

“What’s So Special About Special Ed?”: Specially Designed Instruction (SDI)

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Housekeeping

- These slides are intended to summarize rules, cases and guidance that are often very complex. Neither the slides nor the presentation are legal advice.
- PLEASE: Discuss these topics with your school attorney prior to making changes in your school’s programs and practices.
- **Text highlighted in yellow** is Dave’s emphasis

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Important Sources of Information

- The President's Commission Report on Excellence in Special Education, "A New Era: Revitalizing Special Education for Children and Their Families," July 1, 2002.
- *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified January 10, 2020)(Hereinafter, "Revised Q&A").
- ADAAG guidance from OCR, *Dear Colleague Letter*, 112 LRP 3621 (OCR 2012).

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Regular Education as the Foundation

The President's Commission Report

- **Some thoughts on relationships...**
 - **"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."

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Regular Education as the Foundation

The President's Commission Report

- **Problems arise when we think “Regular vs. Special”**

- “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.”

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Regular Education as the Foundation

The President's Commission Report

- **Problems arise when we think “Regular vs. Special”**

- “General education and special education share responsibilities for children with disabilities. They are not separable at any level — cost, instruction or identification.”
- **Dave summary: For student needs to be met, there must be cooperation and coordination.**

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Regular Education as the Foundation

- A lesson from Open Concept in the egalitarian 1970's
 - Sometimes, equal treatment does not convey equal benefit
 - Sometimes, there are factors in the student's life that interfere with education.

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Regular Education as the Foundation

Sometimes equal treatment does not convey equal benefit

- **Section 504 declares in civil rights language:**
 - “No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” 29 U.S.C. § 794(a).

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Regular Education as the Foundation

Sometimes equal treatment does not convey equal benefit

- NCLB (ESEA) recognizes that **some low-achieving students may need help** as well. The Act
 - Identifies students who have not benefited from traditional education, because of interference from things like disability, poverty, minority/ethnicity, limited English proficiency
 - Requires proficiency on statewide academic assessment
 - Suggests an enriched and accelerated program
 - Creates campus and district level accountability

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Regular Education as the Foundation

Sometimes equal benefit isn't possible, but meaningful benefit is possible

- Special Education (IDEA) protects students who are so disabled that they require “specially designed instruction” not available to regular education students.
 - Special Education may require a student with disability to receive instruction far below the grade-level curriculum provided to nondisabled peer in order for the student to benefit. (Think of a student in a life skills classroom)

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Regular Education as the Foundation

Sometimes equal benefit isn't possible, but meaningful benefit is possible

- Education for disabled student prior to Special Education:

- “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).

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Regular Education as the Foundation

Sometimes equal benefit isn't possible, but meaningful benefit is possible

- Supreme Court rejected using equal benefit as the IDEA FAPE Standard.

- “The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the **benefits** obtainable by children at one end of the spectrum **will differ dramatically** from those obtainable by children at the other end, with infinite variations in between.” *Board of Education v. Rowley*, 553 IDELR 656 (S.Ct. 1982).

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Regular Education as the Foundation

Sometimes equal benefit isn't possible, but meaningful benefit is possible

- Supreme Court on the spectrum of kids served in Special Education

- “One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.” *Id.*

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Regular Education as the Foundation in IDEA 1997

- **Some kids** in Special Education, because of severity of disability, cannot benefit from full exposure to grade level curriculum.

- “Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—having high expectations for such children and ensuring their **access in the general curriculum to the maximum extent possible[.]**” 20 U.S.C. §1401(c)(5)(1997).

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Regular Education as the Foundation in IDEA 2004

- Let's focus first on when to add special education to regular education
 - A short summary of Congress' 2004 Re-authorization of IDEA is required, beginning with some additional analysis by the President's Commission.

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Regular Education as the Foundation The President's Commission Report, July 1, 2002.

- Special education? When regular education is not enough because of a student's disability
 - “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....”
 - “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.”

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Regular Education as the Foundation

The President's Commission Report, July 1, 2002

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- “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 general education.**”

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The last IDEA Reauthorization was in 2004.

Congress' IDEA 2004 changes influenced by the President's Commission

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- Refined approach to determining Specific Learning Disability
- Early Intervening Services & the 15% Rule
 - Can re-directing IDEA-B funds to regular ed prevent IDEA eligibility down the road?
- The Rise of RtI–
 - What happens when we provide better, targeted regular ed?
 - If the student responds to intervention, does she need special ed?

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IDEA 2004 & Early Intervening Services

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- Prior to 2004: IDEA \$\$ could only be spent on IDEA-eligible kids
- After 2004: Schools can 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.
- Why the change?
 - **Universal screening and expansion of regular education services can prevent some students' future special education eligibility**

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IDEA 2004 & Early Intervening Services

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- What should schools do with these funds?
 - Congress envisions the provision of “academic and behavioral evaluations, services and supports, including scientifically based literacy instruction.” § 1413(f)(2)(B).
 - The monies can be used to determine why the student is not progressing and to provide educational services (tutoring, counseling, etc.) and supports (pencil grips, taped text, instructional supplies, etc.) to meet the student's needs.

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IDEA 2004 & Early Intervening Services

- This is an experiment.
 - Congress requires that each LEA that utilizes funds pursuant to this provision annually report to the SEA the number of students served by this program, and the number of students served under this program who subsequently receive special education and related services during the preceding two-year period. § 1413(f)(4).
- This is not IDEA FAPE
 - Congress warns that this provision should not be construed to limit or create a right to a free appropriate public education. § 1413(f)(3).

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IDEA 2004 & Response to Intervention. (Rtl)

- Rtl Basic Essentials: “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.” *Letter to Zirkel*, 62 IDELR 151 (OSEP 2013).

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IDEA 2004 & Response to Intervention. (Rtl)

- Going beyond IQ and achievement testing, Congress looked at 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 (Rtl) and Early Intervening Services (EIS)*, 47 IDELR 196 (OSERS 2007).

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IDEA 2004 & Response to Intervention. (Rtl)

- Rtl is not “specially designed instruction.”
 - Schools can use Rtl to determine if the student will progress with appropriate instruction (thus not needing special ed).
 - But schools shouldn’t delay IDEA evals. The regulations were combined and revised

- “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.” *Commentary to the 2006 IDEA Regulations*, Federal Register, Vol. 71, No. 156 / Monday, August 14, 2006, p. 46658

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Why does this expansion of Regular Education impact special education?

- **IDEA Child Find**, 34 C.F.R. § 300.111(a) *General*.

“(1) The State must have in effect policies and procedures to ensure that—(i) All children with disabilities residing in the State... and who are in need of special education and related services, are identified, located, and evaluated....”

Dave Note: students served by Regular Education or Section 504 should be referred to Special Ed when this standard is met.

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What HASN'T changed since 2004? The definition of “specially designed instruction”

- **What is “specially designed instruction?”**

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

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” (34 C.F.R § 300.39(b)(3)).

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U.S. Dept. of Education (ED) could have fixed SDI following IDEA 2004

- Note this comment to the proposed IDEA regulations:

“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.” 71 Federal Register No. 156 p. 46,577.

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U.S. Dept. of Education (ED) could have fixed SDI following IDEA 2004

- Note this comment to the proposed IDEDA regulations:

“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.” *Id.*

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U.S. Dept. of Education (ED) could have fixed SDI following IDEA 2004

- The U.S. Department of Education's response to the comment 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.

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What's changed since 2004?

Memorandum to State Directors of Special Ed., 56 IDELR 50 (OSEP January 21, 2011).

- **While OSEP supports Rtl initiatives and programs...**
 - **"the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation... to a child suspected of having a disability under 34 CFR § 300.8."**
 - Thus, the memo concludes that "it would be inconsistent with the evaluation provisions... 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."

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Since USDE won't clear up the confusion, how about the courts? Here's some examples. Don't expect consistency.

- **Is it correctable in regular education? *Hood v. Encinitas Union School District*, 486 F. 3rd 1099, 107 LRP 26108 (9th Cir. 2007).**

“Just as courts look to the ability of a disabled child to benefit from the services provided to determine if that child is receiving an adequate special education, it is appropriate for courts to determine if a child classified as non-disabled is receiving adequate accommodations in the general classroom – and thus is not entitled to special education services – using the benefit standard.”

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Since USDE won't clear up the confusion, how about the courts? Here's some examples. Don't expect consistency.

- **Is it correctable in regular education? *Hood v. Encinitas (cont'd)***

“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.**”

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Since USDE won't clear up the confusion, how about the courts? Here's some examples. Don't expect consistency.

● **Student with autism successful on 504 Plan had no need for specially designed instruction.** *Miller v. Charlotte-Mecklingburg Bd. Of Educ.*, 78 IDELR 98 (W.D. N.C. 2021).

- “Here, J.M. was receiving assistance under Section 504 and the plan was modified during the 2018-2019 school year to accommodate his new diagnosis of autism.
- “the conclusion of the evaluation clearly stipulates that ‘new testing data does not suggest that [J.M.] needs specially designed instruction to be successful in his classes.’”

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Since USDE won't clear up the confusion, how about the courts? Here's some examples. Don't expect consistency.

● **504 Plan with one-to-one aide is not specially designed instruction.** *Legris v. Capistrano USD*, 79 IDELR 243 (9th Cir. 2021)

● **Court seems to let school witnesses make the call.** *Gwendolynne S. v. West Chester Area Sch. Dist.*, 78 IDELR 125 (E.D. Pa. 2021).

● **Use of Orton-Gillingham methodology is not specially designed instruction.** *G.M. v. Michael J. Martirano*, 78 IDELR 68 (D.C. Md. 2021).

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Since USDE won't clear up the confusion, how about the courts? Here's some examples. Don't expect consistency.

- **Wilson reading program, extra time to complete assignments, additional instruction as needed, on-task reminders, and having materials read to him is specially designed instruction. *William V. v. Copperas Cove, 75 IDELR 124 (W.D. TX. 2019).***

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Since USDE won't clear up the confusion, how about the courts? Here's some examples. Don't expect consistency.

- *William V. v. Copperas Cove, (cont'd)*
 - **“As the Fifth Circuit highlighted, the line between ‘special education’ and ‘related services’ is murky; however, case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making educational progress, the child does not ‘need’ special education within the meaning of the IDEA.”**
 - **“In the present case, W.V.’s accommodations cannot be said to be minor nor merely a ‘related service.’ Even though W.V. was making educational progress, he was still in need of specifically designed instruction to address his unique needs.”**

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Dave's Thoughts on "specially designed instruction"

- Notice a few interesting things:
 - If all kids are regular education students first, how can their receipt of regular education services be magically transformed into "specially designed instruction" simply by being in special education (and how do those kids become eligible by showing need for SDI?).
 - **For "specially designed instruction" and IDEA eligibility to work, some of educational services must be carved out or designated as unique to special education. ED has known this since 2006.**

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Any recent ED attempts to provide clarification?

OSERS Letter to Porter, November 15, 2021

- In early October 2021, TEA requested guidance from OSERS on two issues:
 - Is SPDI as described in the 2018 Dyslexia Handbook "specially designed instruction" under the IDEA?
 - Whether the need for Standard Protocol Dyslexia Instruction alone, without modification or alteration, could cause a student identified with dyslexia through a Full and Individual Initial Evaluation (FIIE) to be eligible for special education services?

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Any recent ED attempts to provide clarification?
OSERS Letter to Porter, November 15, 2021

- “OSEP has noted in previous guidance, **that instruction that is considered a ‘best teaching practice’ or ‘part of the district’s regular education program’ is not precluded from meeting the definition of ‘special education’ and being included in a child’s individualized education program (IEP).** See OSEP’s Letter to Chambers (May 9, 2012).”

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Any recent ED attempts to provide clarification?
OSERS Letter to Porter, November 15, 2021

- “**The IEP must include**, among other things, a statement of the special education and related services and supplementary aids and services the child will receive, as well as the program modifications or supports for school personnel that will be provided, to enable the child to advance appropriately toward attaining their annual goals and to be involved in and make progress in the general education curriculum. 34 C.F.R. § 300.320(a)(4).”

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Any recent ED attempts to provide clarification?
OSERS Letter to Porter, November 15, 2021

- **“The LEA ‘must provide a child with a disability specially designed instruction that addresses the unique needs of the child that result from the child’s disability and ensures access by the child to the general curriculum, even if that type of instruction is being provided to other children, with or without disabilities, in the child’s classroom, grade, or building.’”**

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Any recent ED attempts to provide clarification?
OSERS Letter to Porter, November 15, 2021

- **“With regard to your question about the second prong of IDEA eligibility, as noted in the *Letter to Chambers*, in the context of developing the IEP, the IEP Team is authorized to determine the nature and scope of the specially designed instruction that the child needs, which could include instruction that is a best practice or part of the regular education program.”**

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Any recent ED attempts to provide clarification? *OSERS Letter to Porter, November 15, 2021*

- Similarly, the Department believes that the **group of qualified professionals and the child’s parent** determining eligibility under IDEA Section 614(b)(4) are authorized to **decide** that the **child’s special education needs include the ‘standard protocol instruction’** described in the Dyslexia Handbook.”

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Compare and Contrast ED Language ED Commentary to 2006 Regs vs. Letter to Porter (2012)

“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....**”

“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.

“instruction that is considered a ‘best teaching practice’ or ‘part of the district’s regular education program” is not precluded from meeting the definition of ‘special education”

“The LEA ‘must provide a child with a disability specially designed instruction ...even if that type of instruction is being provided to other children, with or without disabilities, in the child’s classroom, grade, or building.”

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Compare and Contrast ED Language

ED Commentary to 2006 Regs vs. Letter to Porter (2012)

“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....**”

“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.

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“**neither the programmatic nature** of such instruction, nor the fact that it is **delivered to a group**, are sufficient bases for excluding the ‘standard protocol instruction’ from being considered under the IDEA’s definition of specially designed instruction.”

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The Texas Twist: “dyslexia & related disorders”

- Following changes to the Texas Dyslexia Handbook in 2021,
 - “The evaluation and identification process for students suspected of having dyslexia is guided by Individuals with Disabilities Education Act (IDEA).” *Texas Dyslexia Black Book*, p. 21.
 - **Dave commentary: Virtually all references to 504 evaluation for students with dyslexia were removed from the Black Book, although the 504 process makes an appearance in Figure 3.8 should parents refuse to consent to an FIIE.**

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The Texas Twist: “dyslexia & related disorders”

Dave Commentary: It’s a strange result given this finding from Congress in IDEA 2004.

- “(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by...
 - (F) **providing incentives for whole-school approached, scientifically based early reading programs**, positive behavioral interventions and supports, **and early intervening services to reduce the need to label children as disabled** in order to address the learning and behavioral needs of such children[.]”

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The Texas Twist: “dyslexia & related disorders”

TEA March 18, 2022 Q&A

12. If a student is identified with dyslexia, how does the ARD committee determine if the student requires special education as a result of that disability? (cont’d)

“Keep the following in mind: **Standard protocol dyslexia instruction, without any adaptations, can be considered specially designed instruction for an individual student.** In this situation the ARD committee (including the parents) determines that the student needs standard protocol dyslexia instruction along with customized, measurable annual goals, progress monitoring, direct, indirect, or support services from an appropriately certified special education staff member and other required IEP components.”

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The Texas Twist: “dyslexia & related disorders”

TEA March 18, 2022 Q&A, #12.

“12. If a student is identified with dyslexia, how does the ARD committee determine if the student requires special education as a result of that disability? (cont’d)

- **If the parent declines special education services, or the ARD committee otherwise agrees that special education services/ an IEP is not needed for the student, the student identified with dyslexia may still receive any appropriate tiered interventions, including standard protocol dyslexia instruction (with or without a Section 504 plan).”**

Dave commentary: Note that the student need not be 504 or IDEA-eligible to get SPDI. Doesn't this result only make sense if SPDI is a regular education program?

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Takeaways on “specially designed instruction” Discuss with your school attorney

- This is a messy area of law, made worse by the lack of answers from U.S. Department of Education, and ED’s departure from Congressional language and intent.
 - The following are possible approaches for identifying “specially designed instruction.” Consider these with your school attorney.
 - One approach looks at exclusivity of services in IDEA
 - The other is definitional

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Takeaways on “specially designed instruction” Discuss with your school attorney

- The “exclusive nature of special education services” approach:

Only special education can: (1) Reduce the student’s access to grade-level curriculum and/or provide the student with something other than the grade-level statewide assessment; (2) Place the student with other disabled students in resource or other segregated settings; (3) Access the other 85% of federal IDEA-B funds.; and (4) place the student in programs or provide services that the school district or SEA has determined 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.”

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Takeaways on “specially designed instruction” Discuss with your school attorney

- A second approach is more definitional.

“Specially designed instruction” 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.

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