

“Are They 504 or Special Education?”: Where is the Line Drawn Under Child Find?

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A Little 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

2

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.
- *July 18 Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified July 18, 2023)(Hereinafter, "Revised Q&A").
- ADAAA guidance from OCR, *Dear Colleague Letter*, 112 LRP 3621 (OCR 2012).
- TEA's August 16, 2023 Dyslexia Evaluation, Identification, and Instruction – House Bill (HB) 3928. (HB 3928 Update)

3

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."

4

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.”

5

**All kids are regular education students first.
Section 504 and IDEA add to regular ed.**

All students in
LEA's jurisdiction

Students with
physical or mental
impairments

Section
504
(ADA)

IDEA

6

Sometimes getting the education that everyone else gets is not enough.

- Kids can struggle at school for many reasons. Individualized approaches in response to intervention (Rtl) and multi-tiered systems of support (MTSS) can often be effective.
 - Rtl & MTSS: Are appropriate when something must be added or tweaked for the student to progress **BUT ONLY WHEN**
 - Section 504 is not indicated (no suspected disability).
 - IDEA is not indicated (no suspected disability and/or no suspicion of need for specially “designed instruction”).
- 7** – Parents can request an IDEA or 504 evaluation at any time.

Understand some basic ideas.

Rtl when regular education isn't enough

- **When School suspects that there is NO DISABILITY**, Rtl can be an appropriate next step.
 - Numerous nondisability factors can interfere with the student's education including homelessness, no interest in education, lack of previous educational opportunity, troubles at home, etc..
 - Rtl adds interventions to regular education to take away the negative impact of the factor or factors that interfere with the student's success.
- 8** – Lots of Rtl models and tiered structures exist; district practices vary

Understand some basic ideas.

Rtl when regular education isn't enough

- **When School suspects that there is NO DISABILITY**, Rtl can be an appropriate next step.
 - If the student responds to Rtl, no referral is necessary at this time. *Joshua Ind. Sch. Dist.*, 111 LRP 4652 (SEA Texas 2010).
 - **Should the student NOT respond to Rtl**, new or different interventions, or a change in tier should be timely considered, **along with possible Section 504 or IDEA referral** (student's failure to respond can raise suspicions of impairment).
 - The parent can request a 504 or IDEA evaluation at any time. *Student v. Austin Independent Sch. Dist.*, 110 LRP 49317 (SEA TX 2010).

9

Understand some basic ideas.

When regular ed isn't enough + school suspects disability

- Referral to Section 504 or IDEA should be considered. WHY?
 - Section 504's affirmative child find duty: triggered by School's suspicion of 504 eligibility, together with need for services because of disability. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).
 - IDEA's affirmative child find duty: triggered by School's suspicion of IDEA-level disability [impairment fits one of the IDEA eligibility categories) together with suspicion of need for "**pecially designed instruction.**" 34 C.F.R. § 300.8(a); *El Paso ISD v. R. R.*, 567 F.Supp.2d 918 (W.D.Tex. 2008).

10

Understand some basic ideas.

When regular ed isn't enough + **school suspects disability**

But I thought Rtl was a prerequisite to an IDEA referral? NOPE.

- “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.” *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP January 21, 2011).

11

Understand some basic ideas.

When regular ed isn't enough + **school suspects disability**

The memorandum reiterates that the IDEA and its regulations currently only “*allow*” the use of Rtl data, as part of the criteria for determining if a child has a specific LD.

- Thus, the memorandum concludes “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.” Id.

12

Understand some basic ideas.

When regular ed isn't enough + school suspects disability

- Referral to Section 504 or IDEA should be considered when services are needed but not “specially designed instruction.”
 - “What is 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 school. **Section 504 requires recipient school districts to refer a student for an evaluation** for possible special education or related aids and services or modification to regular education **if the student, because of disability, needs or is believed to need such services.**” OCR Q&A #30, July 18, 2023.

13

Two Pathway Child Find in Federal Disability Law: IDEA & Section 504

Section 504 Evaluation should be offered by the school when it

- Suspects that the student is eligible as a student with a disability AND
- Suspects that because of disability, student needs services.

Letter to Mentink, 19 IDELR 1127 (OCR 1993)(OCR interpretation of 34 CFR § 104.35(a)).

14

Special Education Evaluation should be offered by the school when it

- Suspects that a child has a disability that is listed in § 300.8 AND
- who, by reason of that disability, needs special education [**“specially designed instruction”**] and related services

34 CFR 300.111(a)(1) & (d).

Rtl when Regular Education is not enough.

The President's Commission Report, July 1, 2002

- “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.**”

15

Rtl when Regular Education is not enough.

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

- 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 Rtl–
 - What happens when we provide better, targeted regular ed?
 - If the student responds to intervention, does she need special ed?

16

How does Rtl fit into Two Pathway Child Find Rtl & IDEA Child Find (Success in Rtl means no SDI)

- Quick summary on the Rtl & IDEA Relationship:
 - Rtl arose in 2004 from a desire to reduce IDEA eligibility caused by over- and improper identification by emphasizing the importance of regular education first, and beefing-up the reg ed resources available to struggling students
 - **Rtl, by definition, is not “specially designed instruction” or SDI.** More on this later.
 - If the student responds to Rtl no SDI is required and no IDEA referral is necessary. **The parent can request an eval at any time.**

17

How does Rtl fit into Two Pathway Child Find Rtl & § 504 Child Find (a very different result)

- The ADA was designed to increase eligibility in 504/ADA. Congress wanted to extend the law’s protections to more folks.
 - **The 504/ADA mitigating measures rule takes the opposite approach from IDEA.** In 504, we now ask whether the student would be substantially limited *without* the things the student or school is doing to reduce the impact of the impairment.
 - So, receipt of Rtl (whether effective or not) means the student needs services. If an impairment is suspected, 504 referral is triggered.

18

Why doesn't Rtl work the same way with Section 504 and special education?

- **“30. What is 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 school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.” Revised Q&A, #30.

19

Why doesn't Rtl work the same way with Section 504 and special education?

- **“41. 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, #41.

20

Why doesn't RtI work the same way with Section 504 and special education?

Language from the 2016 OCR ADHD Resource Guide on child find

“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.” *ADHD Resource Guide* at p. 15.

21

Does that language sound familiar (although in reverse order)?

Why doesn't RtI work the same way with Section 504 and special education?

- The post-ADAAA paradigm shift:
 - The school does not exclude from consideration for possible Section 504 referral, students with impairments in RtI, even when RtI appears to adequately address their needs.
- **Note that when the student is struggling and in need of RtI services BUT there is no suspicion of disability, no duty to refer is triggered.**
- The parent may still request 504 evaluation at any time.

22

Section 504 Child Find Health Plans

- Old school (prior to 2008): OCR told schools that if a health plan was sufficient, no § 504 Plan or IEP was needed
- What's a "health plan?"
 - OCR-speak for a document created by school (typically the nurse with input from parent and doctor) that addresses:
 - Maintenance of student health at school
 - Emergency protocols should there be a health issue

23

Section 504 Child Find Health Plans

- OCR's 2012 guidance on the ADA: "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."
- A thought: are health plans fungible? 150 nurses weigh in.

24

Getting the services without 504 rights isn't enough if the child should be referred to 504

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.**”

25

Section 504 Child Find Duty to Evaluate & Health Plans

- So, what to do about health plans and 504?
 - The safest, most conservative position is to refer and evaluate under Section 504 all students on health plans.
 - Any other approach (like that that follows) is subject to some degree of risk and should be the result of school-school attorney discussion prior to proceeding. But it makes sense, because health plans are not fungible.

Consider these factors with your school attorney...

26

Section 504 Child Find 504 Duty to Offer Evaluation (talk to school attorney)

- If the student has a health plan and either of these two things are present, the school should refer to 504.
 - 1. The school administers medication for the child (OCR says this is a related service)

- OCR's Test: Is the service necessary for the student to benefit from his educational program? (Dave thought: Isn't that too simple?)

27

Section 504 Child Find 504 Duty to Offer Evaluation (talk to school attorney)

- If the student has a health plan and either of these two things are present, the school should refer (continued).
 - 2. The student also receives accommodations or services to address academic, social, emotional or behavioral needs.

28

Section 504 Child Find 504 Duty to Offer Evaluation (talk to school attorney)

- If the student just has a health plan, and neither of the two previously discussed situations apply, consider these factors in determining which students the school should refer.
 - 1. Frequency of the required health plan services
 - 2. Intensity of the required health plan services
 - 3. Complexity of the required health plan services
 - 4. Health and Safety risk if health plan services are provided incorrectly or not provided at all.

29

Section 504 Child Find 504 Duty to Offer Evaluation (talk to school attorney)

- Post-ADAAA thinking: A student with a physical or mental impairment who is successful at school due to a health plan must be *considered* for possible 504 referral.
 - 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 health plans.

30

When Regular Education & § 504 are not enough
Sometimes equal benefit isn't possible, but meaningful benefit is

- 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. (For example, a student needing a life skills classroom).

31

Regular Education as the Foundation
Sometimes equal benefit isn't possible, but meaningful benefit is

- U.S. Supreme Court on the spectrum of kids served in Special Education
 - “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).

32

Regular Education as the Foundation

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

- U.S. 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.*

33

IDEA 2004 & Response to Intervention Rtl is not “specially designed instruction”

- “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 (Rtl) and Early Intervening Services (EIS), 47 IDELR 196 (OSERS 2007).

34

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.

35

“Specially Designed Instruction” (SDI) defined

- **IDEA defines “special education as “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)).

36

“Specially Designed Instruction” defined, but hasn’t kept up with modern education

- 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.

37

“Specially Designed Instruction” defined, but hasn’t kept up with modern education

- 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.*

38

“Specially Designed Instruction” defined, but hasn’t kept up with modern education

- 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.

39

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 Standard Protocol Dyslexia Instruction (SPDI) as described in the 2018 Dyslexia Handbook “specially designed instruction” under the IDEA?
 - Whether the need for SPDI alone, without modification or alteration, could cause a student identified with dyslexia through a Full and Individual Initial Evaluation (FIIIE) to be eligible for special education services?

40

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).”

41

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).”

42

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.”**

43

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.”**

44

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.”

45

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.”

46

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.**”

47

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).***

48

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.”

49

Dave's Rant 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 because they are special education eligible?

- How does IDEA eligibility work if needing “specially designed instruction” is required for eligibility but the newly minted IDEA student gets the same services already available to him (if regular ed can be “specially designed”?).

- For “specially designed instruction” to have meaning and for IDEA child find and eligibility to work, some educational services must be carved out or designated as unique to special education. ED has known this since 2006.

50

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 the departure from Congressional language and intent.
 - The following slides 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

51

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.”

52

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.

53

Dyslexia & Related Disorders: The Texas Exception to Two Pathway Child Find

- **“Evidence-based dyslexia programs are not considered to be “regular” education aids and services.** Regular aids and services are things like accommodations provided to a student to assist in classroom instruction and access to instruction, such as giving extra time for assignments and allowing speech-to-text capabilities when given a writing assignment. **While a Section 504 plan could be appropriate for those needs, the need for an evidence- based dyslexia program crosses over into a special education need.”** *HB 3928 Update, p. 7.*

54

Dyslexia & Related Disorders: The Texas Exception to Two Pathway Child Find

- **“Beginning with the 2023-2024 school year, which is the school year in which HB 3928 first applies, a student will not be entitled to receive an evidence-based dyslexia program if a parent refuses to consent to the provision of special education and related services following an FIIE or after an ARD committee has determined that the student is eligible for special education based on the identification of dyslexia and a need for an evidence-based dyslexia program.”** *HB 3928 Update, Question 8, p. 7.*
- Texas law now requires the offer of a special education evaluation when the school suspects dyslexia or a related disorder and need for dyslexia services.

55

The Texas Exception to Two Pathway Child Find A Little Dave Commentary about possible confusion

- **In Texas, dyslexia and dysgraphia are not treated like other impairments under the federal two-pathway approach. In Texas, suspicion of dyslexia and/or dysgraphia in Texas triggers IDEA child find, regardless of severity.**
- After the 2024-2025 school year. dyslexia instruction can only be provided by way of IDEA in an IEP
- **TEA has deemed these services Standard Protocol Dyslexia Instruction and dyslexia instruction “specially designed instruction.”**

56



Thanks for all that you do!