique to specially designed instruction, and not special education.

A federal district court agrees. A 2007 Hawaii federal district court case, *Ashli & Gordon C v. State of Hawaii Department of Education*, 47 IDELR 65 (D.C. HI. 2007), the court addressed the issue of special education eligibility for a student with a disability who was responding well to differentiated instruction provided pursuant to CSSS (Comprehensive Student Support System). The student was a third grader with ADHD who had already been evaluated for special education and denied eligibility (on two separate occasions based on both school data and an independent evaluation) for a specific learning disability, speech-language impairment, mental retardation and other health impairment (OHI). Only the denial of eligibility under OHI is part of the appeal.

The case focused on the teacher’s response to the student struggles (he is easily distracted, struggles with math, has some hyperactivity, gets frustrated quickly with homework). “Sidney’s classroom teacher testified that she provided him with differentiated instruction in the classroom. Sidney received additional time and highlighting of directions during test taking, was moved closer to the teacher during tests; his test papers were folded so he only had to complete half the test at a time; in addition to reading the directions to himself, his teacher read the directions to him; and it was possible for him to receive additional explanation when learning a lesson.” Despite the help, and the student’s progress with the help, the parents argued he was OHI. The holding focused on language of the OHI definition requiring the disability to “adversely affect his educational performance” in order to be IDEA-eligible. HDOE successfully argued, and the court agreed, that “If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal effect does not render him eligible for special education services.” *Id.*, at p. 8. In other words, if the student can learn and perform in the classroom without special education (but with non-special ed supports), he’s not eligible for special education. The court concluded **“While the state regulation could be more specific, there is nothing in either the IDEA or in the state or federal implementing regulations to indicate that a student would qualify as a ‘student with a disability’ when the school voluntarily modifies that regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level.”** (Emphasis added).

A little commentary: This is the type of student that Congress wants to receive early intervening services. Yes, there are struggles, yes, there are needs, but this student does not need what only special education has to offer. In light of the student’s improvement with the teacher’s provision of differentiated instruction (he fell within the majority of student performance levels, was meeting or approaching educational standards, and was redirected/refocused just as often as half the class), the fact that he has ADHD does not create eligibility.

Bottom line: Special education was created because regular ed was not making the changes necessary so that students with disability could benefit. Now that regular education is taking that task more seriously, and doing so in a systematic way that includes referral to special education for students who need pure special ed services like resource classes, it seems contrary to logic (and Congressional desire to meet needs early) to punish those good faith efforts through failure to identify due process hearings. Logic dictates that if a student, despite disability, is making progress due to the efforts of an EIT to individualize instruction for him, and provide the interventions he needs, that student is not in “need of special education and related services.” His needs have been met in regular education. (*See Rowley*: “When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.” *Hendrik Hudson District Bd. of Education v. Rowley*, 458 U.S. 176, 207 fn. 28 (1982)). When he receives benefit without special education eligibility and services, there hardly seems to be a need for child find to determine eligibility for special education services designed to give him what he’s already receiving.

2. If Section 504 services can meet the needs of the struggling student with a disability, there is no educational need arising from disability that requires special education and related services.

In a Louisiana case, a school’s refusal to assess a student for special education was upheld based on the student’s success under the state’s five-step dyslexia program. As a result of the program and minor §504 modifications (extended time, repeated direction, no penalty for misspelling), the impact of the student’s impairment was mild to moderate. The court found that the student was receiving educational benefit, without special education, and that no IDEA assessment was justified. *Grant v. St. John’s Parish School Board*, 33 IDELR 212 (E.D. LA. 2000).

In an Arizona case, a student received accommodations under §504 for ADHD and bipolar disorder. The parents argued that the accommodations (elimination of 1st hour class, breaking assignments into smaller pieces, no after school homework, after school assistance from teachers and tutors, and peer assistance during school hours) amounted to special education, qualifying the student for IDEA. The Hearing Officer concluded that “**Petitioner is entitled to §504 accommodations but, because he does not need specially designed instruction in order to receive educational benefit, he is not entitled to special education services under IDEA.**” The Hearing Officer took the position that “if services can be provided equally as special education services and non-IDEA services, the least restrictive offer for those services exists outside of the IDEA umbrella and should be preferred.” *Scottsdale Unified School District*, 38 IDELR 137 (SEA AZ. 2002).

Another interesting wrinkle in the *Scottsdale* decision was the parent’s argument that once the Student Services Team (SST) suspects disability, it must refer first to special education. The Hearing Officer rejected this notion finding that it would undermine efforts to provide services in the LRE (after all, if the SST believes that the student does not require special education based on his disability, it may properly conclude that §504 evaluation is the appropriate next step. Should §504 fail to meet the student’s needs, a special education evaluation would then be appropriate).

The 9th Circuit agrees. In response to the parents’ argument that the existence of a §504 plan to address the student’s behaviors was evidence of impact to a marked degree and over a long time (justifying special education eligibility under the category of emotional disturbance), the court disagreed. “Furthermore, California school districts commonly turn to behavioral support plans as alternative remedies for students who do not satisfy the IDEA’s criteria for a ‘severe emotional disturbance.’” *RB v. Napa Valley Unified School District*, 48 IDELR 60 (9th Cir. 2007)(citing *Ventura Unified School District*, 102 LRP 7625 (SEA Ca. 2000)). Put differently, when §504 meets the student’s needs, there is no need for special education and related services. *See also, Christopher B. v. Bishop ISD*, Docket No. 022-SE-996 (SEA TEX. 1996)(AD(H)D student making progress with §504

modifications does not need to be identified under IDEA due to lack of educational need.); *Wendy L. v. Gregory Portland ISD*, Docket No. 330-SE-0502 (SEA TEX. 2002) (Student with AD(H)D provided behavior management and accommodations under §504 had no educational need and did not qualify under IDEA.); *George West ISD*, 35 IDELR 287 (SEA TEX. 2001) (A student with a hearing impairment required an FM tuner and §504 accommodations. She had great grades and academic recognition on the statewide assessment. “There is no educational need for special education and related services under these circumstances.”) Of course, where regular education or §504 interventions are tried and are unsuccessful, a referral to special education should occur for a student with disability.

IV. A modern border: what can only special education do?

A logical location for the border between regular and special education services must focus on the principle of all students as regular education students first. Consequently, if regular education cannot meet the needs of the student with disability, and Section 504 cannot meet the needs of the student with disability, then only special education, doing what only special education can do, is required. As a practical matter, there are only a handful of things that only special education can do exclusively. Only special education can:

- (1) Provide the student with something other than the grade-level statewide assessment or reduce the student’s access to grade-level curriculum;
- (2) Place the student with other disabled students in resource or other segregated settings;
- (3) Access the other 85% of federal IDEA-B funds; and
- (4) The school district or SEA has determined that certain programs or services will only be funded with IDEA-B monies, and are only available to IDEA-B students. *See, for example, Mr. I v. Maine School Administrative District No. 55*, 47 IDELR 121, 480 F. 3d. 1 (1st Cir. 2007)(Court looked to provisions added by Maine state law for finding that social skills training and pragmatic language instruction required by the student fell within the definition of “special education.”).

Logic dictates that any other intervention or service is not “special education” or “specially designed instruction” and presumably can be done by regular education or Section 504 as long as the campus has the desire and the resources. It would seem an odd thing for Congress to allow 15% of IDEA B funds to be used for early intervention (without student entitlement to FAPE), allow serious scientific research-based intervention before IDEA eligibility can be determined, and simultaneously restrict regular education service expansion by calling it “specially designed instruction.” This logical border or test provides maximum opportunity for regular expansion while recognizing that there are things that only special education can and should do.

V. Thorny issues at the modern border.

A. The game has changed but the rule is not yet clear.

Unfortunately, the U.S. Department of Education missed an excellent opportunity (as did Congress) to solve the problem in 2004 with the reauthorization or 2006 with the new regulations. Neither body took the opportunity to address the problem, other than the brief commentary to the regulations cited above. Consequently, it is up to the stakeholders in the process to push for an appropriate interpretation of “specially designed instruction” that is consistent with the 15% rule, child find rules, and RTI. For thoughtful hearing officers, this should not prove problematic, but for those missing the

big picture it will be a bumpy ride until the USDE or Congress makes an official and clear change. The following are a sampling of questions hearing officers and judges are addressing as the new border evolves.

1. Are early intervention activities *per se* violations of IDEA? No.

A federal judge in Connecticut rejected a parent's argument that a school's routine use of campus study teams as a pre-referral process is a *per se* violation of IDEA. Agreeing with the hearing officer, the court wrote "As the Hearing Officer observed, CSTs are 'a regular education function' that give local education agencies an additional tool for assisting and identifying struggling students.... Connecticut law requires that '[b]efore a child is referred to a planning and placement team, alternative procedures and programs in regular education shall be explored and, where appropriate, implemented.'The use of alternative programs, such as CSTs, is not inconsistent with the IDEA. For it is sensible policy for LEAs to explore options in the regular education environment before designating a child as a special education student." *A.P. v. Woodstock Board of Education*, 50 IDELR 275 (D.C. CONN. 2008)(internal citations omitted).

A little commentary: Connecticut's requirement is much like those of other states discussed previously in these materials. In light of the modern emphasis on regular education intervention, Congress' permission to use 15% of IDEA-B funds for those pursuits, and the support of the USDE, this question should not persist. *See also, Memorandum to Chief State School Officers and State Directors of Special Education*, 108 LRP 47904 (OSEP 2008)("The Individuals with Disabilities Education Improvement Act amended the IDEA to allow, and sometimes require, local educational agencies (LEAs) to use funds provided under Part B of the IDEA for CEIS [coordinated early intervening services]. This new provision, which is found in section 613(f) of the IDEA (20 U.S.C. §1413(f)) and the regulations in 34 CFR §300.226 permit LEAs to use Part B funds to develop and provide CEIS for students who are currently not identified as needing special education. The rationale for using IDEA funds for CEIS is based on research showing that the earlier a child's learning problems or difficulties are identified, the more quickly and effectively the problems and difficulties can be addressed and the greater the chances that the child's problems will be ameliorated or decreased in severity. Conversely, the longer a child goes without assistance, the longer the remediation time and the more intense and costly services might be.") (bracketed material added by author).

2. Are early intervention activities a roadblock to IDEA referral? It depends. As the following cases indicate, while early intervention can be an effective way to help ensure that only the right students make their way into special education, it can also, if performed badly, result in untimely referrals and delays in necessary special education services.

What if early intervention works for a while... and then doesn't? "A child with a disability is not automatically eligible for special education and related services under IDEA. The MDT team concluded at that time that the Student's needs were adequately met via the IST program in the regular education classroom and private tutoring provided by the Parents. The team also noted that the Student's progress should be closely monitored and further evaluation considered if Student's needs could not be met in the regular education setting." *Dowington Area School District*, 107 LRP 63155 (SEA PA. 2007). Of course, facts can change. Here, early intervention worked (meeting the student's educational needs) until the third semester of the second grade, at which time the school timely referred to special education. *See also, Lake Park Audobon ISD #2889*, 50 IDELR 117 (SEA MINN. 2008)("[T]he District initially provided the Student with Title 1 services based on her academic and behavioral needs. When that strategy proved unsuccessful, the Student's kindergarten teacher obtained pre-referral interventions in

January 2007. While the interventions were helpful, the District requested permission to evaluate by March 2007, and completed the evaluations within the allowed timeframe.... Given the Student's age and multiple home placements, it is reasonable for the District to have attempted other strategies prior to initiating a special education evaluation.”).

Is your early intervention process flexible? “The parents also argue that any request for a referral would have been futile because the Board’s policy was to initially refer every child to CST. The problem with this argument is that there is absolutely no support for it in the record. In fact, when the Parents finally did request a referral at the end of A.P.’s fifth-grade year, the school convened a PPT immediately.” *A.P. v. Woodstock Board of Education, supra.*

What if you don’t seem to follow your early intervention process? Testimony on the school’s early intervention process including its efforts to fulfill the child find duty did not match the school’s efforts on behalf of a struggling student.

“A comparison of this testimony to the district's written procedures raises the question of whether the district followed its procedures as written. The student was not referred for intervention, according to Ms. Putlak, because his academic performance prior to high school showed that he had mastered the basic academic skills necessary for academic achievement. However, the written policy requires referral of a student who is showing problems with his educational progress. The student's decline in grades shows a problem with academic progress, though it does not indicate the reason for the problem. Did the district not refer him to an intervention team because it knew that his declining performance was due to homework not being completed? The answer is unknown because those records no longer exist, and no testimony was presented on this issue.” *Crete Monee Community Unit School District #201-U, 108 LRP 42831 (SEA ILL. 2008).*

A little commentary: Ultimately, the hearing officer concluded that the student was not in fact special education eligible, so the lapses in the early intervention process did not result in an untimely evaluation or denial of FAPE. Had the student been determined eligible, the procedural failures would have proven problematic. The school can hardly argue that special education services were not required due to early intervention efforts, when the student should have been identified as a struggling student but was not. Note that the problem would be even more serious should the school, after not intervening earlier, desire to delay special education evaluation to perform scientific, research-based instruction that will take longer than allowed by state timelines. Lack of timely response and a delay in assessment is unlikely to sit well with a parent wanting FAPE. Understandably, that concerned parent may be unwilling to agree to further delays. Timely intervention for struggling students provides the school with more time in which to try interventions before problems become acute and special education assessment becomes untimely.

Fidelity matters. Note that this problem will also complicate RTI efforts. A campus that is less than faithful to the early intervention process will likely have difficulty providing scientific, research-based instruction with fidelity. A good intervention process is important, but it has to be understood and followed to be of real value. As long as campuses either balk at following through on early intervention initiatives or follow through inconsistently, this question will persist: is the early intervention process a valid attempt to meet student needs early or simply a roadblock to IDEA referral?

3. Do IDEA procedural protections apply during the early intervention process? Not until special education referral. Upholding the conclusion of the special education hearing officer, the federal district court concluded that the procedural protections of the IDEA begin at referral, not before.

“If, as the Parents argue, any ‘meeting’ regarding a child who is having difficulties triggered the procedural protections of the IDEA, then almost any action at all on the part of the school would constitute a referral. In essence, the Parents argue that merely discussing the possibility of a referral becomes a referral and that any time a child is not referred to a PPT, the school has made an unlawful finding that the student does not qualify for special education. Not only would such a system be counterproductive by discouraging teachers from communicating concerns about students, it would also prevent schools from trying alternative strategies for students who, while perhaps not meeting the statutory definition of a ‘child with a disability,’ are in need of extra help in order to succeed academically.” *A.P. v. Woodstock Board of Education, supra*.

4. Should parents be involved in the early intervention process? Yes, collaboration matters. Since the parents can request special education evaluation at any time (§300.309(c)), and are required to be informed of the school’s RTI efforts (§300.311(a)(7)), arguments that a special education evaluation was untimely are undercut by a collaborative process prior to referral in which the parent is an active participant.

“After review of the arguments and evidence, the Hearing Officer cannot fault School District for attempting an RTI program and cannot find that Student was denied a FAPE as a result of the delay in referring Student for special education. Conversely, all parties including school administrative personnel, Student's parents, teachers, doctors, and counselors worked together to address Student's academic and behavioral problems from the time Student enrolled in school. The communication and collaboration of the parties for Student's benefit in the form of medical consultation, behavior plans, Grand Central Station, Reading Rallye, and Section 504 accommodations exceeds what would reasonably be expected for a student presenting the difficulties that Student exhibited.” *Salado ISD, 108 LRP 67655 (SEA TEX. 2008)*.

(*See also, A.P. v. Woodstock Board of Education, supra*. “The Court would also like to point out that the Parents were, in fact, involved in the CST process. The Parents and Ms. Foisy were in regular contact during the fall of A.P.'s fifth grade year. Although the Parents claim that they were not informed about the CSTs, Ms. Foisy testified that she informed Mrs. Powers that the CSTs were to take place and also shared the results of the CSTs with her afterwards. Mrs. Powers admitted as much in her testimony, although the Parents still strive to make the opposite argument here.”).

B. Doesn’t this “what can only special education do?” standard create the possibility of dramatic differences in special education eligibility from district to district due to the differences in the scope of regular education efforts?

Yes, but the differences are already occurring. Some campuses provide split-funded content mastery to all struggling students, and some campuses don’t. On the disability side, some districts are moving to RTI and others are using strengths and weaknesses. While in the past a district could be reasonably secure in the knowledge that an IDEA-eligible student transferring into the district from another district in the state would remain eligible, the differences in both disability determination and available regular education services make for more differences in eligibility than before.

C. How much progress must a student make in regular education (due to EI or RTI) for there to be no need for special education and related services?

This question will be at the heart of many parents’ arguments that the student could be progressing faster under IDEA and that regular education efforts are inadequate. How fast the student should

progress (or how “steep” the slope of progress should be) are tough issues, but have been addressed thoughtfully by at least one court. The 9th Circuit provided an excellent answer grounded in a well-known IDEA test. The court applied the benefit standard. *Hood v. Encinitas Union School District*, 486 F. 3d 1099, 107 LRP 26108 (9th Cir. 2007)(“Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard. Accordingly, the district court used the correct standard of review when it considered the benefit Anna received in the regular classroom as part of its eligibility analysis.”). After all, if the student is already receiving educational benefit without special education, how can the student “need” special education? *See also the factual analysis in Hood, provided previously.*

D. Won’t parent demands for special education evaluation frustrate EI and RTI?

The timeliness for assessment under IDEA do not change merely because the district has decided to follow the RTI model of SLD eligibility. Consequently, unless the parents agree to extend the timeline between parental consent and completion of the evaluation, any intervention the school wants to perform had better fit the timeline. §300.309(c). Of course, if the school wants a sure-fire way to provide more lengthy interventions prior to a referral, it should simply identify the struggling student earlier through early intervention and provide assistance before the parent (and the school) is so concerned over poor-performance that waiting is not an option.

E. What about students who are new to the district? Do we EI or IEP?

The IDEA referral is more complex where the school is just beginning to work with a student and lacks historical reference for the student’s performance. At issue in a California case was whether the school’s decision to attempt regular education interventions through a student services team (SST) unnecessarily delayed the special education evaluation of a student newly arrived on the campus. The Hearing Officer concluded that it did not.

“Student was a middle school student who had never been suspected as a child with a possible disability by any prior school district, nor had he previously been considered for extra general education assistance. Under these circumstances, to have transitioned STUDENT directly from a general education program to special education services, without first attempting to meet his needs using the remedies available in regular education, would have been both imprudent and a disservice to STUDENT. The District also did not attempt general education intervention for an excessive period of time and thereby unreasonably delay in assessing STUDENT for special education. Within three months of entering the District as a new student, the District had undertaken a special education assessment. To attempt available general education services for several weeks with a student who has not previously received extra academic assistance, is a logical, measured, and appropriate response that complies with the law.” *Beverly Hills Unified School District*, 34 IDELR 195 (SEA CA. 2001).

F. How do we track EI and RTI for students on the move?

Early Intervention processes that do not have safeguards or procedures to address situations where the child moves to another campus within the district can create unnecessary delays. Should a child have to begin the EI process anew simply because he changed campuses? As with students with IEPs or §504 plans, the intervention should follow the student from campus to campus. Asking students to submit to the EI process from the start upon enrollment at a new campus makes no sense and

lengthens the review and decision-making process. Of course, should that student be disabled and need special education, the child's mobility and the district's lack of coordination can result in evaluation delays in violation of IDEA.

G. The Commitment Issue

Parents sometimes seek eligibility under §504 and special education when faced with concerns over consistency of services or assistance. (See, for example, *Ashli & Gordon C v. State of Hawaii Department of Education, discussed previously*). Perhaps this year's teacher was willing to do the extra things needed by the student, but what about next year? The provision of regular education differentiated instruction relies, to some degree, on the kindness of strangers. Unfortunately, there are educators who neither believe in nor cooperate with §504 Plans, IEPs or the notion of doing anything different for a particular child. "Voluntary" does not necessarily mean "consistent," nor does it evidence a commitment. See, for example, *M.S. & Jacqueline Simchick v. Fairfax County School Board*, 47 IDELR 289 (E.D. Va. 2007)(Teacher discretion to provide 1-1 is not a commitment of resources. Catch-all statements in an IEP such as "whatever M.S. needs, those services can be provided" are insufficient to assure that adequate one-on-one attention and personal instruction is a part of the educational curriculum.). To convince some parents, some level of commitment to consistent implementation of EI is required.

Give the EIT authority to require teachers to implement modifications. This can be done by board policy, or superintendent or principal directive. Back up this authority through proper use of the teacher appraisal and supervisor directives. The campus motivation to over-identify into special education is based at least in part on the knowledge that teachers are required by law to implement IEPs. When plans created by EITs are recognized by staff as requirements rather than suggestions, compliance increases, student success increases, and the EIT builds on its own success. This is also an important piece in the puzzle of ensuring that interventions are provided with fidelity so that the resulting RTI data is of value.