

**DETERMINING THE PRESENCE OF A SPECIFIC
LEARNING DISABILITY: HOW TO ADDRESS THE
EXCLUSIONARY AND DETERMINANT FACTORS**

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When determining the presence of a specific learning disability, the multi-disciplinary team must rule out certain factors which may be causing the child’s learning problems before concluding that the learning problems are the result of a specific learning disability. These “exclusionary factors” are visual, hearing, or motor disabilities; “intellectual disability (formerly, “mental retardation”); emotional disturbance; or environmental, cultural, or economic disadvantage. There are also determinant factors which must be ruled out. The determinant factors are lack of appropriate instruction in reading, lack of appropriate instruction in math, or limited English proficiency. This presentation will provide a comprehensive overview of these exclusionary and determinant factors, and provide guidance regarding how to conduct a sound assessment of these factors and their level of influence on the child’s learning.

1. How is “child with a disability” defined?

“Child with a disability” means:

[A] child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious

emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. 34 C.F.R. §300.8(a)(1); see also, 20 U.S.C. §1401(3)(A).

2. How do the federal regulations define “specific learning disability”?

That definition is also the same as the definition in the former regulations:

- (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 to 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, of emotional disturbance, or of environmental, cultural, or economic disadvantage. 34 C.F.R. §300.8(c)(10)(ii).

3. What are the alternative models for identifying a learning disability?

The regulation states:

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). 34 C.F.R. §300.307(a).

4. Who makes the determination?

The determination is made by a group as follows:

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in §300.8, must be made by the child’s parents and a team of qualified professionals, which must include—

- (a) (1) The child's regular teacher; or
(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
(3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and
- (b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. 34 C.F.R. § 300.308.

5. What is the core quality of a specific learning disability?

The core quality is that there must be achievement deficits. The group must find and document achievement deficits in one or more of the specified areas, as follows:

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

34 C.F.R. § 300.309(a)(1).

Once achievement deficits are established using state criteria, then the group must assess whether the achievement deficits are the result of a specific learning disability or some other exclusionary or determinant factor.

6. What are the exclusionary factors?

The group must consider and exclude several other possible causes of the child's lack of adequate achievement:

The group described in §300.306 may determine that a child has a specific learning disability, as defined in §300.8(c)(10), if—...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. 34 C.F.R. §300.309(a)(3).

7. What must the documentation include regarding the exclusionary factors?

The regulations require:



For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in §300.306(a)(2), must contain a statement of—

... (6) The determination of the group concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child’s achievement level[.] 34 C.F.R. §300.311(a)(6).

8. Can a child have an exclusionary factor and still have a specific learning disability?

Yes. Many people think that the exclusionary factors make it impossible to have two conditions. However, a child can have one or more of the “exclusionary factors” and also have a specific learning disability. As long as the specific learning disability is not “primarily the result of” an exclusionary factor, the child can be both. For example, if it is determined that the child meets the criteria for emotional disturbance and a specific learning disability, then the child can be both as long as the specific learning disability is not primarily the result of the emotional disturbance.

9. Is there any guidance on how to assess the impact of culture?

In response to a request for guidance, the USDE in its comments to the regulations states:

The identification of the effect 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. 46655.

The USDE discussion continues further with a statement regarding RTI:

The Department believes that the identification of children with SLD will improve with models based on systematic assessments of a child’s response to appropriate instruction, the results of which are one part of the information reviewed during the evaluation process to determine eligibility for special education and related services. States and public agencies must follow the evaluation procedures in §§300.304 and 300.305 and section 614(b) of the Act, including using assessments and other evaluation materials that do not discriminate on a racial or cultural basis, consistent with §300.304(c)(1)(i) and section 614(b)(3)(A)(i) of the Act. 71 Fed. Reg. 46655.

One resource is the National Center for Culturally Responsive Educational Systems (NCCREST), funded by the USDE and located at: <http://www.nccrest.org/>.

10. What do we know about what happens to limited-English proficient (LEP) students who are not offered services to help than overcome language barriers?

From *OCR: Questions and Answers on the Rights of Limited-English Proficient Students* available at: <http://www2.ed.gov/about/offices/list/ocr/qa-ell.html> (last visited Oct. 14, 2010):

Limited-English proficient students (also sometimes referred to as English-language learners) may suffer repeated failure in the classroom, falling behind in grade, and dropping out of school if they are not provided services to overcome language barriers. Students who are not proficient in English and sometimes inappropriately placed in special education classes. Also, because of their lack of English proficiency, qualified students often do not have access to high track courses or Gifted and Talented programs.

11. What is the federal authority that requires school districts to address the needs of English language learners?

From *OCR: Questions and Answers on the Rights of Limited-English Proficient Students* available at: <http://www2.ed.gov/about/offices/list/ocr/qa-ell.html> (last visited Oct. 14, 2010):

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin. In *Lau v. Nichols*, the U.S. Supreme Court affirmed the Department of Education memorandum of May 25, 1970, which directed school districts to take steps to help limited-English proficient (LEP) students overcome language barriers and to ensure that they can participate meaningfully in the district's educational programs

12. What does Title VI of the Civil Rights Act of 1964 require for English-language learner students?

From *OCR: Questions and Answers on the Rights of Limited-English Proficient Students* available at: <http://www2.ed.gov/about/offices/list/ocr/qa-ell.html> (last visited Oct. 14, 2010):

Federal law requires programs that educate children with limited English proficiency to be:

1. based on a sound educational theory;
2. adequately supported, with adequate and effective staff and resources, so that the program has a realistic chance of success; and
3. periodically evaluated and, if necessary, revised.

13. How do we monitor our effectiveness in ruling out cultural factors or limited English proficiency as the cause of the child’s learning problems?

Data, data, data. Your school district and state are already collecting and reporting the relevant data pursuant to the following regulatory requirements:

The State must have in effect, consistent with the purposes of this part and with section 618(d) of the Act, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in § 300.8. 34 C.F.R. § 300.173.

The State must monitor the LEAs located in the State, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

...

- (3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification. 34 C.F.R. § 300.600(d)(3).

14. What are the determinant factors?

The regulations at 34 C.F.R. § 300.306(b) provide as follows:

Special rule for eligibility determination. A child must not be determined to be a child with a disability under this part—

- (1) If the determinant factor for that determination is—
 - (i) Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);
 - (ii) Lack of appropriate instruction in math; or
 - (iii) Limited English proficiency; and
- (2) If the child does not otherwise meet the eligibility criteria under §300.8(a). 34 C.F.R. §300.306(b).

15. What are the essential components of reading instruction?

The essential components of reading instruction referenced in both IDEA 2004 and the regulations are from the No Child Left Behind Act (NCLB):

The term ‘essential components of reading instruction’ means explicit and systematic instruction in—

- (A) phonemic awareness;
- (B) phonics;
- (C) vocabulary development;
- (D) reading fluency, including oral reading skills; and
- (E) reading comprehension strategies. 20 U.S.C. §6368(3).

16. Many reading programs claim to be research-based, but lack credible evidence of the program’s effectiveness.

That’s exactly what one commenter told the U.S. Department of Education. The USDE responded as follows:

Programs that claim to be research-based, but which are not based on sound scientific research, should not be considered research-based instruction by a State or LEA. 71 Fed. Reg. 46656.

17. The determinant factor of lack of “appropriate” instruction in math is new with the IDEA 2004 regulations. Why was this factor added to the regulations?

The USDE in its discussion of the regulations provides the following explanation:

We believe it is equally important that a child not be determined to be a child with a disability if the determinant factor is the lack of “appropriate” instruction in math. Therefore, we will revise §300.306(b)(1) to make this clear. 71 Fed. Reg. 46646.

18. Is there a simpler way of stating the analysis?

The USDE informally describes it as “if a child’s low achievement is a result of ” lack of appropriate instruction in reading, lack of appropriate instruction in math, or limited English proficiency, then “the child must not be determined to be a child with a disability....” 71 Fed. Reg. 46646. Elsewhere the USDE reiterates that “this means evidence that lack of appropriate instruction was [not] the source of underachievement.” 71 Fed. Reg. 46656.

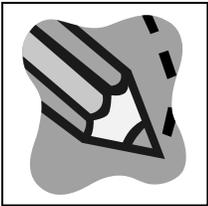
19. Is the determinant factor analysis required for any disability category?

Yes. The analysis is required before you can qualify a child under any IDEA disability category. However, for a learning disability, the analysis is more prescriptive.

20. How is the determinant factor analysis for a learning disability more prescriptive?

When determining the presence of a learning disability, the regulations specify what type of data the group of qualified professionals must consider, as follows:

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. 34 C.F.R. §300.309(b).

21. What data can be used to satisfy this federal requirement?

The USDE tells us:

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. Children should not be identified as having a disability before concluding that their performance deficits are not the result of lack of appropriate instruction. 71 Fed. Reg. 46656.

Data-based documentation refers to an objective and systematic process of documenting a child's progress. This type of assessment is a feature of strong instruction in reading and math and is consistent with §300.306(b)(1)(i) and (ii) and section 614(b)(5)(A) and (B) of the Act, that children cannot be identified for special education if an achievement problem is due to lack of appropriate instruction in reading or math. 71 Fed. Reg. 46657.

22. Does this mean that continuous progress monitoring is required regardless of whether RTI is used as a means of determining SLD?

OSEP addressed this question in *OSEP Letter to Zirkel*, 50 IDELR 49 (April 8, 2008), as follows:

The eligibility group referenced above, under 34 CFR § 300.309(b)(2), must consider 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, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. The regulation does not use the term "continuous progress monitoring."

The information referred to in 34 CFR § 300.309(b)(2) may be collected as a part of the evaluation process, or may be existing information from the regular instructional program of a school or LEA. It must be reviewed and weighed by the evaluation group. As we noted in the Analysis of Comments and Changes for the final IDEA Part B regulations, Federal Register, Vol. 71, No. 56, Monday, August 14, 2006, 71 Fed Reg. 46540, 46657, "[a] critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected and analyzed and that parents are kept informed of the child's progress." We believe that this information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction.

23. Is it possible to find a learning disability if the child has not received appropriate instruction?

The USDE considers receipt of appropriate instruction to be a prerequisite to determining a child is LD:

Eligibility is contingent on the ability of the LEA to provide appropriate instruction. Determining the basis of low achievement when a child has been given appropriate instruction is the responsibility of the eligibility group. 71 Fed. Reg. 46656.

24. How does the group make the determination?

The USDE in its discussion of the regulations tell us: "Whether a child has received 'appropriate instruction' is appropriately left to State and local officials to determine." 71 Fed. Reg. 46656. The discussion suggests two fundamental elements: (1) access to State content standards; and (2) instruction delivered by qualified personnel:

We agree that a child should not be determined to be a child with a disability if the determinant factor is lack of access to State content standards.... 71 Fed. Reg. 46646.

As part of the evaluation, the eligibility group must consider whether the child received appropriate instruction from qualified personnel. 71 Fed. Reg. 46656.

25. How much historical information do we have to gather?

The USDE in its discussion of the regulations equivocates on that issue:

While information regarding the quality of instruction a child received in the past may be helpful in determining whether a child is eligible for special education services, it is not essential. Schools, however, must ensure that the determinant factor in deciding that a child is a child with a disability is not lack of appropriate instruction in reading and math. 71 Fed. Reg. 46646.

26. What do we do when the child has been home schooled or private schooled and there is little information available about the quality of instruction the child has received?

The USDE states:

As part of the evaluation, the eligibility group must consider whether the child received appropriate instruction from qualified personnel. For children who attend private schools or charter schools or who are home schooled, it may be necessary to obtain information from parents and teachers about the curricula used and the child's progress with various teaching strategies. The eligibility group also may need to use information from current classroom-based assessments or classroom observations. On the basis of the available information, the eligibility group may identify other information that is needed to determine whether the child's low achievement is due to a disability, and not primarily the result of lack of appropriate instruction. The requirements for special education eligibility or the expectations for the quality of teachers or instructional programs are not affected, and do not differ, by the location or venue of a child's instruction. 71 Fed. Reg. 46656.

27. What happens if we do not have adequate data?

The regulations and discussion of the regulations indicate that the school can deliver appropriate instruction as part of the referral process and use the data gathered during that period. The determinant factor regulation allows such data to be gathered "prior to, or as part of, the referral process." 34 C.F.R. §300.309(b)(1). The USDE further explains:

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. 71 Fed. Red. 46656.

28. Why are the regulations more specific when it comes to a learning disability?

The USDE in its discussion of the regulations explains it as follows:

Sections 300.306(b)(1)(i) and (ii), consistent with section 614(b)(5)(A) and (B) of the Act, specifically state that children should not be identified for special education if the achievement problem is due to lack of appropriate instruction in reading or mathematics. This issue is especially relevant to SLD because lack of appropriate instruction in these areas most commonly leads to identifying a child as having an SLD. All children should be provided with appropriate instruction provided by qualified personnel. This is an important tenet of the Act and the ESEA. Both the Act and the ESEA focus on doing what works as evidenced by scientific research and providing children with appropriate instruction delivered by qualified teachers. 71 Fed. Reg. 46655.

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