THE SPECIAL EDUCATION STRATEGIC PLAN ERA IN TEXAS: RTI, SECTION 504, DYSLEXIA, & IDEA CHILD FIND

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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, the expansion of eligibility under Section 504, the availability of high quality dyslexia services under Texas law, TEA's 8.5%, and their combined impact on the IDEA Child Find requirement. 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), RTI and robust Section 504 and Texas dyslexia program services?** 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, and a TEA cap that resulted in OSEP findings that Texas is out of compliance with its duty to Child Find under IDEA. 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, neglecting 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 reinforces 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. Action 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, and leave IDEA to those for whom regular education services are insufficient.

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. *See, for example, Hood v. Encinitas Union School District,* 486 F. 3d 1099, 107 LRP 26108 (9th Cir. 2007)("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."). *Hood* is discussed extensively below.

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.

Finding students in regular education who need special education. The Child Find requirement is as old as special education. Child Find is the term used to describe the legal obligation imposed by the IDEA on public school districts to "find" children that may be disabled and in need of special education services. Under the IDEA, schools have an affirmative duty to identify, locate, and evaluate students who they suspect may be disabled, in order to evaluate them for potential eligibility for special education services. 20 U.S.C. §1412(a)(3); 34 C.F.R. §300.111. **We thought we understood it; when reasons arose to suspect disability and the potential need for special education services, the duty to refer and evaluate a child for special education eligibility was triggered.** 34 C.F.R. §300.8(a); *El Paso ISD v. R. R.*, 567 F.Supp.2d 918 (W.D.Tex. 2008). The *El Paso ISD* case set forth a two-step analysis to review whether a school complied with its child-find responsibilities: first, a court examines whether the school had reason to suspect that the student had a disability and a consequent need for special education services (i.e., the "trigger" circumstances outlined above); second, the court addresses whether the school evaluated the child within a reasonable time after the reason to suspect a disability that needs special education services arose.

The federal regulation addressing referrals to special education in the context of potential learning disabilities envisions that interventions will be considered for a struggling child, but also respects the parents' right to request an evaluation at any time. The exact wording is the following:

"The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§300.301 and 300.303, unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in §300.306(a)(1)—

(1) If, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and

(2) Whenever a child is referred for an evaluation." 34 C.F.R. §300.309(c).

The regulation addressing initial evaluations in general clarifies that "either a parent or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability." 34 C.F.R. §300.301(b). And, the commentary to the 2006 regulations indicates that the same timelines and procedures applicable to all initial evaluations would apply to evaluations involving students with potential LDs. "Although there are additional criteria and procedures for evaluating and identifying children suspected of having SLD must follow the same procedures and timeframes required in §§300.301 through 300.306, in addition to those in §§300.307 to 300.311." 71 Fed. Reg. 46,659 (August 14, 2006).

II. OSEP & the trouble with eligibility based on a random number rather than federal law.

A. IDEA eligibility is more than a number.

By now you've probably read, heard, or lost sleep over the HOUSTON CHRONICLE'S story on the state limiting eligibility in special education by means of a cap. Here's a few relevant pieces of the story.

"More than a dozen teachers and administrators from across Texas say they **delayed or denied special education to disabled students in order to stay below the benchmark** state officials set for the number of students who should get such services.

A Houston Chronicle investigation found the **Texas Education Agency's enrollment benchmark for special education services of 8.5 percent has led to the systematic denial of services by school districts.** In the years since Texas' 2004 implementation of the benchmark, the rate of students getting special education dropped from near the national average of 13 percent to the lowest in the country. It fell to 8.5 percent in 2015…. The TEA acknowledged in its statement that there is no research establishing 8.5 percent as ideal. Kathy Clayton, among the agency employees who set the benchmark, said **the percentage wasn't based on research.** Instead, she said, it was driven by the statewide average special education enrollment. Reminded that the statewide average was nearly 12 percent at the time, Clayton said, 'Well, it was set at a little bit of a reach. Any time you set a goal, you want to make it a bit of a reach because you're trying to move the number.'

Teachers and administrators say many Texas school districts have interpreted the TEA monitoring protocol as a strict ban on serving more than 8.5 percent of students in special education." *Report: Benchmark led to special education services denials,* HOUSTON CHRONICLE, Online edition, Sunday, September 11, 2016 (emphasis added).

A little commentary: While the issues involved are complex, one conclusion seems indisputable: when federal law requires eligibility decisions to be made individually for a student, **the imposition of an arbitrary statistical cap that has the power to deny eligibility to a student who is otherwise eligible, or the power to prevent the referral of a student who is suspected to be eligible raises serious compliance concerns.** Eligibility under both IDEA and Section 504 cannot be determined for a child on the basis of how many other students have been determined "disabled" in the school district.

The eligibility of others, even many others, has no bearing on whether an evaluation of *this* child will meet the established eligibility criteria. As long as the school's eligibility process is compliant, eligibility decisions must be made one student at a time as the law intended.

B. Texas School District compliance with the TEA 8.5% indicator violated IDEA Child Find.

The Office of Special Education Programs (OSEP) conducted a monitoring visit during the week of February 27, 2017 to look at Texas' declining special education eligibility rate and possible factors for the decline. **Twelve school districts were visited.** "As a result of the monitoring visit, OSEP determined that some ISDs took actions specifically designed to decrease the percentage of children identified as children with disabilities under the IDEA to 8.5 percent or below." *OSEP, Texas Part B Monitoring Visit Letter, page 1.* **That is, students were denied identification and referral under IDEA because too many students were already eligible.** Students for who evaluation was required did not receive an appropriate evaluation.

> "[N]oncompliance with the IDEA child find and FAPE requirements occurred to the extent that ISD efforts to decrease the percentage of children who were eligible for special education and related services under the IDEA caused delays or denials of evaluations for special education and related services for children who were suspected of having a disability and needing special education and related services. As explained more fully below, these actions demonstrate that **TEA's use of the 8.5 percent indicator operated as an incentive for ISDs to not properly implement the IDEA's child find requirement, and therefore resulted in actions that violated those requirements."** *OSEP Letter, page 3, (emphasis added).*

School districts across the state responded to the indicator in a variety of ways. The most common response appears to be the use of other programs to provide services.

> "While the U.S. Department of Education (Department) encourages the use of supports for struggling learners that can be delivered in the general education environment, TEA and ISDs within the State have an obligation under the IDEA to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of such supports. OSEP found evidence demonstrating a pattern of practices in ISDs throughout the State in which evaluations were delayed or not conducted for children who were suspected of having a disability because these children were receiving supports for struggling learners in the general education environment." *OSEP Letter, page 1.*

While no two district's efforts were identical, OSEP points to three regular education programs that were utilized inappropriately to violate IDEA child find. We will address each in turn.

III. RtI, Early Intervention, and IDEA Child Find.

A. The 2004 Reauthorization

The President's Commission summarized the appropriate regular education/special education relationship quite nicely. **"Children placed in special education are general education children first."** *President's Commission at* 7, (Full text of the quote provided previously). They (and Section 504 students as well), have an educational foundation of the grade level curriculum, and all of the policies, practices and procedures utilized by the school for all children. Section 504 and IDEA then add to, or, make changes *as necessary* to provide FAPE.

LD eligibility was a primary concern addressed in reauthorization. Based on overwhelming concern that the discrepancy model lacks scientific merit, Congress in IDEA 2004 allowed school districts to substitute a "response to intervention" model for purposes of learning disability (LD) 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,* p. 8. Under the new LD 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."** *President's Commission, 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.

IDEA 2004 and Early Intervention Services. In 2004, the Congress acted on concerns related to the increasing number of students in special education, and the suspicion that many students might have avoided the need for placement in special education if interventions had been provided to the students at an early stage in their education, by including provisions in the IDEA emphasizing its desire that students receive early interventions when they struggle at school. Specifically, the law allows schools to use up to 15% of their allotted IDEA-B funds for early intervening services for students not currently identified as special education students, but who need additional academic and behavioral support to succeed in the general education environment. 20 U.S.C. §1413(f); 34 C.F.R. §300.226.

What ED envisioned for Response to Intervention (RtI): improvement in LD evaluations and LD determinations. A variety of experts from a number of different disciplines noted that the special education system in the U.S. represented a "wait-to-fail" dynamic, under which students must show significant educational deficits before they can receive high-quality additional educational services. Instead, they advocated for a system that emphasized interventions within the regular education environment first, and then case-by-case educational decision-making based on struggling student's response to high-quality research-based interventions. According to ED, the purpose of RtI in IDEA is to improve the LD evaluation.

> "The reports of both the House and Senate Committees accompanying the IDEA reauthorization bills reflect the Committees concerns with models of identification of SLD that use IQ tests, and their recognition that a growing body of scientific research supports methods, such as RTI, that more accurately distinguish between children who truly have SLD from those whose learning difficulties could be resolved with more specific, scientifically based, general education interventions. Similarly, the President's Commission on Excellence in Special Education recommended that the identification process for SLD incorporate an RTI approach."

Questions and Answers on Response to Intervention (RtI) and Early Intervening Services (EIS), 47 IDELR 196 (OSERS 2007).

What should RtI look like? In response to a request for OSEP to "bless" a particular version of tiered intervention, OSEP provided the following general guidance. *Letter to Zirkel,* 62 IDELR 151 (OSEP 2013).

> "There are a number of RTI models, and, while the Department does not endorse a particular RTI model, essential components must be present in RTI. These components include: (1) high quality, evidence-based instruction in general education settings; (2) screening of all students for academic and behavioral problems; (3) two or more levels (sometimes referred to as 'tiers') of instruction that are progressively more intense and based on the student's response to instruction: and (4) progress monitoring of student performance."

How long should RtI take? Perhaps the most interesting insight distinguishing the ED's vision from the reality of modern RtI usage comes from this bit of OSERS language from 2007.

> "As required in 34 CFR § 300.301(c), an initial evaluation must be conducted within 60 days of receiving consent for an evaluation (or if the State establishes a timeframe within which the evaluation must be completed, within that timeframe). **Models based on RTI typically evaluate a child's response to instruction prior to the onset of the 60-day period, and generally do not require as long a time to complete an evaluation because of the amount of data already collected on the child's achievement, including observation data….** [I]t generally would not be acceptable for an LEA to wait several months to conduct an evaluation or to seek parental consent for an initial evaluation if the public agency suspects the child to be a child with a disability."

Questions and Answers on Response to Intervention (RtI) and Early Intervening Services (EIS), 47 IDELR 196 (OSERS 2007).

So where are we? The confluence of early intervention programs and RtI-oriented regular education interventions has already delivered some change to the system. According to the Data Accountability Center, the number of students aged 6-21 that receive IDEA Part B services has dropped 3.9% since 2004. The number of LD students has declined by 12.4% since 2004. *See* www.ideadata.org. **Unfortunately, many schools have lost sight of the purpose of RtI as a tool for evaluation, confusing ED's enthusiasm for RtI as license to down-play the IDEA's requirement of Child Find.**

B. RtI and the Duty to Offer IDEA Evaluation

An interesting tension. There is no lack of consensus on the Child Find analysis set forth above. The obligation imposed under the IDEA, however, is currently being applied in a context where the educational system is attempting to emphasize the provision of regular education interventions for struggling students *prior to* deciding to refer them for an IDEA evaluation and *instead* of asking for timeline extensions. In many situations, campuses are asked to provide documentation that they have

implemented serious interventions to address a student's difficulties in the classroom before a referral will be allowed to proceed to evaluation. **The advent of response-to-intervention methodology, together with an expanding range of interventions available outside of special education, have created a tension with schools' simultaneous need to ensure compliance with IDEA child-find requirements,** particularly in cases where parents are approaching the school with concerns about their children's performance or straightforward requests for testing.

OSEP weighs in on the tension. The tension between the parents' right to request a special education evaluation at any time and the desire to improve LD evaluations has clearly not been resolved to the satisfaction of ED. After the 2004 IDEA reauthorization allowed the use of response-to-intervention (RtI) strategies and data as a potential component of SLD evaluations, ED began to express concern that use of RtI was coming into conflict with LEAs' child-find obligations under the IDEA. Inflexible application of RtI, particularly when viewed as a strict prerequisite to IDEA evaluation, could result in delays or denials of valid IDEA evaluations and eligibility.

In a 2011 memorandum, OSEP indicated that "it has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, local educational agencies (LEAs) may be using Response to Intervention strategies to delay or deny a timely initial evaluation for children suspected of having a disability." *Memorandum to State Directors of Special Education,* 56 IDELR 50 (OSEP January 21, 2011). The memo states that while OSEP supported RtI initiatives and programs, **"the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§300.304-311, to a child suspected of having a disability under 34 CFR §300.8."** Also, the memo reiterates that the IDEA and its regulations currently only "*allow*" the use of RtI data, as part of the criteria for determining if a child has a specific LD. Thus, the memo concludes that **"it would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that the child has not participated in an RTI framework."**

But doesn't Texas have an administrative rule that requires *trying other options* prior to a special education referral? Not exactly. The language emphasizes *consideration* of alternatives, but does not compel the school to try them all.

> "(a) Referral of students for a full individual and initial evaluation for possible special education services must 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 individual and initial evaluation. This referral for a full individual and 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 TAC §89.1011(a)(Emphasis added).

OSEP approved the Texas administrative rule. *Letter to Ferrara,* 60 IDELR 46 (OSEP 2012). In that letter, OSEP found no Child Find duty conflict with a Texas regulation (19 T.A.C. §89.1011) requiring that, prior to referral, "students experiencing difficulty in the general classroom *should be considered* for all support services available to all students[.]" (Emphasis added). Nothing in the provision "prohibits school personnel from referring a child suspected of having a disability for an initial evaluation prior to completion of the RtI process." If the parent requests an evaluation and the school does not suspect the child has a disability (and believes that an evaluation is unnecessary), the school can always refuse and provide prior written notice of the refusal to evaluate. "The implementation of an RtI process is not a reason to fail to respond to a parent's request for an initial evaluation."

Same answer for evaluations of students in private school. In *Letter to Zirkel*, 56 IDELR 140 (OSEP 2011), the question involved how child-find operated with private school students in districts implementing RtI programs. There, OSEP wrote that "the district is responsible for meeting its child find obligations under IDEA even if the private school has not implemented an RTI process." Using quite similar language to that in the memo to state directors, OSEP stated that **"it would be inconsistent with the evaluation provisions [of the IDEA regulations] for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a private school has not implemented an RTI process with a child and reported the results of that process to the LEA."**

Same answer for Head Start. Similarly, in *Letter to Brekken*, 56 IDELR 80 (OSEP 2010), OSEP stated that public schools also could not reject or delay IDEA referrals from outside agencies, such as early childhood intervention agencies or Head Start, on the grounds that they had not tried RtI programs. "Once an LEA receives a referral from a Head Start program, the LEA must initiate the evaluation process to determine if the child is a child with a disability." Using language similar to the recent memorandum, OSEP stated that it would be inconsistent with the IDEA's evaluation provisions to reject or delay a referral from an outside agency on the basis that the child had not participated in an RtI program prior to referral.

Highly mobile students. *Letter to State Directors of Special Education,* 61 IDELR 202 (OSEP/OSERS 2013). Concerned that military-connected children, migrant children, children in foster care and children who are homeless face "formidable challenges" as they move district to district, OSERS and OSEP provided guidance to prevent delays in special education evaluation. "If a child transfers to a new school district during the same school year before the previous school district has completed the child's evaluation, the new school district may not delay the evaluation or extend the evaluation time frame in order to implement an RTI process. While the new school district may choose to provide interventions while it is in the process of completing the evaluation, it would be inconsistent with the evaluation provisions in 34 CFR §§ 300.301 through 300.311 for a school district to delay completing an initial evaluation because a child has not participated in an RTI process in the new school district."
Same answer, with a twist, for referrals from other preschool programs and agencies. *Memorandum to State Directors of Special Education, Preschool/619 State Coordinators, Head Start Directors*, 67 IDELR 272 (OSEP 2016). The 2016 Memorandum extends the rationale of the 2011 Memo to referrals from preschool programs and agencies, stating that "[a]n LEA may not decline a child find referral from a preschool program until the program monitors the child's developmental progress using RTI procedures." Indeed, the Memo states that **IDEA "does not require, or encourage, an LEA or preschool program to use an RTI approach** prior to a referral for evaluation or as part of determining whether a 3-, 4-, or 5-year old is eligible for special education and related services." (Emphasis added).

A little commentary: While ED is correct that IDEA allows the use of RtI methodology in SLD assessment, but does not require it, is it accurate to state that the IDEA 2004's shift away from discrepancy formulations and inclusion of RtI strategies did not "encourage" schools to use RtI to prevent improper identification of students as SLD? Ultimately, in the next reauthorization, the Congress will have to address the existing tension between the traditional child-find formulation and its commitment to the use of RtI as part of SLD assessments. **It is also worth noting that the ED letters, taken together, highlight a growing concern by ED that improper use of RtI is negatively impacting a wide variety of student populations.** As we'll see below, RtI modernization without modernizing child find and the definition of "specially designed instruction" has results in IDEA compliance concerns.

C. Lessons at the intersection of RtI and Child Find

1. RtI is not required by the IDEA. The most entrenched misconception in this analysis involves the issue of RtI data as part of LD evaluations. The 2006 regulation *allows* for part of the evaluation to include a determination of whether a child responded to high-quality research-based interventions, but it does not require it. 34 C.F.R. §300.309(a)(2)(i); see also OSEP *Memorandum to State Directors of Special Education* (OSEP, January 21, 2011). Indeed, from a practical standpoint, the regulation could not have required such a determination, since many schools would have been unequipped to provide those interventions. This is why the regulation also allows for the option of an assessment-based determination focusing on patterns of strengths and weaknesses in assessment scores. 34 C.F.R. §300.309(a)(2)(ii).

ED has already commented, moreover, that the portion of the LD regulation requiring the evaluation team to rule out lack of appropriate instruction (§300.309(b)) does not necessarily require the provision of high-quality research-based interventions such as would be found in RtI-oriented programs. The commentary accompanying the regulation stated that in order to address concerns that the provision requiring a finding of provision of appropriate instruction did not delay evaluations, the regulation requires that "the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which *could* include instruction in an RTI model…" 71 Fed. Reg. 46,658 (August 14, 2006)(emphasis added).

Indeed, observers of the 2005-2006 IDEA rule-making process may have noted that the *proposed* IDEA regulation would have required the provision of high-quality research-based instruction prior to identification as SLD. *See* proposed regulation §300.309(b)(1) at 70 Fed. Reg. 35,864 (June 21, 2005 NPRM). Commenters, however, pointed out that such a requirement would exceed the statutory authority vested in ED by the IDEA, since it would have required regular education programs to provide high-level instructional interventions (without additional funding to do so). ED considered those criticisms of the proposed regulation and wrote that "we agree that the requirement for high-quality research-based instruction exceeds statutory authority… Therefore, we will change the regulations to require that the eligibility group consider evidence that the child was provided appropriate instruction and clarify that this means evidence that lack of appropriate instruction was the source of underachievement." 71 Fed. Reg. 46,656 (August 14, 2006). In addition, the regulators also clarified that "we have also revised §300.309(b)(1) to refer to appropriate instruction rather than high-quality research-based instruction…" *Id*. Thus, the provision only serves to rule out that the LD finding not be due to poor or absent instruction in reading or math. "All children should be provided with appropriate instruction provided by qualified personnel." 71 Fed. Reg. 46,655.

2. Parents can request an IDEA evaluation at any time. *Student v. Austin Independent Sch. Dist.*, 110 LRP 49317 (SEA TX 2010)**.** A school addressing the difficulties of a student who is struggling academically is free to consider, explore, and apply its range of intervention options prior to deciding on a referral for special education evaluation. **The circumstance changes, however, when the parent approaches the school asking for special education testing.** Because the parent has a right to request evaluation, and can take legal action against the school if it fails to act on the request, a parent referral places the school in an entirely different situation. *Austin ISD* illustrates the push-pull of the intervention vs. referral dynamic, together with how the current child-find landscape may confuse a parent concerned that their child may have a disability that is going undetected.

The student was diagnosed with ADHD at age three. His grandmother/guardian was also concerned about his life-skills competencies. Although he passed the statewide assessment in reading (probably in 3rd grade) on a second administration, the school was concerned enough about his reading that it

involved a reading specialist and provided him with small-group reading support. Concerned about his performance, the grandmother consulted with a neurosurgeon, who contacted the school principal about the possibility of qualifying the boy as OHI ("Other Health Impaired"). In addition, the doctor provided the school with a prescription for neuropsychological testing to further substantiate the request for consideration of special education services. The school, however, failed to follow up on the request for consideration of testing or OHI eligibility.

Subsequently, the grandmother contacted the student's 4th grade teacher regarding testing in September of 2009. The teacher explained that the District had a response-to-intervention process (called the IMPACT process), and referred the child to the IMPACT team, which held a meeting without the grandparent. **An educational diagnostician discussed the grandmother's request for testing with the teacher, who was of the opinion that the RtI process was an "absolute" requirement prior to referral and testing.** The school's reading specialist, moreover, had assessed the boy in October 2009, and had not found indications of dyslexia, other than low fluency rate. After more intensive intervention by the reading specialist, however, his fluency rate improved.

Meanwhile, the grandmother proceeded to obtain her own independent testing of the boy. That testing found that the student had ADHD, dyslexia, LD in basic reading, dysgraphia, and LD in written expression. It also recommended §504 services, various accommodations, and OT testing. By this time the student was receiving failing grades in three subjects. After another IMPACT team meeting, the team planned to develop a §504 plan for the student. At the §504 meeting, the grandparent was presented with a consent form for Sectin 504 evaluation and services, but was confused about what that meant and whether the school was proceeding to IDEA testing. The team noted that although the boy had responded well to interventions put into place during the IMPACT process, he "still functioned below grade level and was making slow progress in comparison with his peers." At the meeting, the grandparent provided the team with a copy of the independent evaluation conducted four months earlier. **The team did not inform the grandmother specifically that she had a right to request special education testing, but the diagnostician *suggested* that special education testing could be initiated while also commenting that "I have to be very strict by saying I can't… I can't look at your kiddo until we try some interventions… do a lot of interventions."** Thus, the school did not provide the grandparent with a consent form for IDEA testing. **It also neither initiated the referral, nor issued the guardian a notice-of-refusal form.**

The grandparent retained an advocate and attorney, who filed a request for due process alleging a failure to identify. In response, the District formally offered to conduct a full initial evaluation of the student. The evaluation found that the student qualified as LD in reading comprehension, and OHI because of his ADHD. At the initial ARDC meeting, the committee placed the student in special education, and provided him consultative OT services, all the accommodations in the §504 plan, and monitoring by a special education teacher in the classroom. Curiously, by this time, the student had improved in reading fluency, as tested by the reading specialist, and apparently also passed the 4th grade reading statewide assessment. Thus, he actually wound up responding significantly well to the regular ed interventions provided, including dyslexia program assistance.

The Hearing Officer found that as of September 2009, when the child's doctor approached the school principal, the district had reason to know that the student was likely a student with a disability, and that the grandmother was requesting testing. **"Petitioner's grandmother made a parental request for testing for the student and, as a result, the school district had a duty to evaluate the student that overrode the district's use of the local district RTI process—the IMPACT committee—before evaluating the student for special education."**

A little commentary: In other words, in the Hearing Officer's opinion, a parent's request for IDEA evaluation supersedes a district's local RtI procedures and intervention sequence. Of course, the

district could have chosen to reject the request for evaluation, provide the grandmother with notice of the refusal and notice of IDEA procedural safeguards.

As the student made failing grades, "the school district began applying interventions specifically focused on areas of concern in writing and reading skills, and the student began to demonstrate success with measurable increases in those skills." Thus, although the school did not begin evaluating the student until five months later, the Hearing Officer did not find the delay unreasonable, since "the student made progress in targeted areas during the period of increased intervention." But, the hearing officer also found that while the school had in fact refused the request for evaluation, it never provided the grandmother with written notice of the refusal, as required under the IDEA. "This is a procedural flaw." As far as the school staff was concerned, however, they had not really "refused" the evaluation request, they had merely explained the RtI process to the grandparent and followed it as they understood it. In any event, the Hearing Officer excuses the procedural violation, since, in her opinion, it "did not seriously infringe on her opportunity to participate and develop Petitioner's educational program…" Therefore, the Hearing Officer denied any relief. Ultimately, the fact that the District acted in a timely and increasingly proportionate fashion with its regular intervention programs saved the legal case, since the student responded well.

The Hearing Officer addressed the school's procedural violation of failing to issue a notice-of refusal when it *de facto* rejected the guardian's request for testing. But, the Hearing Officer did not address the fact that the school also did not provide the grandparent with notice of her IDEA procedural safeguards when it decided not to test. Other cases have held that the failure to provide notice of procedural safeguards is in fact a procedural violation that can seriously infringe on a parent's opportunity to participate. *See El Paso Ind. Sch. Dist. v. R.R.*, 50 IDELR 256 (W.D.Tex. 2008)(tacit refusal of evaluation request when parent instead agreed to interventions required provision of IDEA procedural safeguards notice).

What if the parents request a referral while the school is working through the RtI process? The regulations answer that question. Ostensibly, one way the regulations *could* have dealt with this situation would have been to allow school districts a certain timeframe if they were implementing RtI programs for a struggling child, say six months, during which it would not have to undertake evaluations at parent request. This scheme would have allowed schools to implement RtI programs, and thus allow for the use of the RtI-based evaluation option in §300.309(a)(2). Instead, the 2006 regulation states that referral must take place if either the student has not made adequate progress after an appropriate period of regular interventions, or whenever the child is referred for evaluation (i.e., a parent request for referral).

ED clarified that the regulations allow a parent to request an evaluation that would take place within the normal 60-day timeline for initial evaluations, RtI process or not. "[W]e will combine proposed §300.309(c) and (d), and revise the new §300.309(c) to ensure that the public agency promptly requests parental consent to evaluate a child suspected of having an SLD who has not made adequate progress when provided with appropriate instruction, which could include instruction in an RTI model, and whenever a child is referred for an evaluation. We will also add a new §300.311(a)(7)(ii) to ensure that the parents of a child suspected of having an SLD who has participated in a process that evaluates the child's response to scientific, research-based intervention, are notified about the State's policies regarding collection of child performance data and the general education services that will be provided; strategies to increase their child's rate of learning; and their right to request an evaluation at any time." 71 Fed. Reg. 46,658. Put another way, **"[i]f parents request an evaluation and provide consent, the timeframe for evaluation begins and the information required in §300.309(b) must be collected (if it does not already exist) before the end of that period." Id.**

RtI "opt-out" by parents. Can a parent then basically "opt out" of the use of an RtI process by simply requesting an evaluation at an early stage of the process and refusing to agree to an extension of the 60-day timeline…? As noted above, ED believes that most RtI models will be complete prior to the 60-day timeline. If not, then the team will have to do with whatever RtI data can be gleaned within the 60-day timeline, keeping in mind that it will also need time to undertake the other components of the comprehensive evaluation and complete a written report. Thus, this provision will most significantly impact schools that implement lengthy interventions as part of an RtI model.

3. Is the RtI data being gathered to improve the IDEA evaluation? An interesting piece of the AISD case was language from the diagnostician. The Hearing Officer found that subsequent to the 504 meeting to determine eligibility, the diagnostician reviewed the private evaluation, and wrote in an e-mail that "we are not at a point of considering a special education evaluation for [the student] just yet, *but I did want you to know that the data we have is a good indicator that [the student] would be eligible for special education if we decided to 'go there*.'" Thus, there appeared to be an acknowledgment that *if* testing proceeded, the student would likely qualify under IDEA.

A little commentary: What is the point of pursuing additional data (and delay of evaluation) if data currently indicates the student is eligible? Doesn't the email statement provide evidence of more than just a suspicion of eligibility prompting the duty to evaluate?

4. Are services required because of suspected disability? Note that while the student's presence in early intervention services or RtI shows need for services, that need alone does not create suspicion of an underlying disability. Students can struggle at school for any number of reasons and require services to address those needs. Without suspicion of disability, the duty to refer is not triggered.

Non-disability reasons for need for services. *Alvin ISD v. A.D.,* 48 IDELR 240 (5th Cir. 2007). A.D. is a student with ADHD. He makes consistently passing grades, and is successful on the grade level statewide assessment (TAKS). Beginning in the seventh grade, disciplinary removals due to classroom behavior became frequent, getting the attention of the school's Student Success Team (SST), a regular education effort to improve student performance. The behavior worsened in eighth grade, (coinciding with the death of a baby brother, a strained relationship with his stepfather, and the beginning of alcohol abuse) culminating in theft of property and robbery of a school concession stand. He was suspended and recommended for placement in an alternative education program (AEP). During this time, the student was on an "academic and behavior contract" created by the SST, which required him to take his medication daily, follow the dress code and complete his assignments on time. While the disciplinary action was pending, The parent requested a special education referral, and filed for due process two weeks later. The complaint alleged that the district violated A.D.'s right to FAPE by its failure to identify, evaluate and place him in special education.

Prior to the hearing, the district completed its evaluation including psychological, behavioral, and intelligence testing. Information was sought from the student's treating physician, but was not received until after the evaluation report was completed. The report indicated average cognitive abilities, and academic performance marked by high average performance in basic reading skills, and average skills in other academic areas. The psychologist reported that the student's ADHD did not prevent him from making age-appropriate academic and social progress. A few of his teachers provided input, agreeing that he was making age-appropriate progress. The student was well-liked by both teachers and peers. The school's evaluation sharply contrasted with the recommendations of the student's treating physicians, who both recommended special education placement.

The Hearing Officer determined that the student was special education eligible, prompting this appeal. At district court, the Hearing Officer was reversed, based on the second prong of special education eligibility– the need for special education and related services. The court agreed that the student's ADHD was sufficient to justify the conclusion that the student met the requirements for "Other Health Impairment" (OHI). What was missing was evidence of a need for special education arising from the impairment. As no need for special education services was substantiated, the student was denied eligibility by the district court, prompting this appeal.

The parents argued that the district court looked only at grades and TAKS scores to determine whether the student was in need of special education. Not so. "Rather, the district court also considered 'a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior....' 34 C.F.R. 300.306(c)(1)(i) (outlining procedures for determining 'eligibility and educational need'). Therefore, in determining whether A.D. needs special education services by reason of his ADHD, the district court properly considered the unique facts and circumstances of this case."

Finally, the parents argued that the district court need only consider whether the student's disability adversely affects his educational performance (a finding required for the determination of OHI eligibility). **The Fifth Circuit disagreed, noting that a disability that adversely affects educational performance does not necessarily require special education services.** As his academic performance was adequate, the main issue was behavior. On that issue, the school argued that testimony from the district's witnesses was more valuable than that of the parents' physicians who did not observe the student and received information second-hand and because the problem behaviors occurred at a time when other (non-disability) factors in the student's life (death of baby brother, alcohol abuse, troubles with stepfather) were also occurring. Consequently, the school argued, **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.

See also, D.G. v. Flour Bluff ISD, 59 IDELR 2 (5th Cir. 2012)(Unpublished). With respect to the question of whether D.G. needed special education, the district court recognized D.G.'s persistent academic difficulties and a litany of non-disability problems that, as in *Alvin ISD* cited above, might cause the difficulties rather than disability. **"D.G. had experienced personal losses in the months preceding his ninth-grade year; D.G.'s previous school had 'reported that D.G.'s behavioral problems were not due to any mental or physical health condition, but rather that D.G. was cynical, unwilling to accept responsibility, and was reinforced in this behavior by a parent going through a divorce';** the psychologist who evaluated D.G. for the FIE testified that 'most of D.G.'s behavioral problems indicated 'oppositional behavior'; D.G.'s school counselor testified 'family stressors' had contributed to his behavioral problems; and his counselor and teachers testified he was performing well, behaviorally and academically, in fall 2009, his tenth-grade year (although the court accorded that testimony little credence)." [Emphasis added]. The 5th Circuit sided with the school and the Hearing Officer, finding that the student did not need special education. As there was no eligibility, there was no violation for failure to timely evaluate. **"In any event, IDEA does not penalize school districts for not timely evaluating students who do not *need* special education." Of course, had the student been determined eligible, compensatory services would be in possible.**

A little commentary: The court also rejected the argument that child find can be violated even if there is no finding that the student is IDEA-eligible. Revisiting its thinking in *Alvin ISD v. A.D.,* the court noted that since the student was not IDEA-eligible, the court need not reach allegation of procedural error. "Although Child Find was not at issue in *A.D.,* the decision is nevertheless persuasive because it involved the preliminary question at issue here: whether the student was eligible for special

education under IDEA. Having answered in the negative, our court proceeded no farther." *See also, W.B. v. Houston ISD,* 60 IDELR 69 (S.D. Tex. 2012)("While the evidence does not conclusively demonstrate the cause or causes of W.B.'s fluctuation in his ability to demonstrate skills like math, **there is evidence of many factors that well may have played a role in his uneven manifestation of his skill levels, such as his sudden and unplanned move to Houston, his mother's serious illness, the new school, new teachers, new classroom, and new teaching methods.** Especially in light of the stressful environmental changes encountered by this nine-years-old child during this one-year period, the Court finds from a preponderance of the evidence that any lack of progress in the advancement of W.B.'s education was not attributable to a failure by [the classroom teacher] to implement the IEP" [Emphasis added.]).

Preliminary screening says no autism *prior* to evaluation? *Timothy O. v. Paso Robles Unified Sch. Dist*., 67 IDELR 227, 822 F.3d 1105 (9th Cir. 2016). A preschooler appeared to show signs of autism to staff, and he was referred for IDEA evaluation. After a school psychologist observed the child for 30-40 minutes, he concluded that the student could not qualify as having autism, and that disability was ruled out as an area of suspected disability. A private evaluation, moreover, determined that the student had autism. The Ninth Circuit found the district violated child-find and proper scope of evaluation because at the time of the student's initial evaluation, the district was aware that the student displayed signs of autistic behavior, but did not proceed to evaluate that are. "It chose, however, not to formally assess him for autism because a member of its staff opined, after an informal, unscientific observation of the child, that [he] merely had an expressive language delay…." The court held that once an area of disability is suspected, there is an obligation to assess that area. "If a school district is on notice that a child may have a particular disorder, it must assess that child for that disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment…. A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation."

A little commentary: While this case is only controlling authority in states within the Ninth Circuit, schools should be cautious in limiting areas of suspected disability that need to be assessed based on informal observations of evaluation staff. Once school staff suspect an area of disability, it should be evaluated, and individual assessment staff that do not think the child will qualify should not be veto the assessment of that area. The standard for child-find is not whether the student will qualify, but rather whether there is suspicion of disability, which is a lower threshold. Schools that engage in pre-evaluation screenings or observations should do so after consulting with their special education attorneys.

5. Are the services required "special education?" services? Since a key element in special education eligibility is data that the student needs "special education and related services" how can we tell at what point the individualized approach to regular education and interventions provided through RtI is *really* special education? The obvious problem is that when a portion of the special education eligibility definition requires a demonstration of need, an expansion of regular education services through EI makes the line confusing. In other words, in a world where regular education is individualizing education and providing a higher level of services and supports, what is "special education?"

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

> "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability…." In turn, **§300.39(B)(3) defines "specially designed instruction" as "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."

If that is the test, isn't *any* individualized education in response to disability "special education?" So does that mean that any time a student needs a modification or an accommodation 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? **Such a result seems odd in light of Congress' encouragement of schools to do more intervention outside special education, and Congress' permission for IDEA-B dollars to be used for that purpose.** Commentary to the federal regulations makes the same point.

Are early intervention activities & RtI 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. 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." **ED'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.

In addition to support from various state's child find rules, discussed previously, the federal courts have upheld this practical view of the line between regular education expansion and specially designed instruction. *See, for example, Ashli & Gordon C. (below)*. Unfortunately, ED 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 ED or Congress makes an official and clear change.

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 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 services, a student hardly seems to need special education services designed to give him benefit he's already receiving.

Given the broad and rather unhelpful definition of specially designed instruction in the regulations, the following are a couple of attempts at functional approaches to identifying "special education." Consider these with your school attorney. The first approach looks to the exclusive nature of special education services.

> 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; and (3) Access the other 85% of federal IDEA-B funds. Finally, a fourth category is possible to the extent that (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. By definition, any other intervention or service, is not "special education."

A second approach is more definitional.

> Special education is (1) Adapting content, methodology or delivery of instruction (2) designed or determined by the ARDC and delivered by a special education-certified teacher or provider (3) where such adaptations are not generally available in regular education.

No "need" for special education when differentiated instruction will do. *Ashli & Gordon C v. State of Hawaii Department of Education,* 47 IDELR 65 (D.C. Hi. 2007). In this case, 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. "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."

A little commentary: This seems to be the type of student that Congress wanted to receive early intervening services. Yes, there are struggles, yes, there are needs, but this student did 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. Note that within the next two years, the student was determined IDEA-eligible (more on this dynamic below).

Does this definition thing *really* matter? Unfortunately yes. *Highland Park ISD v Student,* TEA Docket # 074-SE-1210 (June 2011). Finding that the student met the criteria for both OHI and ED, the Hearing Officer turned to the question of need for special education. After reciting the definition provided in the regulations, the Hearing Officer turned to the extensive supports provided to the student and the school's argument that grade level performance and progress demonstrated no need for specially designed instruction.

> "The record is replete with evidence that Student's teachers were well aware of student's academic and social/emotional needs, needs which they fortunately addressed by providing significant support to Student in the form of **after school tutoring, in school tutoring and re-teach, one-to-one instruction, small group instruction, assigned partners for social interaction, reduced expectations for the amount of work Student had to complete to address Student's slowness so that student could ***, excusing Student from oral performances because of student's fear of speaking in class, preferential seating to help with attention, and checking for understanding to maintain Student's focus.** It is abundantly clear from the record in this case that Student would not be able to perform at grade level without the multitude of supports provided student by student's excellent teachers.
>
> It is equally clear that the support provided by Student's teachers itself constitutes specially designed instruction. **Student's teachers adapted the methodology and delivery of instruction to meet student's unique needs to ensure that student could meet the educational standards of the District that apply to all children.** That is the definition of specially designed instruction. The District cannot point to Student's grade level performance to argue that Student does not need specially designed instruction when the very reason for Student's educational success is the specially designed instruction student already receives. Indeed, the very purpose of specially designed instruction is to enable a student to perform on grade level. **While Student benefitted from the supports and interventions provided student, student is entitled to the guarantee of those services as a result of eligibility under the IDEA, rather than the good fortune of the services as a result of student's teachers' good will and teaching practices."** (Emphasis added).

A little commentary: It appears that the Hearing Officer may not have been concerned about the provision of services, but the lack of special education protections afforded the child along with the services. The language about the school being able to remove the services at any time seems to substantiate that concern. The author wonders whether the result of the case would be the same if the school had provided the services via a Section 504 Plan (there being plenty of evidence supporting the student's 504 eligibility) whereby the school would commit to the provision of services rather than provide them out of a sense of good will, and thereby also endow the student with basic

nondiscrimination rights. The IDEA rights exist to support the provision of FAPE. The point of IDEA is not the rights, but the specially designed instruction (consider, for example, the impact of IDEA regulations on the IDEA rights of a child after the parent has refused consent or revoked consent for services).

The fact that the services could be removed, however, does not make regular education services specially designed instruction. If what the child is receiving is not specially designed instruction, the fact that the services can be taken away at any time doesn't magically transform them into special education. Note further that all services provided to the child were determined, designed and provided by regular education personnel.

A California twist on "needs special education" and the question of adequate response to RtI. *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 you tell if regular ed 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."

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: While California nicely articulates the standard, is this really any different from the current rule that the student must need special education and related services because of the disability in order to qualify? Isn't this rule simply an articulation of the regular education/special education relationship? Finally, for eligibility using an RtI model, the Ninth Circuit provides a good answer to the question of whether the student is a responder. If he achieves educational benefit without special education, why would he need more services (and specially designed instruction in particular) to get the benefit he already enjoys.

Did he respond to intervention? *Joshua Ind. Sch. Dist*., 111 LRP 4652 (SEA Texas 2010). In another Texas case, after a student exhibited some problems in reading, a Problem Solving Team met to consider and implement RtI programming, and the parents agreed to the planned interventions. Eight months later, the parents requested an IDEA evaluation, but the school determined that the data showed that the student had made significant progress in reading. The school eventually agreed to evaluate the student, but found he was not eligible, based on his progress through the RtI program. The Hearing Officer concurred, finding that "the district demonstrated that it determined that RTI could be successful for the student and that the student's progress indicated the RTI process was successful for the student." Thus, the student's improvement (i.e., "response") by means of RtI-oriented interventions was evaluation data showing that the student was not in need of special education services. (Curiously, the parent in Joshua apparently testified that she "sought special education eligibility only to ensure that the plan of the problem solving team would be implemented).

See also, Greenwich Bd. of Educ. v. K.M., 68 IDELR 8 (D.Conn. 2016). A Connecticut District that was providing RtI programming to a child with reading deficits declined the parents' request for an IDEA evaluation because it felt that the student had responded to interventions, and thus did not require special education services. A private evaluation, however, indicated the student was functioning below grade level in reading, and although the student entered into the RtI program close to grade level, she actually dropped to below grade level during the first RtI tier. School records indicate it increased the intensity of RtI services as a result. These factors, found the Court, raised a suspicion of disability and need for special education services. It noted that the standard for child-find is not whether the school is *certain* that the student is disabled, just whether there are reasonable grounds to suspect a reading disability. That standard was met here.

A little commentary: The District was not well-served by its decision to decline evaluation on the basis of RtI data. Rather the SLD regulation allows the use of RtI data *as part of* the SLD evaluation. *See* 34 C.F.R. §300.309(a)(2)(i). If it had conducted the evaluation, it could have analyzed the student's response to interventions, perhaps together with assessment data. Moreover, the District could have continued with the interventions in the weeks while the evaluation was pending. Then, the parents would have had to argue a more difficult issue—that the evaluation was inappropriate under the IDEA. A puzzling aspect of the decision, however, is the Court's statement that a child with reading disabilities must be making greater than year-to-year-progress in reading in order to "close the achievement gap" with peers. Given that IDEA does not impose a requirement of progress on par with nondisabled students, why would RtI programs be expected to generate progress beyond that in order to show a good "response."

Are child-find disputes possible even when students appear to be improving with regular ed interventions? You bet. In *Pajaro Valley Unified Sch. Dist*., 109 LRP 31586 (SEA CA 2009), a 6th-grader was advancing from grade to grade with some difficulty in writing, on-task attention, and turning in homework. His 4th grade teacher attempted classroom interventions that were tracked in a

log. At the beginning of 5th grade, the parents requested evaluation, and also obtained a private evaluation. The student was never retained. The District met to review the evaluations but determined the student was not IDEA-eligible. The parents obtained additional evaluations and filed for a hearing claiming a child-find violation. The hearing officer found that the school acted appropriately in the 4th grade in attempting regular education interventions prior to resorting to an IDEA referral. Some of the private evaluations advocated for eligibility as LD. But, the school did not act inappropriately in following the assessment data that indicated that the student was improving in language arts standardized testing year after year, and that the student would continue to improve without special education services, as long as the school addressed his problems focusing and completing homework.

Timing is everything in child find (is he *still* responding?). *R.E. v. Brewster Cent. Sch. Dist.,* 67 IDELR 214 (S.D.NY 2016). A student with Tourette syndrome and associated tics was provided a §504 plan that called for modified homework, testing accommodations, preferential seating, and allowance to visit the nurse's office to release tics as needed. While on this plan, the student earned 80's and 90's in all subject and passed all statewide assessments. Unlike alleged by the parents, standardized tests showed he functioned at grade level. The mother in fact expressed satisfaction with his progress and credited the school for "going above and beyond" with its §504 plan. After a private evaluation also diagnosed the student with ADHD and obsessive-compulsive disorder, the school evaluated the student under IDEA and determined him eligible. The parents, however, alleged that the school did not identify the student in a timely fashion under the IDEA. The Court agreed with the hearing officer and review officer that the school did not violate its IDEA child-find obligation. It pointed to the student's good progress under the §504 plan, and found that the student responded well to the assistance and was performing at grade level. The Court thus denied the parents' request for reimbursement of private school tuition.

A little commentary: Providing the student with an evaluation, eligibility, and a services plan under §504 showed both that the school had complied with §504, and had not failed in its child-find obligation under IDEA. Moreover, when the student was diagnosed with additional conditions, it acted quickly to evaluate him under the IDEA. The effective implementation of the §504 plan, and the student's response, showed that the district legitimately had no suspicion that the student needed special education services. In turn, this enabled the school to avoid payment for private school. If the student had exhibited struggles under the §504 program, the school would have been well-advised to increase the §504 plan services, and if that was not effective, to refer him for an IDEA evaluation. The case shows that compliant child-find under both §504 and IDEA relies on good communication and coordination between the two programs.

What if interventions fail and the child winds up in special education after all? A Texas hearing officer ruled that it could not "fault the School District for attempting an RTI program and find that Student was denied a FAPE as a result of the delay in referring Student for special education." *Salado Ind. Sch. Dist*., 108 LRP 67655 (SEA TX 2008). The hearing officer found that all stakeholders had worked collaboratively in providing pre-IDEA interventions. "The Hearing Officer cannot fault [the] school district for not timely referring a student for special education where the school district attempted an RTI program which eventually resulted in the student's referral for special education."

A little commentary: The case shows that there can be litigation even where all stakeholders, including the parent, collaboratively agreed to attempt regular education interventions prior to a special education referral. Note, therefore, how the hearing officer took care to point out that the provision of interventions was accomplished collaboratively with the parents. In all likelihood, cases will emerge (like *Lafayette,* below) where the decision-making is not made on a consensus basis, thus giving the parents more room to argue that use of RtI programs served to delay eventual special education services, and that they have an arguable claim for compensatory services.

What about students who are new to the district? The EI task is more complex where the school is just beginning to work with a student and lacks historical reference for the student 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).

Does the student's age matter? IDEA eligibility and the young child with ADHD. *D.K. v. Abington School District,* 59 IDELR 271, 696 F.3d 233 (3rd Cir. 2012). Parents seek compensatory services for an alleged failure to provide FAPE for a student who repeated kindergarten and was not determined IDEA-eligible until late fall of his third grade year. During his first year in kindergarten, he exhibited difficulty "following oral directions, listening to and acknowledging the contributions of others, exhibiting self-control, following rules, producing neat and legible work, completing class work in the time allotted, and using non-instructional time appropriately." He matured very little with respect to behavior in his second year of kindergarten, where he threw tantrums, was extremely argumentative, and had difficulty with self-control. He did demonstrate proficiency in reading and advanced scores in math. Teachers and parents both expressed concern over how he would perform in 1st grade.

By the mid-point of his 1st grade year, three parent-teacher conferences had been held to address the student's behaviors, which now included making obscene gestures to other students, copying other students' work, lack of attention, misplacing work and poor organizational skills. The teacher told the parents she was providing as many supports as she could, and that it was "too soon to discuss testing" as D.K. was passing. In the spring, he took part in a social skills group where his behaviors were "on par" with the other students in the group. The school conducted a variety of assessments, including a BASC and determined he was not in the clinically significant or at-risk range for ADHD. Further, he did not need special education services. He was promoted.

In second grade, he received 30 minutes of extra help in math, and 180 minutes of extra help in reading per week. By now, he was experiencing academic difficulties according to the parents. The school argues that he was making progress, but he continued to have behavioral troubles during unstructured time, fighting with other students on the playground and bus. Midway through the school year, the student began seeing a private therapist. The therapist believed that D.K. was in need of special education and discussed with his teachers the possibility of re-testing the student. The parents also reported to the school that an outside evaluator had diagnosed D.K. with 'auditory processing and sensory stimulation" problems. Prior to the third grade, the parents requested a second evaluation. In addition to the school's assessment, the parents provided a pediatric neurological evaluation which diagnosed ADHD and suggested D.K.'s learning would be enhanced if he were provided "the usual kinds of accommodations for children with ADHD."

In November of his 3rd grade year, the school determined D.K. qualified for special education as OHI. This litigation was filed as his first IEP was being finalized. The court provides some great language on a number of child find issues. Extensive quotations from the case follow:

> "Child Find extends to children 'who are suspected of [having] ... a disability ... and in need of special education, even though they are advancing from grade to grade.' As several courts have recognized, however, Child Find does not demand that schools conduct a formal evaluation of every struggling student. *See, e.g., J.S. v. Scarsdale Union Free Sch. Dist.,* 826 F. Supp. 2d 635, 661 (S.D.N.Y. 2011) ('The IDEA's child find provisions do not require district courts to evaluate as potentially 'disabled' any child who is having academic difficulties.'). **A school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part because some disabilities 'are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all….**
>
> **The School District was not required to jump to the conclusion that D.K.'s misbehavior denoted a disability or disorder because hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years….**
>
> [**T]he school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required.... The IDEA does not require a reevaluation every time a student posts a poor grade.')….**
>
> Finally, the measures the School District did take to assist D.K. in the classroom militate against finding a Child Find violation. His teachers did not neglect his difficulties. Far from it, they and other Copper Beach faculty took proactive steps to afford him extra assistance and worked closely with his parents to maximize his potential for improvement. **It would be wrong to conclude that the School District failed to identify D.K. as a challenged student when it offered him substantial accommodations, special instructions, additional time to complete assignments, and one-on-one and specialist attention en route to eventually finding a disability.**
>
> **In sum, schools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.**" [Emphasis added.]

A bit of commentary: Note that facts make all the difference. Change a few facts, and the result would likely change as well. For example, had the school provided less support or been less engaged, or had the student been older or suffering from greater educational deficits, the court may not have been as forgiving. Note also the significance of the court's looking to same-age peers to see whether D.K.'s behaviors and troubles were within the normal range.

Lock-step RtI vs. IDEA's individualized approach. *Santa Barbara USD,* 113 LRP 1802 (SEA CA. 2013). A California Hearing Officer summarized the school's response a child find claim:

> "The District claims that it did not fail to meet its child find obligation before or during the 2010-2011 SY because it had no reason to suspect that Student was disabled, and even if it had, it was required to utilize general education interventions before it referred him for an assessment to determine if he was eligible for special education. The District argues that it met its child find obligations by making information available to parents via the District and special education local area plan's (SELPA) websites, placing an annual notice in the local newspaper, and providing parents with information when students are enrolled in the District, and register each year when they are at SBJHS. The District also argues that the Individuals with Disabilities Education Act (IDEA) does not require it to train teachers and staff about child find, how to determine if a child might be suspected of

having a disability, and what to do if one does have such a suspicion. The District claims that it did not have an obligation to refer Student for a special education assessment until Parent requested one on April 27, 2011."

The district utilized two four-tiered intervention pyramids to address the needs of students. One pyramid addressed academics and another dealt with behavior. The Hearing Officer was not convinced that either pyramid or the school's practices addressed IDEA child find.

> **"The District's child find efforts do not, however, appear to involve significant activity beyond making information available to parents.** The IDEA requires not only that parents be informed of the availability of special education, but also that a district engage in active and systematic efforts to identify possibly disabled students, whether their parents are engaged or cooperative or not, or even if their parents cannot be found. A central part of such efforts is the law's encouragement of special education referrals by school personnel. This requires a level of training and awareness that does not appear to exist in the District….
>
> **It is particularly troubling that at SBJHS, the teachers and staff relied almost exclusively on the flawed intervention pyramids for guidance when a student was struggling either academically or behaviorally.** These pyramids may well be useful in supporting general education students. But there was nothing on either pyramid that guided school personnel in the direction of making a direct referral for a special education assessment for a struggling student, especially when the interventions on the pyramid did not seem to be working. **Even more troubling was that even though many of Student's teachers on the SST reporting forms reported that he was a distraction to others, and was distracted himself in class, no one at the SST meeting on December 15, 2010, connected that behavior with the fact that Student had a medical diagnosis of ADHD.** Instead most of Student's teachers seemed to attribute his academic struggles to a 'lack of motivation.' This was true even when they testified at the due process hearing." (Emphasis added).

A little commentary: While the Hearing Officer also took issue with the intervention systems themselves, the major takeaway here is that IDEA-compliant RtI is not blind obedience to a set of steps by folks with no training or concern for IDEA child find. The duty to refer under IDEA is not restricted to the student reaching a particular level or intervention. Rather, the duty is triggered by what the school suspects with respect to disability and need for services.

RtI in a discipline context. *Harrison County (CO) Sch. Dist. Two*, 111 LRP 62993 (OCR 2011). A student with ADHD was required to participate in an RtI program after the parent asked for an IDEA evaluation. When the student's behavior escalated, the school did not initiate an evaluation, but rather intensified the RtI program's behavioral interventions. Meanwhile, the student amassed 10 separate suspensions (some of them multi-day). Eventually, the student was tested and determined eligible for an IEP under the IDEA. OCR explained that RTI does not justify delaying or denying the evaluation of a student with a disability who is believed to need special education and related services. "Although the initiation of RTI strategies may have been justified to identify promising instructional strategies to benefit the Student, RTI does not justify delaying or denying the evaluation of a child who, because of a disability, needs or is believed to need special education or related services." The amount of removals, moreover, represented a collective disciplinary change in placement undertaken without consideration of relationship to disability.

A school's failure to share RtI data with parent during an IDEA evaluation is a problem. *M.M. v. Lafayette School District,* 64 IDELR 31 (9th Cir. 2014). While the school properly incorporated RtI data into the student's special ed evaluation, the school failed to share that same data with the parents, running afoul of meaningful participation.

"Although the other members of C.M.'s IEP team were familiar with his RTI data because they participated in his Assessment Wall meetings three times a year, the parents were unfamiliar with the data and, more importantly, the picture the data painted of C.M.'s deficits and his progress during his kindergarten through third grade years. C.M.'s DIBELS measures on Initial Sound Fluency, Letter Naming Fluency, and Nonsense Word Fluency were below benchmark prior to his initial evaluation, but his measure on Phoneme Segmentation Fluency was at benchmark. Based on the 2007 Assessment results, the IEP team determined C.M. was eligible for special education services based upon a phonological processing disorder. This result conflicts with his Phoneme Segmentation Fluency score, especially his above benchmark Phoneme Segmentation Fluency score and below benchmark Oral Reading Fluency score at the end of his first grade year. Without a complete presentation of the RTI data, the parents were unaware of the discrepancy and thus unable to properly consider C.M.'s particular processing disorder and the instructional strategies he needed. Also, at the time of the first annual IEP meeting in C.M.'s second grade year, his RTI data showed that his progress in the language arts had declined after receiving special education services for nearly one year. Despite his lack of progress, the IEP team made no changes to his educational program. **Without the RTI data, the parents were struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the ISP [instructional support program], and thus unable to properly advocate for changes to his IEP.** We therefore conclude that the District's procedural violations prevented the parents from meaningfully participating in the IEP process. Therefore, the District denied C.M. a FAPE." (Emphasis & bracketed material added).

And a final bit of commentary on RtI and Child Find: While it seems somewhat simplistic, the easiest solution to the tension between the desire for good RtI data as part of a potential IDEA evaluation and the need to not delay an IDEA evaluation requested by a parent is for the school to find struggling students before parents find them. In that way, the school can complete the interventions it desires before the student's problems become severe. Consequently, the parent will not feel the pressure to "do something" because the student's performance is suffering, and will credit the school for spotting a problem and taking appropriate action.

D. OSEP's Concerns with RtI in Texas and IDEA Child Find.

OSEP determined that TEA had provided proper guidance to schools in the use of RtI. Citing TEA's *Parents Guide to the Admission, Review, and Dismissal Process,* OSEP says TEA provided background information on RtI and clarity on special education services in the state. "A child does not need to advance through each tier of the RtI system before a referral or special education is made. Once it is apparent that general education interventions are not sufficient, school personnel should suspect that the child has a disability an should initiate a referral. Parents can also request a referral at any time regardless of whether the child is receiving interventions through an RtI system."

Nevertheless, implementation of RtI by school districts was noncompliant with IDEA. Specifically, OSEP found the following problems.

Anecdotal noncompliance. "Across the State, parents described processes by which the implementation of RTI either delayed or denied their children from receiving timely evaluations for special education and related services under the IDEA. For example, one parent wrote about district employees having been instructed to continue RTI for years prior to referring a student suspected of having a disability for an initial special education evaluation. Another parent described a situation in which the family moved from another State into Texas and provided former evaluation data, yet the referral for an initial evaluation in Texas was delayed for three and a half years so that the child could receive ten minutes of RTI intervention each day. The same parent noted that once the child was

evaluated for special education and related services under the IDEA, the child was found to be eligible." *OSEP Letter, page 7.*

Completing all tiers prior to referral? "However, the information OSEP collected and analyzed also revealed a general understanding among teachers and parents in Texas that completing all tiers of RTI was required prior to a referral for special education, particularly for children with SLD[.]"

That's a problem, says OSEP: "this practice cannot be used to delay or deny a timely evaluation of a child who is suspected of having a disability and in need of special education and related services. Allowing a child who is not making adequate progress to remain in RTI for an unreasonable or excessive amount of time, if the LEA suspects the child has a disability and needs special education and related services, is inconsistent with the IDEA child find requirements because it would result in an evaluation that is inappropriately delayed. 34 CFR §300.111." *Id.*

Lack of clarity in how the district implemented RtI. "[T]eachers could not always define what level of progress would be sufficient for a child to stop receiving interventions provided through an elevated tier of RTI. In different schools within the same ISD and across different ISDs, staff expressed a lack of clarity as to which children enter tiers two or three, how long children are served in each tier, and when children move from one tier to the next within the RTI framework. School staff often explained that a child moves beyond tier one when the child does not meet the teacher's established academic benchmarks.

Parent's rights to refer to Special Education at any time. While OSEP heard Texas teachers report that parents were free to refer a student in RtI to special education at any time, "this is inconsistent with information OSEP learned through parents in Texas, whose comments indicate they have encountered difficulty in obtaining an initial evaluation under the IDEA when their child was participating in the RTI process, even if they had contacted the school to request a referral for an initial evaluation." *OSEP Letter, page 8.*

Teacher referrals to Special Education. "With regard to teacher referrals, interviews that OSEP conducted with school and ISD staff revealed that although the staff referral will be considered, the school may deny the initial evaluation if the child has not completed all tiers of the RTI process, even if there is reason to suspect the child has a disability. OSEP also identified instances in which staff members described suspecting that a child may have a disability and not making a referral for an evaluation under the IDEA, or delaying the referral, because the child was already receiving services through RTI." *Id.*

Bottom line, OSEP concluded that RtI had been used to delay or deny IDEA evaluation. "While ISD's certainly have flexibility in implementing RTI, the lack of clarity in LEA- and school-level implementation contributed to the delay or denial in the identification and evaluation of children suspected of having disabilities and needing special education and related services." *OSEP Letter, page 7.*

E. Some Miscellaneous Stuff

1. IDEA Child Find following revocation of consent for special education. *Houston ISD,* 114 LRP 44750 (SEA TX 2014).

One of the problems with the revocation of consent rules is that the student's ineligibility did not arise from evaluation data. That is, the data still indicates that the student is eligible and in need of special education and related services. This case from Houston examines the school's Child Find duty when academic and behavioral problems addressed under the IEP are no longer served following revocation

of consent and the problems become more intense.

> "Following Student's withdrawal from special education, Student's IStation ratings show a notable decline in Reading. In addition, Student's grades declined from passing subjects taught in English to failing all subjects except Social Studies. After Student's withdrawal from special education, student also experienced more difficulty with student's behavior at school. Student's conduct marks on student's report card declined and student began to demonstrate more frequent and intensive behavioral challenges that resulted in increased disciplinary events, including suspensions. The behaviors exhibited were substantially similar to those that are part of student's identified disability. It is well documented that a failure to adequately address Student's academic needs results in increased problem behaviors. The types of behaviors demonstrated by Student following student's withdrawal from special education are of the same type previously exhibited during periods where student did not receive adequate special education support."

In short, the student needed special education services and without those services, things are not going well. The question that remains is whether the school has a duty to offer a special education evaluation based on the struggles following revocation of consent.

> "The Child Find obligation extends to all students within a school district, including students who have been withdrawn from special education services by a parent. Thus, HISD clearly continued to have a Child Find duty with respect to Student following Parent's revocation of consent for services on November 6, 2013. IDEA requires a two-pronged analysis for determining whether a student should be identified as eligible for special education services. The 'Child Find' obligation is triggered when the school district has reason to suspect the student has a disability and that the student is in need of special education services. 34 C.F.R. §§ 300.8(a)(1)…."

The Hearing Officer, apparently taking into account the existing evaluation data and ARDC determination that the student is IDEA-eligible *but for* the parent's revocation of consent, found no Child Find duty here. "Applying this standard to the instant circumstances means that **the Child Find obligation would be triggered when the school district had reason to suspect that Student had new or different needs than had been previously identified at the time when consent was revoked for special education services."** (Emphasis added). In essence, the student's struggles are consistent with existing data, and the only thing preventing the student's receipt of special education for those struggles is consent—more evaluation serves no purpose.

> "Before revocation of consent for special education services, Student was identified with both academic and behavioral/emotional needs. Student had an extensive BSP and had been repeatedly offered counseling to help manage frustration and inappropriate reactions to peers and adults. **The behaviors displayed by Student after November 6, while perhaps initially more intense and frequent, are substantially similar to behaviors documented over a several year period.** In fact, Student's past record supports the predictable result that behavioral problems would escalate when academic and behavioral supports were withdrawn. This link between Student's behavior issues and reading deficits was noted in student's assessments as early as April 2012.

In short, after Parent withdrew consent for special education services, behaviors emerged that were precisely the reason for the special education services in the first place. Student did not exhibit new or different needs that should have triggered Respondent's Child Find duty. Respondent was required to, and did, stop all special education services when Parent withdrew consent. At least during the 2013-2014 school year, until such time as Petitioner requested services or Student demonstrated a new and different need for services, Respondent's Child Find duty toward Student was not triggered." (Emphasis added).

A little commentary: The Hearing Officer also provided some discussion of the child find obligation with respect to needs, as opposed to his eligibility category. The Child Find obligation "would be triggered based on a student's new and different needs and not solely on a potentially new or different disability category. When a student is designated as eligible under IDEA, a district is obligated to meet all of the student's needs, whether they are commonly associated with the student's disability category or not. 34 C.F.R. §300.304(c)(6)." Further, IDEA is clear that "Nothing in the Act requires that children be classified by their disability so long as each child who has a disability ... and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act. 34 C.F.R. §300.111(d)."

2. How does RtI interface with Section 504 and Texas dyslexia child find? *Students with ADHD and Section 504: A Resource Guide,* (Dear Colleague Letter,) 68 IDELR 52 (OCR 2016).

> "Implementation of intervention strategies, such as interventions contained within a school's RTI program, must not be used to delay or deny the Section 504 evaluation of a student suspected of having a disability and needing regular or special education and related aids and services as a result of that disability." (p. 18).

A little commentary: Note the language borrowed from the 2011 letter to state directors of special education applying the same rule to the IDEA. For 504 purposes, the mitigating measures rule treats successful RtI much differently than the IDEA. Under the IDEA, a student's successful response to RtI indicates no need for special education eligibility as the student is making progress without specially designed instruction. In 504, eligibility is determined in the absence of the mitigating measure (is the student substantially limited without the RtI services?). When the school suspects that this is a student with a disability and there is a clear need for services (the student is getting RtI), the duty to evaluate under Section 504 is triggered. 34 CFR §104.35(a).

A significant concern of OCR, as reflected in various complaint investigations, is that RtI programs can be implemented in a way that denies or delays evaluations of students that are suspected of having disabilities that may qualify them under §504. See, e.g., *Indian River County (FL) Sch. Dist*., 11 LRP 70055 (OCR 2011)(school found to have untimely evaluated student when it took the position that RtI was required to be implemented prior to evaluation under IDEA or §504); ***Forest Hills (OH) Local Sch. Dist*.., 111 LRP 70117 (OCR 2011)(school violated §504 when it required all students with diabetes to participate in a three-stage, months-long RtI process prior to considering §504 eligibility);** *Bristol-Warren (RI) Regional Sch. Dist*., 56 IDELR 303 (OCR 2010)(student with diagnoses of anxiety disorder and ADHD was provided an RTI plan rather than a §504 evaluation, although district did not dispute the diagnoses and the parent was requesting evaluation); *Harrison (CO) Sch. Dist. Two*, 57 IDELR 295 (OCR 2011)("Although the initiation of RTI strategies may have been justified to identify promising instructional strategies to benefit the Student, RTI does not justify delaying or denying the evaluation of a child who, because of a disability, needs or is believed to need special education or related services.").

Does the student have to complete the RtI process before a Texas dyslexia referral can be made? The plain answer is NO. "Progression through tiered intervention is not required in order to begin the identification of dyslexia." *Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders, July 2014, (Burgundy Book) p. 14.* The logic used here is in line with U.S. Department of Education guidance indicating that RtI implementation should not be used to delay or deny special education evaluations when data raises the suspicion of disability. *See Memorandum to State Directors of Special Education*, 111 LRP 4677 (OSEP, January 21, 2011). Moreover, the RtI process is intended, in part, to help determine if a student is in need of special education services, not regular-education dyslexia services. "The use of a tiered intervention process should not delay or deny an evaluation for

dyslexia, especially when parent or teacher observations reveal the common characteristics of dyslexia. The needs of the students must be the foremost priority." *Burgundy Book p. 14.* **So what's the rationale for this?** "Frequently, a child with dyslexia may be making what appears to be progress in the general education classroom based on report card grades or minor gains on progress measures. While various interventions may prove to be helpful in understanding curriculum, a child with dyslexia also requires a specialized type of intervention… to address his/her specific reading disability." *Id.*

Reading difficulties, dyslexia, RtI and child find. *Student v. Hardin-Jefferson ISD,* TEA Docket # 200-SE-0315 (July 2015). Having determined that the child was not dyslexic (with its own evaluation together with some outside assessment provided by the tutor) but facing parent insistence of dyslexia and a student with reading difficulties, the school provided the student with RtI services. The services included preferential seating, re-teaching difficult concepts, and "RtI services from the campus dyslexia teacher for 45 minutes a day four times a week with a focus on multisensory skills, phonics, and spelling." The parents also provided the services of an outside dyslexia tutor. The school believed that the student had not been exposed to enough reading instruction to qualify as dyslexic. While the district believed the student was making progress and doing well, the parents reported that the child was restless, upset and frustrated when studying or doing work at home. The Hearing Officer ordered the student eligible at LD.

> "The school district argues it had no reason to suspect Student might be in need of special education because Student was making progress. This is a close case in that regard to be sure. All of Student's teachers are to be commended for their diligent efforts and commitment in attempting to meet Student's needs. It is clear from the evidence and their testimony that they care deeply about Student and Student did make good grades and demonstrated some educational gains. However, the evidence also showed that despite their best efforts Student continued to struggle with reading—**there is no real dispute that Student needed, and continues to need, accommodations and interventions in order to learn.** The preponderance of the evidence demonstrates the school district should have suspected Student might have an educational need for special education." (Emphasis added).

A little commentary: So what special education does the student require? Interestingly, the Hearing Officer notes a need for continued accommodations and interventions in order to learn. But is that specially designed instruction? The Hearing Officer's Finding of Fact #58 describes some additional services required by the student. "Student needs a specific reading program that is multisensory, phonics-based, sequential, systematic, highly structured, and repetitive enough to provide Student with practice and review over time. Student needs one on one and/or small group reading instruction (1:3 ratio) delivered by a dyslexia specialist or teacher trained in the reading program for at least 45 minute per day." It seems that the Student requires the school's regular education dyslexia program (not RtI), but not specially designed instruction. See the previous discussion of RtI and dyslexia from the Burgundy Book. A final question: did the Hearing Officer order special education eligibility and the dyslexia program because the school would not find the student dyslexic?

Consider the following takeaways with your school attorney to address Child Find and RtI:

1. Texas does not have a current problem with over-identification of students in IDEA.
2. Use of RtI data is not required by the IDEA for evaluation, and suspicion exists among ED, Hearing Officers and courts regarding its use as a means to delay or deny IDEA evaluation.
3. An RtI system that does not allow for a special education evaluation *at any time* raises IDEA child find compliance concerns.
4. An RtI system that is not monitored for IDEA child find purposes is equally problematic.
5. Participants in the RtI process should be well-versed in IDEA, 504 and Texas dyslexia child find.
6. The RtI system must work toward consensus with parents.

7. The importance placed by special education on the gathering of RtI data should be directly proportional to the fidelity with which interventions are determined and provided.
8. The importance placed by special education on the gathering of RtI data prior to evaluation should be directly proportional to the importance placed on the use of that data during the IDEA evaluation itself.

IV. Section 504 and IDEA Child Find.

A. OSEP finds that 504 Eligibility is increasing

In the second paragraph of its analysis of Section 504's influence on special education referral in Texas comes the most important language with respect to OSEP's understanding of 504.

> "OSEP administers the IDEA, and has no enforcement responsibility for Section 504. OSEP is therefore not authorized to monitor the provision of Section 504 services in Texas. However, with regard to the IDEA, OSEP determined that some children in Texas who were suspected of having a disability and needing special education and related services under the IDEA were not referred for an evaluation under the IDEA, because they instead received services under Section 504." *OSEP Letter, page 8.*

That lack of expertise plays large both here, and in the analysis of the state's dyslexia program below. For example, rather than look directly at the Americans With Disabilities Amendments Act of 2008 for evidence on Congress's intent and actions, OSEP looked to other sources.

> "In interviews with OSEP during the monitoring visit, school-based, district-level, and TEA staff explained that it was their understanding that because coverage under Section 504 has expanded, more children can now be considered to have a disability and receive services under Section 504 than in the past.

A little commentary: The author suggests that sometimes Congress tells us what it intended, and that while educators can be found in the teacher's lounge, legislative history cannot. By the way, Congress explains its desire for increased ADA (and similarly 504) eligibility with this language: "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." 42 U.S.C. §12102(4)(A). Note that while OSEP cites the first half of this quote, it goes no further in analyzing Congress' expansion of eligibility. This purpose is supported by Congress' reduction in the substantial limitation standard, a new mitigating measures rule, and new and narrower major life activities as described previously in these materials.

So, without understanding what Congress had in mind, OSEP looked at the growth in number of Section 504 students. "Data demonstrate that a growing number of children with disabilities in Texas received related aids and services under Section 504 in order to access the general education curriculum. According to estimates from the Department's Civil Rights Data Collection, 55,434 children in Texas received Section 504 related aids and services in 2004, and that number grew to 132,078 by the 2011–12 school year."

A little commentary: Implicit in OSEP's focus on growing Section 504 eligibility is OSEP's accusation that kids are being "held back" from IDEA. Missing from the analysis is the fact that the growth is driven by students who previously were ineligible for 504 because the standards were higher for substantial limitation and the mitigating measures rule was not in place. In other words, they were not "disabled enough" prior to 2008. The growth in Section 504 is not at the high end where we find students with more serious impairments and needs, it's at the other end where students are now meeting

lower standards for 504/ADA eligibility. The notion that these "now eligible" students who required a lower standard to get into 504 are being held back from IDEA (which requires much higher levels of impairment than 504) makes no sense.

B. The IDEA "Educational Need" Requirement.

The often-forgotten component of IDEA eligibility is educational need. "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). "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).

Texas hearing officers have agreed that if 504 meets the student's needs, special education is not necessary. *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 modifications. She had great grades and academic recognition on TAAS. "There is no educational need for special education and related services under these circumstances.")

Some other examples. 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 Section 504 evaluation is the appropriate next step. Should 504 fail to meet the student's needs, a special education evaluation would then be appropriate).

A Louisiana 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). *See also, Karnes City (TX) ISD,* 31 IDELR 64 (OCR 1999)(Student successfully served under the regular education state dyslexia program had no educational need for Section 504 services). *See also, Houston County Public Schools,* 35 IDELR 25 (SEA AL. 2001)(Hearing Officer rejected parent argument that ADHD diagnosis requires IDEA eligibility, finding that educational need must be present and is not present on these facts. "Absent

exceptional circumstances, a child suffering from [ADHD] does not require special education and related services. Petitioner does not meet these exceptional circumstances.")

This is complicated analysis. Note that success in regular education or Section 504 is not always an easy thing to determine. *See the conflicting findings of B.M. v. Northside ISD,* Docket #336-Se-0605 (SEA Tex. 2005)(Student with dyslexia and below average IQ did not qualify for special education, as there was no discrepancy and the student was making slow but steady progress.); and *B.C. v. Seguin ISD, Docket #232-SE-0305 (SEA Tex. 2005)*(District violated child find by failing to refer and evaluate student, despite fact that school behaviors "were still problematic, although improving" due to classroom management techniques). While one might hope for a bright line between "needs special education and related services" and "needs are met in regular education with early intervening services, or Section 504" the line is fuzzy at best.

C. OSEP finds that Section 504 is used to delay or deny IDEA referral.

OSEP looked to anecdotes from parents who wanted special education services for their students but got Section 504 instead. The story cited by OSEP involved a parent whose student eventually was evaluated and determined eligible for IDEA after delays in both RtI and Section 504. "This parent's story is just one example of the stories shared with OSEP about delays in trying to secure a special education evaluation when Section 504 related aids and services were already being provided." *OSEP Letter, page 9.* As a result of this line of thought, OSEP asked questions during the monitoring visit about the implementation of 504 in relation to the IDEA. After the visits, OSEP concluded:

> **Student needs special education but is not referred from Section 504**. "Through input from parents and groups in Texas, as well as interviews during the monitoring visit, OSEP staff learned that while a growing number of children with disabilities receive related aids and services under Section 504 -- even when a teacher suspects that one of these children has a disability and needs special education and related services under the IDEA -- the child may not be referred for an initial evaluation under the IDEA in a timely manner if the child is receiving services under Section 504. These practices create an unnecessary delay in the identification of children and in the provision of special education services under the IDEA.
>
> In cases where a child receiving services under Section 504 is suspected of having a disability and needing special education and related services under IDEA, but is not referred at all for an IDEA evaluation, this also would constitute a denial of FAPE under the IDEA.
>
> **Confusion over which program should address the child's needs**? In at least one ISD, when a child was identified as a child with a disability who could be served under Section 504 or the IDEA, the child received an initial evaluation to determine whether services under the IDEA were needed in addition to the related aids and services made available to the child under Section 504. However, comments provided to OSEP with regard to general ISD practices throughout Texas indicated that this is not the general practice in the State. Some school staff differentiated between Section 504 and the IDEA, indicating that if a child demonstrates a need for adapted academic goals or instructional programming, such a need would indicate a reason to suspect a disability, and that the child should be referred for an IDEA evaluation. Teachers in one ISD, and district staff in another ISD, informed OSEP that, in some instances, a child suspected of having a disability and needing special education and related services can be served under Section 504 for about a year before a recommendation for an IDEA evaluation is considered.
>
> Through monitoring visit interviews, OSEP learned that parents, teachers, and other school staff have an inconsistent understanding of when an evaluation under the IDEA may be warranted for a student

served under Section 504. While some teachers noted that such decisions are individualized based on the needs of each child, it was unclear what criteria teachers use to inform such decisions. Information from parents collected during the listening sessions conducted prior to on-site monitoring also indicated parents' frustration with not understanding the differences between Section 504 and the IDEA." *OSEP Letter, pages 9-10.*

A little commentary: The author agrees that it is difficult for teachers to determine the difference between 504 and IDEA services (and interventions for that matter). Unfortunately, that problem was created and can be easily solved by OSEP which has chosen not to help. When the legal definitions of "specially designed instruction," "special education" as it is used in the 504 regulations, and regular education are increasingly blurring together, there is little hope of over-worked educators making consistent child find decisions correctly. This dynamic is addressed in greater detail in the discussion of 504 services below.

D. Some thoughts on 504 Child Find

1. The Section 504 Duty to Refer & the Student with a Health Plan

Some districts ignored major life activities other than "learning." Some of the first Letters of Finding issued by OCR following the implementation of the ADAAA in 2009 exposed the problem of schools hyper-focusing on the major life activity of learning and ignoring the possibility of Section 504 eligibility due to substantial limitation in any of the other major life activities. A few examples….

Asthma and the major life activity of "learning." In *Memphis (MI) Community Schools,* 54 IDELR 61 (OCR 2009), the school had taken the position that a student could *only* qualify for Section 504 if the student's physical or mental impairment substantially limited the major life activity of learning. The student at issue was asthmatic, and his impairment did not impact his learning or education. The student received a medical management plan. The "District advised OCR that, prior to December 2008, it generally had been using medical management plans instead of Section 504 plans for students with impairments who were not displaying difficulties in academic performance but who needed assistance with medical needs. If the impairment was determined not to have an impact on the student's education, the District would determine that the student did not qualify for a Section 504 plan and would instead provide a medical management plan for medical needs."

However, after training on the ADA Amendments… "The District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment." To correct its error, the district sent a letter to parents of students on health plans indicating that it would be reviewing each child's situation under the correct standard. Additionally, under a resolution agreement, new Section 504 procedures were to be drafted and published to all parents and students, and training provided to relevant staff on Section 504. The district also agreed to reevaluate any student who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-09 school year using the correct definition of disability (as opposed to the school's previous understanding) as required in the Section 504 regulations and the ADA Amendments Act.

Bone cancer and "learning." In *Union City (MI) Community Schools,* 54 IDELR 131 (OCR 2009), the District refused to provide accommodations for a student with bone cancer in a Section 504 plan because the child's impairment did not impact the major life activity of learning. OCR noted, however, that the impairment periodically affected the student's ability to walk, climb steps, participate in P.E., attend field trips, and obtain transportation services. OCR held that the district's

use of an unduly restrictive definition of major life activities (excluding consideration of those other than learning) and its failure to evaluate the student in a timely manner denied the student FAPE.

Other physical impairments and "learning." In *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009), a Section 504 committee responded to a parent referral and addressed the potential Section 504 eligibility of a student with irritable bowel syndrome (IBS) and another digestive condition. The team noted that the student was making good grades in advanced classes with the help of accommodations provided under a campus student services team (SST) process. Thus, the team determined that the student's condition did not substantially limit his learning, and that he was not eligible under Section 504. OCR found the district in violation of the law, since the team did not address whether the student's IBS substantially limited his major life activity of digestive function (and presumably bowel function). In addition, OCR found that the team failed to consider that the condition caused frequent absences and a declining GPA when it determined that his condition did not substantially limit his learning. *See also North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009) (school failed to properly consider eligibility of child with peanut allergy when it looked only at the degree the condition affected academic performance).

A little commentary: While these misconceptions of eligibility were uncovered following the ADAAA, OCR warned as early as 1995 that schools should look at other major life activities as well.

> "Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school." *Letter to McKethan,* 23 IDELR 504 (OCR 1995).

OCR provided some additional examples of impairments impacting other major life activities in the 2012 guidance. "(1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing; (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and (3) a student with ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system." 2012 DCL, p. 6, Question 7.

A history of health plans for physical impairments rather than Section 504 Plans. By way of reference, the author uses the phrase "health plans" as a catch-all term to describe protocols or processes put in place for an individual student to maintain the student's health at school or to respond to a health emergency at school. In everyday school usage, a "health plan" is limited to health issues and rarely addresses the educational supports or services that a student might need due to an impairment. Some schools use phrases like "individualized health care plan," "emergency plan," or a name that directly references the impairment like "allergy plan" to convey the same idea.

In addition to districts that simply failed to consider the impact of physical impairments on major life activities other than learning, other districts used something akin to tiered intervention thinking, and concluded that Section 504 was not necessary if a health plan could meet the student's needs. For example, in a pre-ADAAA Indiana case, OCR found that the District's practice of not serving all students with diabetes under Section §504 or IDEA was appropriate, as long as such students had protocols in place to address their medical conditions, and the District included language in future student/parent handbooks that read "Section 504 plans may be developed for those students with a disability whose parents/guardians are able to provide sufficient medical documentation that indicates that there is a need for such services." *Hamilton Heights (IN) School Corp.,* 37 IDELR 130 (OCR

2002). **This "regular ed health plan makes §504 unnecessary" approach is of course complicated by the ADAAA's mitigating measures rule.**

Post-ADAAA, OCR has determined that health plans and emergency plans are mitigating measures. *North Royalton (OH) City School District,* 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADAAA, North Royalton initially found the student with an anxiety disorder and tree nut allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan. OCR determined that at no point was the student denied appropriate services. **Further, OCR did not dispute the school's claims that the student never had a reaction to nuts at school, and never visited the health services coordinator due to anxiety or allergy issues.** Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his §504 plan on Jan. 1, 2009. As the student's needs had been met throughout, OCR found no violation with respect to the child's services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning (like the *Memphis* case, previously discussed). With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations. **"In doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students' disability status."**

A little commentary: A fact revealed during OCR's investigation leads to an interesting question. "The district also stated, however, that no other student with a food allergy being served under an EAP — approximately 40 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADAAA took effect on January 1, 2009." **Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made.** Instead, OCR was satisfied with the following: "The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district's Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child's medical impairment substantially limits one or more major life activities." *But see also, Isle of Wight County (VA) Public Schools*, 111 LRP 1964 (OCR 2010) (as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504); *Memphis (MI) Community Schools,* 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year). **Note the absence of language from OCR indicating that all students on health plans are Section 504 eligible.**

Given the history described above, OCR provided the following language on the adequacy of health plans versus Section 504 plans in its 2012 guidance. The question focuses on students served on health plans prior to the ADAAA and whether that status can continue without Section 504 eligibility *after* the ADAAA.

> "Q13: Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?
>
> A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation. **For example, before the Amendments Act, a student with a peanut allergy may not have been**

considered a person with a disability because of the student's use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student's school may have created and implemented what is often called an 'individual health plan' or 'individualized health care plan' to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures. Now, after the Amendments Act, the effect of the epipen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. **If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards.** In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation." 2012 DCL, Question 13, p. 9-10 (emphasis added).

A little commentary: If, on the other hand, there is *no* belief that the student needs special education or related services due to her peanut allergy, she has no right to evaluation, placement and the procedural safeguards. Her health plan would be sufficient. *See, for example, Cleveland (MT) Elementary School District No. 14,* 111 LRP 34458 (OCR 2011)(As part of a resolution agreement, the District agrees to draft policies and procedures that "provide each student with the diabetes management services the student needs, consistent with the student's Section 504 plan, individualized education program, or individual health plan.").

The Section 504 Duty to Evaluate. The school's duty to evaluate under Section 504 is triggered by the school's suspicion that the student is disabled and in need of services. The Section 504 regulation on evaluation provides: "A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 CFR §104.35(a). In short, a student should be referred to §504 when the District believes that the student may be eligible, i.e., when the District believes that the student has a physical or mental impairment that substantially limits one or more major life activities, AND believes that the student is in need of either regular education with supplementary services or special education and related services. *Letter to Mentink,* 19 IDELR 1127 (OCR 1993). This trigger did no change with the ADAAA, as the 2012 OCR guidance makes clear, a school district must conduct an evaluation of any individual who because of disability "needs or is believed to need special education or related services." 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)).

The duty to offer evaluation does not depend on parent request. *West Contra Costa (CA) Unified School District,* 42 IDELR 121 (OCR 2004)("The District had this obligation under Section 504 whether or not the parent made a request for an assessment.") What choices does the school have when parents request a Section 504 evaluation? There are two: evaluate the student OR refuse to evaluate and provide the parent with Section 504 notice of rights. *See, for example, Bryan County (GA) School District,* 53 IDELR 131 (OCR 2009)("Under Section 504, upon receiving notice of a parent's belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that

the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights.").

The post-ADAAA disconnect between §504 eligibility and the §504 duty to evaluate. Prior to the ADAAA, most school districts operated under the assumption that Section 504 eligibility required (1) a physical or a mental impairment that substantially limits one or more major life activities, and (2) need for accommodations or services. Just as IDEA includes a "needs special education and related services" requirement for eligibility, the assumption was that Section 504 had a similar "needs services" requirement. This thinking logically followed from the regulatory trigger for the school's duty to evaluate under §504—the school has a duty to evaluate when it suspects disability together with the student's need for services. §104.35(a).

Post-ADAAA Section 504 eligibility is not contingent on a student's need for services. At least two OCR decisions in the last few years (and the January 2012 Dear Colleague Letter) highlight a view of Section 504 eligibility not previously recognized by most public schools. In these decisions, OCR has separated the eligibility questions from the question of whether the student needs a Section 504 plan. *See, e.g., Memphis (MI) Community Schools,* 54 IDELR 61 (OCR 2009) **("The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student's educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate").** *See also, Oxnard (CA) Union High School District,* 55 IDELR 21 (OCR 2009)(applying similar analysis to mitigating measures, OCR wrote: "Though the positive impact of accommodations is pertinent in evaluating the effectiveness of those accommodations, their impact should not be conflated with the issue of eligibility").

The result of the new ADAAA rules is a "disconnect" between Section 504 eligibility criteria and the Section 504 duty to evaluate. To trigger the Section 504 duty to evaluate, there must be suspicion of need for special education or related services. However, to be a student with a disability under Section 504, no need for special education or related services is required. Where a student with an impairment is not in need of "special education or related services" (as that term is used in the 504 regulations), the plain language of the §504 regulation on evaluation is not triggered. Consequently, an evaluation of this type of student would likely occur only in response to parent referral.

So, which students with physical impairments and medical needs should the school refer? OCR's January 2012 guidance warns schools that a pre-existing health plan does not satisfy the FAPE obligation if the student would be entitled to FAPE upon appropriate evaluation. "As described in the Section 504 regulation, a school district must conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services, and must do so before taking any action with respect to the initial placement of a person in regular or special education or any significant change of placement." 2012 DCL, Question 11, p. 8-9. The question then is which kids on health plans to refer? **The safest, most conservative position is to refer and evaluate under Section 504 all students on health plans. Any other approach is subject to some degree of risk and should be discussed with your school attorney prior to proceeding.**

Should your district desire a more targeted response, consider developing an approach with your school attorney that includes the following considerations.

(1) A review of OCR Letters of Finding where health plans are at issue reveals the following:

- Not all students with a health plan will need to be referred for Section 504 evaluation. *(See, for example, North Royalton, Isle of Wight County).*

- Students on health plans cannot be categorically excluded from consideration for Section 504 evaluation, even if their health plans appear to allow these students equal participation and benefit in the school's programs and activities *(see Tyler,* below).

- Each student on a health plan should be considered individually to determine whether a referral for Section 504 evaluation is appropriate. Put simply, significant differences exist among health plans, even for students with the same impairment (see factors below).

- The health plan provides evidence of the student's need for services from the school, as well as insight into the impact of disability, giving the school information that can contribute to its thinking on whether the student might be substantially limited by his impairment, and thus needs to be referred.

(2) Where the student needs the school to administer medication to meet a student's educational needs as adequately as the needs of nondisabled students are met, whether as part of a health plan or as a stand-alone service, OCR believes the student is receiving a related service triggering the duty to evaluate under Section 504. 2012 DCL, Question 8, p. 7.

OCR's test: "For the purposes of Section 504, administration of medication is considered a related service if that service is necessary to enable the handicapped person to benefit from the educational program. The purpose of the medication prescribed for [ ] was to modify symptoms of his diagnosed ADHD and improve his ability to benefit from the educational process." Since the student was not administered his Ritalin on 13 occasions because he did not report to the principal's office, and the medication was necessary for him to benefit from education, the school denied the student FAPE by failing to administer medication as a related service. *San Ramon Valley (CA) Unified School District,* 18 IDELR 465 (OCR 1991); *See also, Berlin Brothersvalley (PA) School District,* 353 LRP 9134 (OCR 1988)("Related services refer to those services which enable a handicapped student to benefit from the regular or special education which is provided. Thus, where one of the District's handicapped students requires the administration of medication in order to benefit from his or her educational program, the District is obligated to ensure that the medication is administered.").

What if state law already allows for administration for all kids? As a practical matter, OCR looks to the school to ensure that FAPE occurs. The student cannot be made responsible for delivery of required services. *Tempe (AZ) Union High School District,* 102 LRP 8296 (OCR 2001)("OCR concluded that EC did not receive his medication as scheduled because he failed to follow the procedure established by his IEP. The nurse acted reasonably by sending for him two times. OCR discovered no evidence that the District failed to provide the student with his medications at all other times. We find that one incident does not constitute a failure to provide related aids and services. However, if the student continues to fail to follow the procedure established by his IEP, the District should convene an IEP meeting to develop a more effective method to ensure that the student receives his medication at the required intervals. Therefore, OCR found that the District is not in violation of Section 504 or Title II with regard to this allegation."). *See also, Fairfield-Suisun (CA) Unified School District,* 353 IDELR 205 (OCR 1989)("Because [ ] handicap seriously interfered with his ability to learn without medication, the District's FAPE obligation clearly required that he receive adequate assistance in taking his medicine. There is substantial evidence that the District took steps to encourage [ ] to take his medication daily. However, by requiring that a ten-year-old child retrieve his own medicine from the nurse's office, and by refusing to provide daily monitoring by an adult, it failed to fulfill its obligation to provide a FAPE.")

Can the school require the parents to sign a waiver or a release of liability in exchange for the related service of administration of medication? Maybe? "The regulation contains no provision permitting a recipient to make an appropriate education contingent upon a release of liability from the parent. Accordingly, we conclude that, as applied to handicapped students, the District's policy granting school officials unspecified discretion as to whether they will administer the medication and requiring the parents of handicapped students to sign a liability waiver in order for officials to consider administering the medication is in violation of the Section 504 regulation at 34 C.F.R. Section 104.33(a) and (b)(1)." *Berlin Brothersvalley, supra. See also, In re: Student with a Disability,* 103 LRP 57786 (SEA NM 2003)("The District's position in this case, of requiring that the Parents sign a liability waiver or themselves come to the school each day to administer the Student's medication, runs contrary to IDEA."); *but see, Pearl (MS) Public School District,* 17 IDELR 1004 (OCR—Dallas 1991). "Our review of the policy established that the medication is to be administered at a set time/place by school personnel working under the supervision of the school nurse. The policy also provides that parents are required to sign a parental permission form and a waiver to protect school personnel from liability that may result from the dispensing of a controlled substance. Although the District maintained a no-medication policy which discriminated against ADD students requiring the administration of medication during school hours in order to benefit from their education program, we find, that the District has corrected the violation with respect to its medication policy on December 17, 1990, and is currently following the policy in compliance with 34 C.F.R. 104.35(a) and (b) with respect to this issue."

(3) Where the student, in addition to a health plan, receives accommodations or services from the school to address academic, social, emotional, physical or behavioral needs, the student should be evaluated under Section 504 and no additional analysis is necessary.

(4) If the student is only receiving a health plan from the school (and no other services or accommodations), the school should consider the following factors as part of the decision to refer and evaluate the student, together with other factors as determined appropriate by the school:

- The frequency of the required health plan services. (For example, where services are rarely needed during the school year, the student is less likely to require a Section 504 evaluation than when health plan services are required on a daily or weekly basis.)

- The intensity of the required health plan services. (For example, where a student who self-tests and administers medication for diabetes needs access to the nurse for questions or occasional assistance, the student is less likely to require a Section 504 evaluation than a student who relies on the nurse or other school staff for daily testing and medication due to diabetes.)

- The complexity of the required health plan services. (That is, do the services require a complex or systematic approach to integrate or coordinate efforts of staff and others to meet the student's needs? For example, the more a student requires constant monitoring and exchange of information among staff, parents, and doctor to meet his health needs, the more likely he requires a Section 504 evaluation.)

- The health and safety risk to the student if health plan services are not provided or are provided incorrectly. (For example, the greater the risk of serious injury or death to the student from the failure to provide appropriate health plan services, the more likely the student requires a Section 504 evaluation.)

- In analyzing the student's needs with respect to these factors, no one factor is necessarily dispositive in every decision. The weight to be given any factor is to be determined by the school as appropriate in its case-by-case determination pursuant to the regulations.

(5) Where the student is Section 504-eligible (a student with a disability under Section 504) a health plan should be governed by the Section 504 procedural safeguards even if the health plan is separate from the Section 504 Plan and even if no Section 504 Plan of academic accommodations or services is provided.

A little commentary: Resist the urge to argue that an effective health plan is always enough. OCR does not agree. OCR's concern with respect to serving potentially Section 504-eligible students through health plans rather than under Section 504 is the lack of procedural compliance and safeguards. *See, for example, Tyler (TX) ISD,* 56 IDELR 24 (OCR 2010)("In relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the TISD circumvents the procedural safeguards set forth in Section 504."); *Dracut (MA) Public Schools,* 110 LRP 48748 (OCR 2010)("A significant distinction between serving the Student on a Section 504 Plan which references a Health Plan, versus a health plan alone, is that the Student without the Section 504 Plan does not have any of the procedural protections that he is afforded under Section 504."). A 2011 letter of finding from Virginia simply declares that when an eligible student has a health plan, he is receiving services under Section 504.

> "The Division states there is no reference to a Health Treatment Plan in any part of the June 2009 IEP. There is only a reference of 'cool temps' on the testing accommodations sheet and documentation of the ice pack use in a daily log. Because the Division did provide some evidence that it was complying with the Health Treatment Plan in assisting the Student with body temperature regulation, OCR finds there is insufficient evidence of a violation of Section 504. **However, OCR cautions the Division that, where any student with a disability has a health plan in place in order to address the impact of a disability, OCR considers this student to be receiving services under Section 504, whether or not the health plan is formally incorporated into an IEP or Section 504 Plan.** Thus, the student's health plan is to be developed and implemented according to the requirements of Section 504, and the student and his or her parents are entitled to Section 504's procedural safeguards with regard to the health plan." *Prince William County (VA) Public Schools,* 111 LRP 49536 (OCR 2011)(emphasis added).

2. The Section 504 Duty to Refer & the Student in RtI/Early Intervention

IDEA & Early Intervention/RtI. Special education has clearly embraced RtI and early intervention in an effort to solve a variety of problems with respect to eligibility and to restore an appropriate, cooperative, relationship between special education and regular education. At the risk of over-simplification, consider the following elements in the successful relationship between IDEA and RtI/early intervention. First, the relationship arises from a desire to reduce IDEA eligibility caused by over-identification and improper identification by emphasizing the importance of regular education first, and beefing-up the resources and interventions available to struggling students through regular education. Second, IDEA reserves specially designed instruction for IDEA-eligible students who cannot benefit from education unless they have specially designed instruction. If the student's needs can be met without special education, the student is not eligible for special education.

Section 504 & RtI. Unlike its efforts in IDEA (where it was concerned in part with over-identification), Congress made changes in the ADAAA to *increase* eligibility. Those changes apply to Section 504 as well. One of those changes was a new mitigating measures rule, which prohibits the consideration of the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity. Specifically listed among the mitigating measures to be "filtered out" during the Section 504 Committee's evaluation is "reasonable accommodation." OCR has determined that the phrase "reasonable accommodations" includes things

such as accommodations and assistance provided to students through a student services team or early intervention team, *Oxnard (CA) Union High School District,* 55 IDELR 21 (OCR 2009); and informal help provided consistently by classroom teachers, *Virginia Beach (VA) City Public Schools,* 54 IDELR 202 (OCR 2009). The inclusion of those two activities would seem to logically include RTI as well.

How does this impact the line between RtI and Section 504 eligibility for students who need support due to impairments? Consider these two portions of the Revised Q&A.

> **"31. What is a reasonable justification for referring a student for evaluation for services under Section 504?** School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the student, because of disability, needs or is believed to need such services." Revised Q&A, Question 31.

> **"40. What is the difference between a regular education intervention plan and a Section 504 plan?** A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school." Revised Q&A, Question 40.

More recently, the **July 2016 ADHD Resource Guide** spends three pages on this issue, alerting schools that while RtI programs can be beneficial, they should not be applied in a way that unduly denies or delays evaluations when the suspicion of disability and need for services exists. U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guid*e, 68 IDELR 52 (July 2016). OCR states that **"school districts violate this Section 504 obligation when they deny or delay conducting an evaluation of a student when a disability, and the resulting need for special education or related services, is suspected."** *Resource Guide* at p. 15. While OCR agrees that "interventions can be very effective and beneficial," rigidity in implementing RtI can lead to problems with §504 child-find compliance. **"If the district suspects that a student has a disability and because of the disability needs special education or related aids and services, it would be a violation of Section 504 to delay the evaluation in order to first implement an intervention that is unrelated to the evaluation, or to determining the need for special education or related aids and services."**

A little commentary: The key point is that RtI interventions should not be applied or viewed as a "prerequisite" to §504 evaluations, or as a required step prior to deciding to evaluate a student under §504. OCR thus states that districts tend to run afoul of §504 child-find and evaluation requirements when they "rigidly insist" on implementing RtI before conducting §504 evaluations, when they inflexibly apply tiered intervention strategies sequentially before considering evaluation, and when they "categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation." *Id.* at p. 17. Interestingly, this position seems at odds with both the current RtI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation.

> "Under Section 504, prior to evaluating a student's need for special education or related services, the district must have reason to believe that the student is having academic, social or behavioral problems that substantially affect the student's overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such

interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services." *Karnes City (TX) Independent School District,* 31 IDELR 64 (OCR 1999).

What are "special education or related services" under the Section 504 regulations? *Fergusson-Florissant R-II (MO) School District,* 56 IDELR 56 (OCR 2010). OCR upheld a school's determination that a student diagnosed with Asperger's was not eligible under Section 504 because he was not substantially limited. Interestingly, the letter references a lengthy list of parent demands for accommodations (including an extra set of textbooks at home, daily checking of his planner, extra time on assignments), together with the school's response that many of the requested items were already provided. The parent complained that the school focused too heavily on the student's academic success in determining eligibility (the student had a 3.875 average in 7th grade, and carried a 4.0 on a 4-point scale in 8th grade). OCR rejected that allegation due to evidence that the student's social interactions, standardized test scores, and adaptive behavior were also considered. Missing from the analysis was any mention of the positive impact of the mitigating measures (accommodations already provided the student) on the major life activity. In essence, most of what the parent wanted was already provided informally through regular education. The school does not appear to have done any mitigating measures analysis as part of the Section 504 evaluation (there is no reference to such analysis in the letter) and OCR says nothing of the failure, despite the fact that the student is determined ineligible because of a lack of substantial limitation. It's a strange letter, but does hearken back to a *Karnes City*-like approach (but does so without any analysis, and perhaps, without intending to do so).

Does early intervention/RtI = special ed services for purposes of the Section 504 duty to evaluate? It appears that some wiggle room exists between the two. Note the following finding in a Mississippi case. A student with ADHD referred by the parent for Section 504 evaluation was served under the school's RtI program in Tier II. Because of the success of the interventions, the school believed that a Section 504 evaluation was not required as the student did not appear to need special education services. The interventions were significant. **The student was in Tier II and received, in both math and reading, five fifty-three minute computer lab sessions per week for remediation, together with one-to-one tutoring, and interventions to address his behaviors including an FBA, meetings with a behavioral specialist, behavioral timeouts, teaching of alternate behaviors, refocusing on work, and verbal praise.** Said OCR "The evidence was sufficient to give the district a reasonable belief that the complainant's son did not need special education at the time of the request." Consequently, there was no violation of the Section 504 duty to evaluate. OCR did find a violation due to the school's failure to provide the parent with the notice of rights when the school determined that it would not be conducting an evaluation. *Stone County (MS) School District,* 52 IDELR 51 (OCR 2008). *Fergusson* and *Stone County* offer quite a different approach than the *more recently issued* Revised Q&A and ADHD Resource Guide.

Bottom line on the Section 504-RtI relationship: We're getting something of a mixed message, so caution is the order of the day. Due to changes from the ADA Amendments and OCR's concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to RtI or early intervention need not be *considered* for possible Section 504 referral. **Schools should consider with the school attorney an approach that does not categorically remove from consideration for Section 504 referral students with physical or mental impairments whose disability-related needs are successfully met through RtI or early intervention.** When a parent request for Section 504 evaluation is refused, the parent must be provided with notice of Section 504 rights.

3. Temporary Impairments and the Duty to Refer for Section 504 Evaluation

Are only life-long disabilities covered by Section 504? In a 1994 response to the question "does the ADA require school districts to provide services to students with broken limbs," OCR provided the basis for its position on temporary impairments. *Letter to Rahall,* 21 IDELR 575 (OCR 1994). It's a lengthy excerpt but it's very instructive.

> "Your third question asks whether the ADA requires that school districts provide services to students who are temporarily disabled by broken limbs. **Neither Section 504 nor the ADA contemplate that only 'life-long' disabilities are covered. The answer depends, once again, on whether the broken limb constitutes an impairment that significantly limits a major life activity. The significance of the impairment relates both to its severity and to its duration.** Coverage depends upon an evaluation of all the facts in each situation.
>
> Some examples may help in describing how this evaluation should work. If a right-handed student broke his left arm and the break is expected to heal normally, without complications, this would probably not constitute a disability. **The reason is that the impairment will heal within a short period of time and, even during its worst phase, would not prevent the student from attending school or from doing written assignments.**
>
> On the other hand, if the student broke both legs, recovery is delayed by complications and surgeries, and the entire period of disability will last for many months, the condition would likely be covered. The impairment prevents the student from walking and will not heal within a period of time that is typical for such injuries. Furthermore, the amount of time is sufficiently long to suggest that the student's educational program will be significantly disrupted.
>
> **There are no hard and fast rules as to the specific temporary impairments that may constitute disabilities under Section 504 and the ADA.** Therefore, it is not possible to list conditions that will always be considered disabilities. Schools must evaluate these conditions on a case-by-case basis. If, after the evaluation, the conclusion is that the condition does constitute a disability, the school must evaluate the student's needs. However, the evaluation does not have to be extensive or time consuming, but simply enough to determine what services or aids the child needs in order to continue to receive an appropriate education." (Emphasis added).

So in the absence of a hard and fast rule, a review of OCR Letters of Finding and guidance is required to figure out a course of action. Let's start with the existing guidance. Be prepared, the guidance is all over the place.

How does the Section 504 Committee deal with temporary impairments? The question arises from the recognition that some impairments are so temporary that it makes little sense to worry about eligibility and services since the student will likely recover before the parent returns the request for consent for Section 504 evaluation. OCR provides the following guidance: **"A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time."** Revised Q&A, Question 34. Hence, impairments that do not last "an extended period of time" would not create eligibility, and presumably, would not trigger the school's duty to evaluate. OCR continues: **"The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual."** Id.

Does extended period of time refer to the ADA's six-month rule with respect to duration of an impairment? The ADAAA does in fact include a reference to a six-month standard for an impairment to be a disability, but the reference is frequently misunderstood. OCR references the six-month rule in the Revised Q&A at Question #34. "In the Amendments Act (see FAQ 1), Congress clarified that an individual is not 'regarded as' an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." Note that the reference is to the third prong of eligibility (the student is regarded as disabled) as opposed to a student with an actual, present impairment. Section 504 Committees do not look at prong 2 or prong 3 as part of the evaluation. The Fourth Circuit recently confirmed the limited application of the six-month rule to eligibility under the "regarded as" prong. *Summers v. Altarum Institute Corporation,* 48 NDLR 95 (4th Cir. 2014)(**"while the ADAAA imposes a six-month requirement with respect to 'regarded-as' disabilities, it imposes no such durational requirement for 'actual' disabilities, thus suggesting that no such requirement was intended."**

OK, so if six months isn't the answer what does "extended period of time mean"? Extended period of time + reasonable. *Anaheim City (CA) School District,* 115 LRP 19319 (OCR 2014). "On August 12, 2014 the Complainant informed the District that the Student had suffered a severe leg break during the summer and was required by his doctor to use a wheelchair for four weeks. Before classes started on August 22, the School Nurse drafted an Individualized Health Plan (IHP) after some consultation with the Complainant, and a copy was provided to the Complainant on August 21." The IHP provided that a staff member would push the student in his wheelchair to lunch, recess, and the restroom. Commenting on the anticipated duration of the student's impairment, OCR wrote

> "'General Guidance' states that for a temporary impairment to be considered a disability it must result in a 'substantial limitation of one or more major life activities for an *extended period* of time' (our emphasis). **The interpretation of 'extended' should not contravene the regulatory standard under Section 504 for reasonableness, and should not be interpreted rigidly. In particular, the eligibility determination of whether a temporary impairment qualifies as a disability must be conducted on a case-by-case basis, through an appropriately individualized assessment."**

A little commentary: It appears then that OCR's use of "extended period of time" adds little to the existing guidance on case-by-case analysis.

What about a common sense rule, that if the impairment won't outlast the 504 process, there's no need to pursue an evaluation? OCR has indicated that in the absence of timelines in Section 504, the school can look to state IDEA rules, and apply those timeframes by analogy. For example, in *Rockbridge County (VA) School Division,* 57 IDLER 144 (OCR 2011), OCR provided the following guidance. "Section 504 does not contain a specific requirement for the period of time from a parental request or consent for an assessment to the actual assessment, but requires that an evaluation be conducted within a reasonable period of time." A "reasonable time" is generally viewed as the time allowed by IDEA rules for similar events—i.e., how long does your state allow between consent and completion of the evaluation? *See also, Rose Hill (KS) Public Schools, USD #394,* 46 IDELR 290, 106 LRP 35103 (OCR 2006).

So, if the impairment will be healed or disappear before state IDEA rules require you to complete the evaluation and meeting to determine eligibility and services, the impairment is too temporary to be substantially limiting, right? Not necessarily. Consider this language from *Anaheim City,* discussed above.

> "However, OCR was concerned that a period of five weeks elapsed between the Complainant's request for a Section 504 evaluation, and the evaluation meeting itself, and that assessment took 34 days for completion. While we recognize that the Complainant did not return the signed Section 504 assessment form until the first week of September, **the District indicated to the Complainant that it had up to sixty days to complete assessments, and informed OCR that it was following the guidelines under the Individuals with Disabilities in Education Act (IDEA).** The sixty-day period refers to the maximum time within which assessments must be completed, while the regulatory standard for an appropriate period under Section 504 is based on reasonableness. **Given the District's awareness that the Student had an obvious physical impairment requiring a wheelchair, a reasonable time-frame for assessment should not be extensive." (Emphasis added).**

In other words, while schools can look to the IDEA timelines, Section 504's reasonableness requirement means that some impairments won't require such lengthy data-gathering, and evaluation should occur sooner. **Consequently, that the impairment is not expected to outlast the IDEA timeliness for evaluation and placement is no safe harbor if the impairment is sufficiently straightforward enough to allow for a speedier evaluation and placement.**

Homebound instruction, least restrictive environment, and the duty to refer for temporary impairments. Homebound instruction, or some similar label, is used to describe instruction provided in the home for Section 504-eligible students. Note that under Section 504, a student's physical or mental impairment that requires him to be educated at home, while not automatically creating Section 504 eligibility, likely triggers the school's duty to refer the student to Section 504 for evaluation.

Homebound when the school lacked a nurse to review a student's health plan as required by state law. *Lourdes (OR) Public Charter School,* 57 IDELR 53 (OCR 2011). Oregon law required that school health plans be reviewed by a nurse each year. The charter school lost its nurse and had not been able to hire a replacement. Lacking appropriate staff to address the medical needs of a student with diabetes via the health plan, the school placed the student on homebound instruction. OCR determined that this was a significant change of placement for the student because of a physical impairment requiring a Section 504 evaluation first. In essence, the school suspected disability and the need for services. Thus, the school had a duty to conduct a Section 504 evaluation before it could place the student on homebound instruction. "Further, because LPCS placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously and subsequently been provided, LPCS failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a)."

Homebound is a significant change of placement. *Logan County (WV) Schools,* 55 IDELR 297 (OCR 2010). OCR determined that the school's placement of the student on homebound was a significant change in placement "as it changed the type, nature, length and duration of the education program he received when not on homebound instruction" and should have been preceded by a Section 504 evaluation.

Home-hospital as a *substitute* for a 504 evaluation? *Cobb County (GA) School District,* 51 IDELR 54 (OCR 2008). In response to a student with mononucleosis who had missed seventeen days of school due to illness, the school offered to reduce the student's course load and provide three hours per week of in-home tutoring. No Section 504 evaluation was offered. The student's physician indicated (after the student's return to school in January for roughly a week) that she would be out of school through the end of the semester.

> "The District advised OCR that it never evaluated the Student to determine if she was eligible for services as a student with a disability because it believed that her medical condition was temporary and that the District was providing her sufficient educational services in accordance with its H/H program. Applying the Section 504 principles set forth above, however, OCR finds that the District, at least by the time it received notification that the Student would be out of school for the remainder of the spring 2007 semester, should have conducted an evaluation of the Student to determine her eligibility to receive special education and related aids and services."

OCR found the school in violation of Section 504 for its failure to offer a Section 504 evaluation.

A little commentary: OCR's position creates a wrinkle in state and school policies/procedures that attempt to address home instruction outside of the procedural safeguards of Section 504. While not all students confined to the home and receiving services there will be Section 504 eligible, the school's decision to serve students at home because of a physical or mental impairment means (at least to OCR) that such students get to home instruction via a Section 504 evaluation.

Unfortunately, even the "evaluate where LRE is changed due to homebound" rule is not universally accepted by OCR. *Boling (TX) Independent School District,* 110 LRP 48659 (OCR 2009)(OCR finds no violation where homebound was provided without a Section 504 evaluation due to school's belief (based on a series of representations from the parent) that the student's medical condition was temporary, and he would be returning to school shortly); *Maderia (OH) City Schools,* 41 IDELR 217 (OCR 2003)(Student recovering from foot surgery keeping him out of school for six weeks was served with a home tutor and the provision of school assignments pursuant to the school's extended absence policy. "Factors to consider in assessing whether an impairment substantially limits a major life activity under Section 504 or Title II include the extent, duration, and impact of the impairment. Temporary, non-chronic impairments, such as a broken leg that heals normally within a few months, are not commonly regarded as disabilities under Section 504 or Title II. With respect to broken limbs, only in rare circumstances would the degree of the limitation and its expected duration be substantial enough to amount to a determination that the temporary disability constitutes a disability." No duty to evaluate was triggered.) **Note that LRE was not discussed in either *Boling* or *Maderia*.**

"Services alone don't replace a failure to offer a 504 evaluation when on offer is required. *Bradley County (TN) Schools,* 43 IDELR 143 (OCR 2004). The school provided a variety of services including home instruction to a student following a serious motorcycle accident, but did not conduct a Section 504 evaluation. In response to the school's argument that it provided FAPE, OCR did not overlook the school's obvious efforts to assist the student. On the contrary, OCR recognized the efforts extended on the student's behalf, but noted that the 504 regulations required something more.

> "The District had numerous meetings with the complainant and the Student in efforts to help him complete course requirements for English 12. But the fact remains that these evaluation and placement decisions were not made by a Section 504 review committee in accordance with the evaluation and placement procedures required by OCR's regulations. The purpose of these requirements is to assure that an informed decision is made as to a student's eligibility and need for services. As the District did not follow these procedures, there is no way to know if the services that were provided to the Student actually were appropriate."

What do we do about concussions? While broken limbs and recovery from surgery have traditionally been the most common sources of questions on temporary impairments, concussion seems to be trending now. Whether a result of football, soccer, cheerleading, a car accident or some other cause, concussed students are increasing common in public schools. Concussion raises

interesting issues with respect to both evaluation (is this temporary, and if so, how temporary?) and services. Note that these materials will not analyze "return to play rules" that now exist in many states (for example, see TEXAS EDUCATION CODE §38.151 ET. SEQ.) as these rules typically apply only to athletic activity and do not extend into the classroom or address the student's access to education generally.

A little background on concussion from the Center for Disease Control (CDC) "Traumatic brain injury (TBI) is a major cause of death and disability in the United States, contributing to about 30% of all injury deaths. Every day, 138 people in the United States die from injuries that include TBI. **Those who survive a TBI can face effects lasting a few days to disabilities which may last the rest of their lives.** Effects of TBI can include impaired thinking or memory, movement, sensation (e.g., vision or hearing), or emotional functioning (e.g., personality changes, depression). These issues not only affect individuals but can have lasting effects on families and communities.

A TBI is caused by a bump, blow, or jolt to the head or a penetrating head injury that disrupts the normal function of the brain. Not all blows or jolts to the head result in a TBI. The severity of a TBI may range from 'mild' (i.e., a brief change in mental status or consciousness) to 'severe' (i.e., an extended period of unconsciousness or memory loss after the injury). **Most TBIs that occur each year are mild, commonly called concussions….**

In 2009, an estimated 248,418 children (age 19 or younger) were treated in U.S. EDs [emergency departments] for sports and recreation-related injuries that included a diagnosis of concussion or TBI. From 2001 to 2009, the rate of ED visits for sports and recreation-related injuries with a diagnosis of concussion or TBI, alone or in combination with other injuries, rose 57% among children (age 19 or younger)." TRAUMATIC BRAIN INJURY IN THE UNITED STATES: FACT SHEET, CDC January 12, 2015, http://www.cdc.gov/traumaticbraininjury/get_the_facts.html. Bracketed material and emphasis added by the author.

Concussion as a temporary impairment. Like any other impairment, the effects of a TBI will vary in terms of duration and effect/impact.

> **"A TBI can result in health effects that vary in intensity, length, and clinical manifestation.** These health effects can persist and contribute to potential impairment, functional limitation, disability, and reduced quality of life. Disturbed cognition is the hallmark symptom of TBI but the injury also can affect behavior, emotion, and motor function. Cognitive disturbances can lead to difficulties with memory, attention, learning, and coordination. Other signs and symptoms include headaches, fatigue, and sleep disturbances. In addition, secondary neurologic disorders such as mood disorders and post-traumatic epilepsy can occur following TBI and disrupt health-related quality of life. The scientific literature also suggests that TBI increases the risk for neurodegenerative disorders, such as dementia. **However, a majority of persons, particularly those with mild TBI, will generally experience one or more of these health effects for a short time following the injury."** CDC Report to Congress, TRAUMATIC BRAIN INJURY IN THE UNITED STATES: EPIDEMIOLOGY AND REHABILITATION, (2014), p. 3. (Internal citations omitted for clarity of reading).

While the possible duration of the impairment can't be determined immediately, most individuals do not experience prolonged impact from the concussion. In a take-home pamphlet CDC supplies to hospitals for patient education, CDC notes that **"most people with a concussion recover quickly and fully"** and that "If you do not feel back to normal within one week, see a health care professional who has experience treating brain injuries." CDC, WHAT TO EXPECT AFTER A CONCUSSION, http://www.cdc.gov/concussion/pdf/TBI_Patient_Instructions-a.pdf. That one-week marker with respect to seeking additional medical attention is helpful, as it indicates that in the first

days following the concussion symptoms may appear that are part of the healing, and may not last but a few days. For substantial limitation purposes and the duty to offer a Section 504 evaluation, that's important.

How might services be different for students with concussions? Note that since a concussion is a brain injury, healing may require that the school do nothing at all in the short term. Since the brain cannot work and heal very well at the same time, concussion patients are typically instructed to either avoid activities that stimulate the brain, or engage in moderation. "**Resting after a concussion is *critical* because it helps the brain recover. Mental and cognitive exertion requires the brain's energy, and when the brain's energy is depleted due to injury, symptoms such as headaches and problems concentrating can worsen."** CDC, RETURNING TO SCHOOL AFTER A CONCUSSION, A FACT SHEET FOR SCHOOL PROFESSIONALS, p. 6. Consequently, cognitive rest is a key element of recovery.

> "Cognitive rest may require a student to limit or refrain from activities, such as working on a computer, driving, watching television, studying for or taking an exam, using a cell phone, reading, playing video games, and text messaging or other activities that cause concussion symptoms to appear or worsen. Many students find limiting or completely avoiding cognitive activities difficult, because these activities are a routine part of their lives." *Id.,* p. 7.

That said, the focus of the school's immediate efforts will likely not be on providing educational services, but instead, on delaying instruction and mastery of curriculum until education is appropriate again. Note that absence from school due to concussion (or any other impairment for that matter) does not exempt the student under Section 504 from mastering the grade level curriculum. Section 504 is not a statute of reduced expectation. Instead, should the student be evaluated and determined eligible, services will likely focus on how to provide instruction at a time and place when the student can actually benefit.

So what to do? Talk with your school attorney about temporary impairments, and consider these thoughts/issues in the discussion.

1. OCR has not provided a clear, bright-line rule on referral of students with temporary impairments. Don't get too caught up in "extended time" or 6 months as standards for duration. Instead, there appear to be two factors to consider: (1) probable duration of the impairment and (2) degree and nature of the impact during the duration of the impairment. For example, where an impairment is of both short duration and minimal impact, there is less call for an offer of a Section 504 evaluation than when the impairment is of a longer duration and has greater impact.

2. Changes to LRE require more serious consideration. When students must receive instruction at home because of a physical or mental impairment, the student is served in a very restrictive placement due to little or no access to peers. Consequently, impairments requiring homebound instruction need not have the same duration as other impairments to trigger the duty to refer for a Section 504 evaluation. The conservative position is that non-IDEA eligible students access homebound services by way of a Section 504 evaluation. That process is reflected in the CESD forms.

3. So what do we do about concussions? While the school should certainly attend to the student's immediate needs following a concussion, it makes little sense to immediately refer for a Section 504 evaluation when most concussion patients heal very quickly. **Should the student's symptom persist and negatively impact his ability to participate and benefit at school, or should homebound be required, the school should seriously consider offering a Section 504**

evaluation. The school should carefully monitor the student's recovery and be aware that a return to full school-related cognitive activity too soon can only make matters worse. Seek consent from the parent to communicate with the student's physician to jointly discuss the student's safe and appropriate return to school tasks.

V. Texas Dyslexia and IDEA Child Find

A. OSEP's Findings

OSEP recognized that students with dyslexia can qualify under IDEA in certain circumstances.

> "Dyslexia is a condition that could qualify a child as a child with a specific learning disability under the IDEA. Under the IDEA and its implementing regulations, "specific learning disability" is defined, in part, as "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." 20 U.S.C. §1401(30) and 34 CFR §300.8(c)(10). **That is, where a child is identified with dyslexia and needs special education and related services under the IDEA, that child must be evaluated under the IDEA, subject to parental consent.** Moreover, regardless of whether a child has dyslexia or any other condition explicitly included in this definition of "specific learning disability," where the child is suspected to need special education and related services, the LEA must conduct an evaluation in accordance with 34 CFR §§300.304-300.311 to determine whether that child meets the criteria for specific learning disability or any of the other disabilities listed in 34 CFR §300.8. *OSEP Letter, page 11, (emphasis added).*

OSEP found that 80% of the students with dyslexia served in Texas are served under Section 504, and that "in some cases, this may have been appropriate. It is certainly permissible to provide services to children with dyslexia under Section 504." *Id., p. 11-12.* But OSEP believes there is a problem…

> "However, at times, parents described situations in which **the parent believed that the student had a disability that required special education and related services, and requested an evaluation for services, yet the student was not referred for an evaluation under the IDEA.** Some situations were described in which dyslexia assessments didn't begin until a certain grade (for example, an ISD that didn't begin testing until second grade). Statements such as these led OSEP to collect additional data through the monitoring visit to determine if some students with dyslexia may have had delayed evaluations or have been denied evaluations for special education and related services, even though school staff had suspected that the student may need special education and related services under the IDEA." (Emphasis added).

A little commentary: Such a result should not occur if Burgundy Book instructions for referral are followed (as previously discussed). As to the timing of services, OSEP seems to have missed this paragraph from the Burgundy Book.

> "Research continues to support the need for early identification and assessment. The rapid growth of the brain and its responsiveness to instruction in the primary years make the time from birth to age eight a critical period for literacy development. Characteristics associated with reading difficulties are connected to spoken language. Difficulties in young children can be assessed through screenings of phonemic awareness and other phonological skills. Keeping the above-referenced information in mind, **it is important that the school district not delay identification and intervention processes until second or third grade for students suspected of having dyslexia."** *Burgundy Book, p. 13* (internal citations to research sources omitted). **"The appropriate time for assessing is early in a**

student's school career (19 TAC §74.28). TEC §28.006 Reading Diagnosis requires assessment of reading development and comprehension for all students in kindergarten, first grade, second grade, and as appropriate, seventh grade. While earlier is better, students should be recommended for assessment for dyslexia even if the reading difficulties appear later in a student's school career." *Burgundy Book, p. 16*

Is the Texas Dyslexia Program "specially designed instruction?" NO. Conspicuously absent from OSEP's letter is a finding that the Texas Dyslexia Program (as required by the Burgundy Book) constitutes "specially designed instruction." Said OSEP: "OSEP did not collect district-level data regarding the quality of services provided through the State dyslexia program, or data and information to determine whether the State dyslexia program provides special education and related services to individual children as defined by the IDEA." *OSEP Letter, page 11.*

In the absence of such a finding, the fact that a student's reading needs are appropriately addressed under the Texas Dyslexia Program means that specially designed instruction is neither required nor suspected to be needed by the student. Consequently, the school would have no obligation to refer such a student for a special education evaluation (although the parent could do so at any time). The lack of such a finding by OSEP together with TEA's long-standing position since 1986 that the dyslexia program is not specially designed instruction (as evidenced by adoption of the Section 504 process as the default process rather than the IDEA IEP process for identifying and serving students with dyslexia) indicate that proper use of the dyslexia program does not violate IDEA child find.

This view is supported by the TEA's "To the Administrator Addressed" Letter on dyslexia released on June 6, 2018.

> **"Some students who are identified with dyslexia or a related disorder may receive appropriate intervention supports and services under a Section 504 plan through a district dyslexia and related disorder program."**

A little commentary: Note that TEA is referencing Section 504-eligible students served in the dyslexia program governed by the state handbook. If the state handbook created only a special education dyslexia program, these students would be ineligible for the program as they have not received an IDEA evaluation and are not IDEA-B eligible! The passage also reflects that 504 is appropriate for some, but not all students with dyslexia. "This is permissible when it is not suspected that the student requires special education services or when the student with dyslexia or a related disorder is determined to be not eligible for special education by the ARD committee." This view accurately reflects the reality that some students with dyslexia may not be able to benefit from the state dyslexia program together with accommodations, but may also need some special education services (specially designed instruction) to meet their needs.

In summary. Section 504 evaluation is appropriate for a student suspected of having dyslexia when at the time of referral, the school does not have a suspicion of need for specially designed instruction. Section 504 placement for a student with dyslexia is possible when (1) the student is identified as dyslexic and the Section 504 services and accommodations, and/or the dyslexia instructional program are sufficient to meet the student's needs; (2) the student is referred to special education, identified as dyslexic but found not IDEA eligible, and is later evaluated under Section 504 and determined eligible; OR (3) the student with dyslexia is dismissed from IDEA and is then found Section 504 eligible.

So, when should we worry about IDEA child find for students with dyslexia? Finally, IDEA child find problems *will arise* under the Texas dyslexia law when (1) schools ignore or delay IDEA evaluation for students served in the dyslexia program when parents ask for special education

evaluation; (2) schools fail to timely refer students from the dyslexia program to special education when the school suspects that the student needs specially designed instruction to address the dyslexia; or (3) when the student with dyslexia has other impairments suspected of meeting IDEA criteria and appears to need specially designed instruction to address those needs.

B. Some other interesting OSEP findings with respect to dyslexia:

1. OSEP finds that dyslexia (without some other disability) cannot give rise to IDEA eligibility under the Burgundy Books. Said OSEP:

> "OSEP's understanding of the Dyslexia Handbook—clarified through conversations with teachers and other staff across the State—is that a child must not only have difficulties related to reading (which would indicate a potential need for dyslexia services in Texas), but also must present a second, potentially disabling condition in order for school staff to refer the child for an evaluation under the IDEA. This practice violates IDEA child find requirements to the extent that there are students in Texas whose only disability is dyslexia, who are suspected to need special education and related services under the IDEA because of dyslexia, and yet are not referred for an evaluation for special education and related services." *OSEP Letter, page 11.*

OSEP's understanding (and that of some folks in the state) is unsupported by the Burgundy Book. Note the discussion on ARDC involvement with students with dyslexia.

> **"At any time during the assessment for dyslexia, identification process, or instruction related to dyslexia, students may be referred for evaluation for special education services.** At times, students will display additional factors complicating their dyslexia and will require more support than what is available through the general education dyslexia program. **At other times, students with severe dyslexia** or related disorders **will be unable to make a sufficient rate of academic progress within any of the programs described in the procedures related to dyslexia."** *Burgundy Book p. 23 (emphasis added).*

That language notes both that dyslexia can become complicated by other disorders resulting in the need to refer to special ed, and that the dyslexia alone (or a related disorder alone) could also be so severe as to require evaluation.

2. OSEP finds inconsistent procedures for referring dyslexic students for initial special education evaluation in Texas.

> "For example, in one ISD, staff indicated that in cases where a child with dyslexia does not qualify for special education and related services under the IDEA, the ISD may provide the child with services through the State dyslexia program under Section 504.
>
> Yet in another ISD, a staff member indicated that a child can qualify for special education and related services under the IDEA for dyslexia only when there is another disability present.
>
> Staff in another ISD noted that a child can be dually identified as having dyslexia under Section 504 and the IDEA, and therefore could be served under both Section 504 and the IDEA, however the child would only receive services through the State's dyslexia program rather than any additional services through the IDEA." *OSEP Letter, page 11.*

A little commentary: The first statement is correct, 504 can provide dyslexia services to a student with dyslexia who despite failing to meet IDEA eligibility, is substantially limited by her dyslexia in one or more major life activities.

The second statement is clearly incorrect. The Burgundy Book states in the Q&A that "A student with severe dyslexia or related disorders who is unable to make adequate academic progress may be referred to special education for evaluation and possible identification as a child with a disability within the meaning of IDEA 2004." No additional or other impairment is needed to trigger that referral. *Burgundy Book, p. 67, Question 27.* In Question 29, the handbook notes that further assessment through special education should be considered when "in dyslexia instruction, the student is not making sufficient progress[.]"

The third statement is a mess. All special education students are also 504/ADA eligible—dual eligibility is no surprise. Once special education eligible, however, the student does not receive all educational services from special education service providers. Should her reading needs be met in the regular education dyslexia program, the ARDC can require that program via the IEP. If that regular dyslexia program is insufficient, the ARDC can supplement it (or replace it as the Committee sees fit) with specially designed instruction.

3. OSEP finds Texas schools misunderstand the difference between dyslexia "screening" and "assessment." OSEP found that

> "staff in multiple ISDs indicated that initial evaluations for special education and related services under the IDEA are not conducted for children with dyslexia; rather, screenings are used to determine which children will benefit from the dyslexia program provided through Section 504. During one phone call with multiple stakeholders throughout the State, participants reported that one ISD has a common practice of initially evaluating children with dyslexia under both the IDEA and Section 504; however, upon hearing this statement, staff from other ISDs responded that this was not a common practice throughout the State and not the way that children were referred and evaluated within their respective ISDs." *OSEP Letter, page 12.*

This evidence of misunderstanding and inconsistency in Texas districts and campuses "demonstrates that the State is not meeting its general supervisory responsibility to ensure that ISDs in the State are properly implementing the IDEA child find requirements in accordance with 34 C.F.R. §§300.111 and 300.201." *If* these local practices have resulted in delays and/or denials of IDEA evaluations for students suspected of having dyslexia and needing special education and related services under the IDEA" the State has not made FAPE available to all eligible children as required by law. *Id., (emphasis added).*

VI. What Comes Next? Relevant Pieces of the TEA Strategic Plan

A. OSEP's Requirements

OSEP required TEA to come up with a corrective action plan that would meet the following criteria:

"1. Documentation that the State's system of general supervision requires that each ISD identifies, locates, and evaluates all children suspected of having a disability who need special education and related services, in accordance with section 612(a)(3) of the IDEA and its implementing regulation at 34 CFR §300.111, and makes FAPE available to all eligible children with disabilities in accordance with section 612(a)(1) of the IDEA and its implementing regulation at 34 CFR §300.101.

2. A plan and timeline by which TEA will ensure that each ISD will (i) identify, locate, and evaluate children enrolled in the ISD who should have been referred for an initial evaluation under the IDEA, and (ii) require IEP Teams to consider, on an individual basis, whether additional services

are needed for children previously suspected of having a disability who should have been referred for an initial evaluation and were later found eligible for special education and related services under the IDEA, taking into consideration supports and services previously provided to the child.

3. A plan and timeline by which TEA will provide guidance to ISD staff in the State, including all general and special education teachers, necessary to ensure that ISDs (i) ensure that supports provided to struggling learners in the general education environment through RTI, Section 504, and the State's dyslexia program are not used to delay or deny a child's right to an initial evaluation for special education and related services under the IDEA; (ii) are provided information to share with the parents of children suspected of having a disability that describes the differences between RTI, the State dyslexia program, Section 504, and the IDEA, including how and when school staff and parents of children suspected of having a disability may request interventions and/or services under these programs; and (iii) disseminate such information to staff and the parents of children suspected of having a disability enrolled in the ISD's schools, consistent with 34 CFR §300.503(c) .

4. A plan and timeline by which TEA will monitor ISDs' implementation of the IDEA requirements described above when struggling learners suspected of having a disability and needing special education and related services under the IDEA are receiving services and supports through RTI, Section 504, and the State's dyslexia program." *OSEP Letter, page 14.*

B. The TEA Response: The Special Education Strategic Plan

In response to the OSEP findings of noncompliance, TEA not only addressed the concerns, but also took the opportunity to make other changes in special education. For example, TEA is adding technical assistance networks, a handbook on school finance for special education, and a special education personnel forum with higher education to better meet future demands for staff.

TEA identifies the core of its compliance response (together with that of LEAs as follows.

> "Further, this strategic plan focuses on the agency's responsibilities related to special education in the state, especially as it relates to monitoring, supportive tools, and professional development. There are minimal additional requirements for a local school system outside of what has always been the expectation as outlined in IDEA and state statute. TEA recognizes that many school systems have operated within the legal and statutory guidelines. *Those that have not done so may see a moderate to significant increase in workload as they adjust their practices to meet the requirements set out in law." Strategic Plan, p. 3 (emphasis added).*

The following summary only addresses the pieces relevant to the OSEP findings.

OSEP Issue #1: Documentation that the State's system of general supervision of Child Find

The 8.5% cap inspired noncompliance. Texas law now includes the following prohibition: "the commissioner or agency may not adopt or implement a performance indicator in any agency monitoring system, including the performance-based monitoring analysis system, that solely measures a school district's or open-enrollment charter school's aggregated number or percentage of enrolled students who receive special education services." Texas Education Code 29.0011.

Schools required to provide information on interventions to parents. Texas Education Code Section 26.0081 on the right to information concerning special education and education for students with learning difficulties now includes a section on students served through interventions outside of

IDEA. Note that for purposes of this provision, "'intervention strategy' means a strategy in a multi-tiered system of supports that is above the level of intervention generally used in that system with all children. The term includes response to intervention and other early intervening strategies." Tex. Educ. Code Section 26.004(a).

"Sec. 26.0081. RIGHT TO INFORMATION CONCERNING SPECIAL EDUCATION AND EDUCATION OF STUDENTS WITH LEARNING DIFFICULTIES.

(d) Each school year, each school district shall notify a parent of each child, other than a child enrolled in a special education program under Subchapter A, Chapter 29, who receives assistance from the district for learning difficulties, including through the use of intervention strategies, as that term is defined by Section 26.004, that the district provides that assistance to the child. The notice must:

(1) be provided when the child begins to receive the assistance for that school year;

(2) be written in English or, to the extent practicable, the parent's native language; and

(3) include:

(A) a **reasonable description of the assistance that may be provided** to the child, including any intervention strategies that may be used;

(B) **information collected** regarding any intervention in the base tier of a multi-tiered system of supports that has previously been used with the child;

(C) an **estimate of the duration** for which the assistance, including through the use of intervention strategies, will be provided;

(D) the estimated time frames within which a **report on the child's progress** with the assistance, including any intervention strategies used, will be provided to the parent; and

(E) a copy of the explanation provided under Subsection (c).

(e) The notice required under Subsection (d) may be provided to a child's parent at a meeting of the team established for the child under Section 504, Rehabilitation Act of 1973 (29 U.S.C. Section 794), if applicable." (Emphasis added).

A little commentary: The "copy of the explanation" required in "E" references the parent's right to evaluation and a required notice that TEA is instructed to create. **The notice must inform the parents of their right to request special education services under the IDEA or "aids, accommodations, or services" under Section 504 evaluation at any time.** Further, "each school year, each district shall provide the written explanation to a parent of each district student by including the explanation in the student handbook or by another means."

In addition, Dear Colleague Letters were issued to schools with additional information on timelines for child find and clarifying guidance on over-identification and appropriate LEA response to parent requests for evaluation.

OSEP Issue #2: Identify, locate and evaluate enrolled students who should have been referred for IDEA evaluations

In the Strategic Plan, TEA recognizes its role with respect to its LEA's child find compliance.

> "TEA is responsible for ensuring, through policies and procedures, that districts fully comply with the Child Find mandate. However, TEA accepts that, as USED determined, not every school district appears to understand the full import of it Child Find responsibilities and what must be done in order to fulfill its obligations. Through this strategic plan, the agency will work to eliminate confusion by providing additional guidance to districts and families within districts." *Strategic Plan, p. 15.*

Key to the strategic plan is an informational campaign to be create by TEA and distributed by LEAs to parents.

Dissemination of Information to Schools. By December 1, 2018, TEA will "provide guidance and information related to LEA legal responsibilities under state and federal law, including the identification of all eligible students and subsequent additional service guidelines, processes and best practices regarding provision of Child Find, Evaluation, Procedural Notice and Safeguards, and supports and services that results in positive school outcomes and success." *Strategic Plan, p. 37.*

Dissemination of Information to Parents. By December 1, 2018, each LEA must distribute information "to every enrolled student's family regarding the Child Find and FAPE requirements and obligations under IDEA, to provide them with contact information to request initial evaluation." *Id.*

Who pays for the new evaluations? Once of the most perplexing problems in the plan is the likelihood of an unnaturally occurring wave of referrals following both the district dissemination of information on IDEA and the broader TEA approach. With this new dynamic, schools will be faced with both the traditional pattern of parent and school referrals during the year, but also the wave that will result from parents who might not have previously considered IDEA referral, or have been recently denied. "The cost of identifying and conducting initial evaluations for students suspected of having a disability has always been the responsibility of the LEA, and this will continue." Strategic Plan, p. 15-16. Schools already pressed to timely respond to evaluation requests will now be more pressed. TEA is offering some help.

> "TEA will provide for short-term relief in contracting with external diagnosticians and expert personnel to support LEAs, upon request. TEA will work with existing in-state and out-of-state organizations through a competitive solicitation process to provide necessary psychologist and diagnostician support for LEAs that require or request it. TEA will develop a process for LEAs to request assistance. LEAs will be asked to identify the date range for requested assistance, approximate number of students, and other relevant information in order for TEA to create a schedule through which additional resources will be available, at no cost to LEAs. For those LEAs that prefer to conduct and facilitate this work independently, the same vendors will be placed on a state-approved list with negotiated pricing. TEA does not have the authority to waive the state or federal statute requiring students to be evaluated within a certain period of time." *Strategic Plan, p. 16.*

Does the Plan require the school to evaluate based on every request? The answer appears to be no. A concern by many special educators was that in response to the OSEP findings on the refusal or delay in IDEA evaluation, all new parent referrals would have to result in evaluation to repair any damage caused by the 8.5% and the resulting district actions. Note that TEA is neither directing nor assuming that all parent referrals will give rise to evaluations.

> "There are many issues related to the identification of students who were not identified in accordance with IDEA. A child's parent may make a request for an initial evaluation in any format to any school official (including a teacher). **The school/LEA must then determine if testing is required by evaluating the existing data. If testing is required,** the school/LEA must comply with federal and state law related to timelines, eligibility determinations, and services." *Strategic Plan, p. 16-17 (emphasis added).*

Special emphasis on students who were previously delayed or denied evaluation. Given OSEP's focus on students not receiving timely evaluations, requests from parents where an

evaluation has been delayed or denied should be a priority. To help schools identify these children, TEA provided the following.

> "given the flexibility that parents have in how they choose to make a request for an initial evaluation, it is anticipated that some issues will occur when it comes to determining whether a particular student who should have been referred for an initial evaluation was denied one. The following are some examples of when it could be difficult to determine whether a child should have previously been evaluated for special education eligibility:
>
> - Parent made a verbal request that was not documented;
> - Request was made in writing, but the school or LEA does not have a copy or record of the request (though a parent may);
> - Staff who received the request may no longer be employed by the LEA or may no longer remember;
> - Records retention policies that limit the records that are available for retroactive review; or
> - Questions/lack of clarity as to whether alternate supports that were provided to the child outside of IDEA can be applied to ARD committee decisions related to additional services provided through IDEA.
>
> In light of the difficulties associated with identifying students who should have referred for an evaluation, TEA will solicit the feedback of leading special education experts nationwide to ascertain best practices and approaches in making these critical decisions. It is expected that these experts will address topics including, but not limited to, how LEAs might consider relevant and available information, how LEAs might consider additional service needs, and what monitoring activities might look like." *Strategic Plan, p. 16-17.*

Collection of Data. LEAs are required to track each request for evaluation in 2018-2019, "whether the reason for request indicates a claim that the child should have been referred" previously, and if found eligible, whether compensatory services are needed. The comp ed finding should take into consideration supports and services previously provided. Where compensatory services are needed, schools should document what services are required and a timeline for their implementation. *Strategic Plan, p. 38.*

OSEP Issue #3: TEA will provide guidance to ISD staff to ensure that supports for struggling learners do not delay or deny IDEA referral.

State Dyslexia Handbook (Burgundy Book). By November 2018, TEA will facilitate a process" to revise the Handbook to "clarify the difference between dyslexia and dyslexia related services, IDEA, Section 504, and RtI and ensure clear guidance in the field as it related to dyslexia and dyslexia related disabilities being eligible for IDEA." *Strategic Plan, p. 39.*

A little commentary: The author is again reminded of the difficulty of providing such clarity when little exists in federal law and the U.S. Department of Education seems uninterested in providing it, as demonstrated by the previous discussion.

Parent's Guide to the ARD Process. TEA appears to be content with this guidance, citing sections where the guidance indicated no requirement to complete all RtI tiers prior to evaluation and emphasizes that IDEA evaluation should not be delayed or denied due to RtI. *Id.*

Create a Suite of Information. "TEA will execute a campaign to reach parents more broadly than the targeted outreach noted above, and will partner with an external organization to create and execute the campaign. Part of the campaign will likely involve district actions to reach families with templates and other resources developed centrally to facilitate the process." Strategic Plan, p. 16. What is contemplated is a district campaign (outlined above) and this broader effort. TEA commits to "leveraging resources to enable" the creation of a suite of information to be shared with parents of children suspected of having a disability. Coverage includes the following: differences among RtI, state dyslexia program, Section 504 and IDEA; how and when staff and/or parents may request interventions and/or services under these programs; and "relatable and understandable translation of federal regulations and state statutes." "TEA will provide resources and guidance to support LEA understanding of IDEA and state statute compliance." *Strategic Plan, p. 40.*

OSEP Issue #4: TEA will monitor ISDs implementation. By August 2018, "TEA will restructure Agency oversight with increased capacity and monitoring expertise, ensuring a balanced system of compliance and results-driven accountability monitoring and intervention practices in the state, that includes specific monitoring requirements to review LEA's implementation of the IDEA requirements found in 34 CFR §§300.111 and 300.101 when struggling learners suspected of having a disability and needing special education and related services under the IDEA are receiving supports through RTI, Section 504, and/or the State's dyslexia program." *Strategic Plan, p. 40.* TEA will also pursue greater feedback from stakeholders on monitoring practices to ensure that LEAs are meeting their compliance duties. *Id., p. 41.*

A strategy to discuss with your school attorney… Immediately seek out students previously denied IDEA evaluation inappropriately.

- Did school talk a parent out of an IDEA evaluation?
- Did school ignore a parent request for an IDEA evaluation because it was vague, wasn't in writing, or provided on proper form?
- Did school ignore a teacher request for an IDEA evaluation out of hand?
- **Do you have students in RtI, 504 or Dyslexia who are struggling academically, socially, emotionally or behaviorally? These students should be considered for referral for an IDEA evaluation.**

Once students are identified, offer evaluation before TEA media campaign to more evenly distribute evaluation deadlines

- Conduct the evaluation, and if the student is eligible, The ARDC should carefully consider compensatory services with an eye to resolving any future dispute. The school attorney should be consulted as part of this decision-making to determine litigation risk.
- Recognize that the OSEP findings will likely influence due process hearing results on evaluation and compensatory services claims in interesting ways
- **AND THIS IS IMPORTANT!** Verify whether the school attorney believes that all students in the dyslexia program are receiving specially designed instruction. If so, all currently served students in the dyslexia program should be referred for special education evaluation, and future referrals seeking placement in the dyslexia program should be sent to special education as well. **NOTE:** As previously discussed, the author does not believe that the state dyslexia program is "special education" as defined by IDEA, and does not believe that either OSEP or TEA consider the program to be "special education" as defined in IDEA. **Please consult your school attorney to address this critical issue.**