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THE LEARNING DISABILITY MESS

RUTH COLKER*

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INTRODUCTION

When Congress adopted the Education for All Handicapped Children Act¹ (EAHCA) in 1975 and mandated the education of all children with disabilities, a key supporter of the bill noted that “[n]o one really knows what a learning disability is.”² Because of this lack of understanding of the term “learning disability,” Congress used a provisional definition of the term and instructed the Commissioner of Education to further study the term and devise a more refined definition as well as a diagnosis.³ Thirty-five years later, that definition⁴ remains in federal special education law

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1. Education for All Handicapped Children of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1482 (2006)).

2. 121 CONG. REC. 25,531 (daily ed. July 29, 1975) (statement of Rep. Bill Lehman).

3. *See id.* (discussing an agreement requiring the Commissioner of Education to “spell out” what is to be considered a specific learning disability as well as the process determining whether a child meets the definition).

4. *Compare* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (“[T]he term ‘children with specific learning disabilities’ means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental

under the Individuals with Disabilities Education Act (IDEA)⁵—the modern version of the EAHCA.⁶

In order for a child to receive special education and related services under the IDEA, the child must qualify as a child with a “disability.”⁷ The IDEA lists ten impairments that qualify as a disability,⁸ including “specific learning disabilities.”⁹ Although Congress expressed concern in 1975 that the inclusion of “specific learning disabilities” would overwhelm special education resources, and placed a temporary cap on that category to avoid this possibility, Congress’s initial concerns have borne fruit. The category of “specific learning disabilities”¹⁰ has become the most common disability classification for children under the IDEA. As of August 3, 2009, nearly six million children were classified as disabled under that statute; about 2.5 million (42.8%) were considered to have “specific learning disabilities,” more than twice the figure for the next most common disability—speech or

aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.”), *with* 20 U.S.C. § 1401(30) (2006) (current definition) (“(A) [I]n general. The term ‘specific learning disability’ means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (B) Disorders included. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (C) Disorders not included. Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.”).

5. *See* 20 U.S.C. § 1401(3) (2000) (amended 2006) (“[C]hild with a disability (A) In general [t]he term ‘child with a disability’ means a child – (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”).

6. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. § 1400 *et seq.* (2006)) (amending the EAHCA by renaming it the Individuals with Disabilities Education Act (IDEA) to align its terminology with the Americans with Disabilities Act).

7. *See generally* 20 U.S.C. § 1400(d) (2006) (explaining the purpose of the IDEA).

8. *See* 20 U.S.C. § 1401(3)(A) (2006) (“[T]he term ‘child with a disability’ means a child – (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”).

9. *Id.*

10. The term “specific learning disabilities” is the technical term used in the special education statutes but the term “learning disabilities” is also often found in special education law literature. This Article uses both terms interchangeably.

language impairments.¹¹

Although Congress has retained the 1975 definition of specific learning disabilities, it enacted new guidelines for diagnosing the impairment with the 2004 Amendments to the IDEA.¹² But that Amendment only added to the confusion in the field. Rather than take a clear position on how states should diagnose learning disabilities, Congress gave states the choice of using a “response to intervention model”¹³ or a “discrepancy model”¹⁴ while also disfavoring the discrepancy approach.¹⁵ The states have complied with the 2004 Amendments with a wide range of approaches for diagnosing learning disabilities, creating highly disparate results. For example, in 2008, 15.4% of all disabled children met that definition in Kentucky while 60.2% met that definition in Iowa.¹⁶ Unfortunately,

11. See U.S. Dep’t of Educ., Office of Special Educ. Programs, Data Analysis Sys. (DANS), OMB # 1820-0043: *Children with Disabilities Receiving Special Education Under Part B of the Individuals with Disabilities Education Act, Table 1-3: Students ages 6 through 21 served under IDEA, Part B, by disability category and state: Fall 2008* (data updated as of Aug. 3, 2009) [hereinafter U.S. Dep’t of Educ., *Table 1-3*], available at https://www.ideadata.org/arc_toc10.asp (reporting that, out of the 5,889,849 children receiving special education services, the largest group, 2,525,898 children (42.8%), were classified as having “specific learning disabilities,” while the next most common category was speech or language impairments with 1,121,961 children).

12. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. § 1401 *et seq.* (2006)), (defining what a child with a disability means and the guidelines of what constitutes a disability).

13. See 20 U.S.C. § 1414(b)(6)(B) (2006) (“[I]n determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in paragraphs (2) and (3).”); *Id.* § 7801(37) (2006) (defining “scientifically based research”); 34 C.F.R. § 300.309(a)(2)(i) (2011) (“[T]he child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the areas identified in paragraph (a)(1) of this section when using a process based on the child’s response to scientific, research-based intervention . . .”).

14. See 34 C.F.R. § 300.309(a)(2)(ii) (2011) (“[T]he child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305.”).

15. See 20 U.S.C. § 1414(b)(6)(A) (2006) (“[N]otwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.”).

16. See U.S. Dep’t of Educ., *Table 1-3, supra* note 11 (noting the discrepancy in the reporting that, in Kentucky, out of the 87,977 children diagnosed with a disability, 13,587 of those children were classified as having a specific learning disability which accounts for approximately 15.4% of the disabled children, whereas, in Iowa, out of the 61,418 children diagnosed with a disability, 37,038 of those children were classified as having a specific learning disability accounting for approximately 60.2% of the disabled children).

neither the 2004 Amendments nor states' attempts at implementation bear much relationship to the understanding of learning disabilities within the field of educational psychology. Instead, these efforts reflect an attempt to align the IDEA with No Child Left Behind¹⁷ so that children who fall behind grade level can get extra assistance.¹⁸ Although extra help is a good idea, it need not come at the cost of a learning-disability label.

Meanwhile, the field of educational psychology has floundered to develop a coherent definition of learning disabilities. The American Psychiatric Association (APA) endorsed the discrepancy approach for diagnosing learning disabilities in the Fourth Edition of its Diagnostic and Statistical Manual of Mental Disorders in 2000. But it has proposed new learning disability guidelines in the Fifth Edition¹⁹ that would align its professional standards with the 2004 Amendments to the IDEA. Educational psychologists have criticized the APA for caving to Congress rather than following professional norms in their field.²⁰

The United States Department of Justice (DOJ) recently promulgated regulations that merely add to the confusion about learning disabilities.²¹ These regulations state that a child's disability category under the IDEA must be presumptively accepted by other entities, such as the College Board, the ACT or the Law School Admissions Council (LSAC).²² Given the enormous state variation in defining learning disabilities, these regulations make it impossible for national testing entities to impose a uniform, national standard when deciding which students should receive accommodations.

In Part I of this Article, I will review the legal and psychological literature on what constitutes a learning disability and how such a disability should be diagnosed. This part also examines the continued disagreement that continues to exist on whether there must be evidence of a

17. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6311 (2006)) (requiring every child to be proficient in reading and math by 2014).

18. See, e.g., CONN. STATE DEP'T OF EDUC., 2010 Guidelines for Identifying Children with Learning Disabilities 1, 5 (2010) [hereinafter CONNECTICUT GUIDELINES], *available at* http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/2010_Learning_Disability_Guidelines_Acc.pdf (recognizing the interconnected relationship between No Child Left Behind and the 2004 Amendments to IDEA).

19. Compare AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 46 (4th ed. rev. 2000), with *Proposed Draft Revisions to DSM Disorders and Criteria*, AM. PSYCHIATRIC ASS'N DSM-5 DEV., <http://www.dsm5.org/ProposedRevisions/Pages/Default.aspx> (last visited Nov. 24, 2011).

20. See *infra* notes 61-64 and accompanying text.

21. See 28 C.F.R. § 36.309(b)(1)(v) (2011). For text of the regulation, see *infra* note 104 and accompanying text.

22. See *id.*

psychological or neurological impairment, and whether the discrepancy model should be part of the diagnostic model. In Part II, I will survey the wide range of definitions of learning disability used by the various states despite the fact that the IDEA is a national statute. In Part III, I will discuss the implications of the learning disability classification for college admissions testing. The national testing organizations continue to use the “discrepancy model” for determining whether students are learning disabled even though Congress disapproved that model under the IDEA. The DOJ insists that these national testing organizations should presumptively follow the definitions used by the states under the IDEA without any sense of the wide variance in those definitions and their departure from accepted norms within the field of educational psychology. In Part IV, I will suggest that we should solve the learning disability mess by giving less weight to the importance of the classification.

I. LEARNING DISABILITIES

The term “learning disabilities” has been in use since the 1960s under a wide variety of definitions. It describes individuals who have great difficulty in reading, writing or math but do not seem to have a cognitive impairment that would explain such difficulties. The definitional areas of dispute are whether a diagnosis of a psychological or neurological dysfunction is required for a child to have a learning disability and whether the discrepancy model is an appropriate tool for diagnosing the existence of a learning disability.

Samuel Alexander Kirk suggested the first definition of learning disability in 1962:

A learning disability refers to a retardation, disorder, or delayed development in one or more of the processes of speech, language, reading, spelling, writing, or arithmetic resulting from a possible cerebral dysfunction and/or emotional or behavioral disturbances and not from mental retardation, sensory deprivation, or cultural and instructional factors.²³

This 1962 definition has many features that are part of the various ways this term is used even today.²⁴ This definition seeks to distinguish between academic deficits that are a result of a psychological handicap rather than mental retardation or a lack of instruction. The 1962 definition describes

23. SAMUEL ALEXANDER KIRK, EDUCATING EXCEPTIONAL CHILDREN 263 (1962).

24. See 20 U.S.C. § 1401(30)(A) (2006) (referring to the definition of a specific learning disorder in the IDEA as a “disorder in one or more of the basic psychological processes”); § 1401(30)(C) (referring to the exclusionary clause in IDEA—the term “does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage”).

the symptoms of the condition but does not suggest how to diagnose its existence.

Barbara Bateman developed the concept of the discrepancy model to diagnose the existence of a learning disability in her 1965 definition:

[C]hildren who have learning disorders are those who manifest an educationally significant discrepancy between their estimated intellectual potential and actual level of performance related to basic disorders in the learning process, which may or may not be accompanied by demonstrable central nervous system dysfunction, and which are not secondary to generalized mental retardation, educational or cultural deprivation, severe emotional disturbance, or sensory loss.²⁵

Her definition was similar to Kirk's in that she referenced psychological disorders and excluded other factors, but she added the concept of a discrepancy between intellectual potential and actual performance as a diagnostic tool.²⁶ She also put into doubt whether a finding of a "central nervous system dysfunction" was a necessary part of the definition.²⁷ Kirk had posited that a learning disability was caused by "a possible cerebral dysfunction."²⁸ Bateman placed less emphasis on that requirement. Bateman's emphasis on the existence of a discrepancy between "intellectual potential" (or what we might call "aptitude") and "actual level of performance" (or what we might call "achievement") is the basis for the discrepancy model that has historically been the primary mode for diagnosing the existence of a learning disability.²⁹

Under the discrepancy approach, one would assess a child's aptitude, typically through an IQ test. Then, one would administer various achievement tests. Normally, one would expect the child's achievement to be consistent with the child's IQ. Hence, if a child scored in the 50th percentile for IQ—a score of 100—then one would expect the child's achievement to be around the 50th percentile. If the child's achievement is significantly below what is expected, and that result cannot be explained by other factors, then, under the discrepancy model, the child would be considered to be "learning disabled."

25. Barbara Bateman, *An Educational View of a Diagnostic Approach to Learning Disorders*, 1 *LEARNING DISORDERS* 219, 220 (1965).

26. *Id.*

27. *See id.* (maintaining that a learning disability need not be associated with physical disorders).

28. KIRK, *supra* note 22, at 263.

29. *See, e.g.*, AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 44 (3d ed. rev. 1987) [hereinafter *DSM-III-R* 1987] (using the discrepancy model to define "specific learning disabilities"); Corrine E. Kass & Helmer R. Myklebust, *Learning Disabilities: An Educational Definition*, 2 *J. LEARNING DISABILITIES* 377, 378-79 (1969) (discussing the U.S. government sponsored organizations endorsement of the use of the discrepancy model to diagnose learning disabilities).

In 1968, the National Advisory Committee on Handicapped Children (NACHC), under Kirk's leadership, offered a definition of learning disability quite similar to Kirk's 1962 definition. The key difference was the addition of the word "specific" to the term so that it became "specific learning disability."³⁰ The purpose of adding the adjective "specific" was to emphasize that "the learning failure was not a generalized problem like [mental retardation] but rather one predicated on the possession of only a discrete number of deficits."³¹ The NACHC definition also provided a list of conditions that could cause this disorder: "perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, developmental aphasia, etc."³² It provided these examples instead of referring to "central nervous system dysfunction." As Kenneth Kavale, a critic of this approach, observed: "[I]n other words, the simile becomes the metaphor."³³ The issue that existed in 1968, and remains today: determining whether "learning disability" is a general term to describe many specific conditions or a precise etiology that includes the existence of a neurological impairment.

The addition of the term "specific" was supposed to add some refinement to the example provided above for use of the discrepancy model. Students with learning disabilities typically do not have low achievement in every academic subject. Instead, they may have low achievement in one area, such as reading. As the above definition suggests, the child only has a "discrete" number of deficits—maybe reading and writing but not math. If the problem is more generalized, then other hypotheses such as mental retardation are considered.

The NACHC 1968 definition was incorporated into the Educational for All Handicapped Children Act in 1975:

The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are

30. SAMUEL A. KIRK, SPECIAL EDUC. FOR HANDICAPPED CHILDREN, FIRST ANNUAL REPORT OF THE NATIONAL ADVISORY COMMITTEE ON HANDICAPPED CHILDREN 34 (1968) [hereinafter NACHC].

31. Kenneth A. Kavale & Steven R. Forness, *What Definitions of Learning Disability Say and Don't Say: A Critical Analysis*, 33 J. LEARNING DISABILITIES 239, 242 (2000).

32. NACHC, *supra* note 30, at 34.

33. Kenneth A. Kavale et al., *A Time to Define: Making the Specific Learning Disability Definition Prescribe Specific Learning Disability*, 32 LEARNING DISABILITY Q. 39, 41 (2009).

primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.³⁴

The 1975 definition included a requirement of a “disorder in one or more of the basic psychological processes.” It is not clear whether that term means the same thing as a “central nervous system dysfunction.” Like the NACHC definition, it listed qualifying disorders as well as excluded conditions. It did not indicate how one would diagnose the existence of a specific learning disability.

When Congress adopted the NACHC definition in 1975, there was concern that too many children would receive the “learning disability” classification, detracting from the resources devoted to other disabilities covered by the EAHCA. To address this problem, the bill’s supporters agreed to require the Commissioner of Education to provide a more specific definition and specify “diagnostic procedures that will be used in determining whether a particular child has a disorder or condition which places that child in the category of children with specific learning disabilities.”³⁵

The bill’s supporters also agreed to a temporary cap so that the learning disability numbers in any given state could not be more than one-sixth of all the children classified as disabled within a state.³⁶ Congressman Lehman spoke in favor of capping the number of children classified under the learning disability category until the diagnosis and definition become more clear because “no one really knows what a learning disability is.”³⁷

Congress was correct to be concerned that requests for assistance by children labeled as learning disabled could swamp the special education system. Today, nearly half of all children served under the special education statutes receive the learning disability classification.³⁸

Following the passage of the EAHCA, professional organizations continued to discuss how to best define that term both from a definition and diagnosis perspective. The emerging view, as reflected by an institute funded by the United States Office of Education, endorsed the need to use the discrepancy model to diagnose the existence of a learning disability.³⁹ This view posited that “significant deficits are defined in terms of accepted

34. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1411(i)(4)(A) (2006)).

35. 121 CONG. REC. H25,531 (daily ed. July 29, 1975) (statement of Rep. Albert H. Quie).

36. *Id.*

37. *Id.* (statement of Rep. Bill Lehman).

38. See U.S. Dep’t of Educ., Office of Special Educ. Programs, *supra* note 11.

39. See Kass & Myklebust, *supra* note 29, at 378-79 (discussing the importance of the discrepancy model and the practical application).

diagnostic procedures in education and psychology.”⁴⁰ But it did not define how large the deficit would have to be in order to constitute a “significant” deficit. It also added that a learning disability is not the result of “a lack of opportunity to learn”⁴¹ which was part of the tendency to exclude other explanations for the academic deficit as part of the learning disability definition.

The APA began to recognize specific learning disabilities in its Diagnostic and Statistical Manual of Mental Disorders in its Third Edition, published in 1980.⁴² It termed them “specific developmental disorders” and recognized that the “inclusion of these disorders in a classification of ‘mental disorders’ is controversial” but concluded that they should nonetheless be incorporated because they are a type of mental disorder.⁴³ The Third Edition used a discrepancy model to define the existence of this disorder. For example, it provided the following description of the diagnostic criteria for a “developmental reading disorder”:

[P]erformance on standardized, individually administered tests of reading skill is significantly below the expected level, given the individual’s schooling, chronological age, and mental age (as determined by an individually administered IQ test). In addition, the child’s performance on tasks requiring reading skills is significantly below his or her intellectual capability.⁴⁴

It did not define how much discrepancy is necessary for it to be “significant,” but did approve of the discrepancy model.

The APA refined this definition in 1986, still relying on a discrepancy model for diagnostic purposes. For example, its diagnostic criteria for “developmental reading disorder” included:

- A. Reading achievement as measured by standardized, individually administered test, is markedly below the expected level, given the person’s schooling and intellectual capacity (as determined by an individually administered IQ test).
- B. The disturbance in A significantly interferes with academic achievement or activities of daily living requiring reading skills.
- C. Not due to a defect in visual or hearing acuity or a neurologic disorder.⁴⁵

It connected the specific learning disability in reading with difficulties in school and excluded other explanations for this disorder. On its list of

40. *Id.* at 379.

41. *Id.*

42. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 44 (3d ed. rev. 1980).

43. *Id.* at 92.

44. *Id.* at 94.

45. DSM-III-R 1987, *supra* note 29, at 44.

exclusions was “neurologic disorder,” which seems contrary to other views that described a learning disability as the result of a “central nervous system dysfunction.”

Meanwhile, professional organizations began to emerge in the field. The National Joint Committee on Learning Disabilities (NJCLD) tried to take the lead in reconciling the views of these various organizations.⁴⁶ After developing various approaches, the NJCLD endorsed the following definition in 1994:

[L]earning disabilities is a general term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual, presumed to be due to central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behavior, social perception, and social interactions may exist with learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (for example, sensory impairment, mental retardation, serious emotional disturbance) or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.⁴⁷

This definition took the position that a learning disability was “presumed to be due to central nervous system dysfunction.” NJCLD’s current web page continues to take that position, providing that a “learning disability is a neurological disorder.”⁴⁸ Its definition also deleted reference to the word “specific” that had been added by the 1968 NACHC definition and incorporated into the federal definition. It took the position that a learning disability was a lifelong condition based on central nervous system dysfunction but it took no position on whether the discrepancy model was the best way to diagnose the existence of this condition. Its view was contrary to that of the APA in not insisting that the deficit be a narrow deficit and in not ruling out neurological explanations for the deficit.

The APA published the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders in 1994⁴⁹ It continued to endorse the discrepancy model for diagnosing a learning disability—now termed a

46. The National Joint Committee on Learning Disabilities (NJCLD) was founded in 1975. For further information, see <http://www.ldonline.org/about/partners/njclcd> (last visited Oct. 6, 2010).

47. NAT’L JOINT COMM. ON LEARNING DISABILITIES, *Learning Disabilities: Issues on Definition*, in COLLECTIVE PERSPECTIVES ON ISSUES AFFECTING LEARNING DISABILITIES 61-66 (1994).

48. See *What is a Learning Disability?*, LD ONLINE, <http://www.ldonline.org/ldbasics/whatislcd> (last visited Oct. 6, 2010).

49. See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994).

“learning disorder”—and defined with more precision how much of a discrepancy was necessary to be a “significant” discrepancy:

Learning Disorders are diagnosed when the individual’s achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling and level of intelligence. The learning problems significantly interfere with academic achievement or activities of daily living that require reading, mathematical, or writing skills. A variety of statistical approaches can be used to establish that a discrepancy is significant. Substantially below is usually defined as a discrepancy of more than 2 standard deviations between achievement and IQ. A smaller discrepancy between achievement and IQ (i.e., between 1 and 2 standard deviations) is sometimes used, especially in cases where an individual’s performance on an IQ test may have been compromised by an associated disorder in cognitive processing, a comorbid mental disorder or general medical condition, or the individual’s ethnic or cultural background.⁵⁰

This definition was much more specific in stating how much discrepancy was needed for it to be considered significant. It also deleted the exclusion for neurological disorders.

The next big development in the definition of learning disability came as a result of action by Congress due to complaints about the discrepancy model. The state of Connecticut explains this development in its recent guidelines for identifying students with learning disabilities:

Another critical problem with the IQ-achievement discrepancy is that research does not support excluding students from services based on their failure to meet IQ-achievement discrepancy criteria. Struggling readers with an IQ-achievement discrepancy and those without a discrepancy tend to have similar remedial needs and benefit from similar types of interventions (Gunderson and Siegel, 2001), yet nondiscrepant low achievers may be erroneously viewed as intellectually limited and incapable of improvement. The IQ-achievement discrepancy also appears to contribute to biased identification practices. For example, several studies have found that the use of a discrepancy model in reading favored identification of Caucasian students and middle- and upper-income students; whereas students of color and students from lower socioeconomic backgrounds were more likely to be identified as having an intellectual disability (Fletcher et al., 2007; Speece, Case, and Molloy, 2003). Since students from nonmainstream cultural groups often possess cognitive styles that differ from those typically promoted by the schools, the inappropriate use of standardized tests that are not normed or validated for a specific population often perpetuates cultural misunderstandings, which in turn contributes to poor instructional decision-making (McIntyre.1996). Aaron, Joshi, Gooden and Bentum

50. *Id.* at 46.

(2008) and Vaughn, Levy, Coleman, and Bos (2002) argued that testing for an IQ-achievement discrepancy often does not provide instructionally useful information and may contribute to inadequate remedial efforts.⁵¹

Researchers therefore argued that the definition of learning disability should be expanded to encompass a wider variety of children who might benefit from educational intervention, not only those who would fit within the discrepancy model.

In response to complaints about exclusive reliance on the discrepancy model, Congress amended the IDEA in 2004 to indicate that states could no longer require the use of the discrepancy model in identifying learning disabilities but, instead, must develop another approach, called the “response to intervention” (RTI) approach. The new language reads:

(6) Specific learning disabilities.

(A) In general.

Notwithstanding section 607(b), when determining whether a child has a specific learning disability as defined in section 602, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority.

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).⁵²

Despite creating those new rules for diagnosing a learning disability, Congress retained the longstanding definition of “specific learning disability” earlier in the statute.⁵³ In other words, Congress created new rules to diagnose a learning disability but did not modify the underlying definition of what is a learning disability. As in 1975, a specific learning disability “means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”⁵⁴ Congress maintained the longstanding requirement that a disorder exists in “one or more of the basic psychological processes.”

Under the RTI model endorsed by the 2004 Amendments, a school district would not have to administer an IQ test as part of the identification

51. CONNECTICUT GUIDELINES, *supra* note 18, at 2.

52. 20 U.S.C. § 1414(b)(6) (2006).

53. § 1401(30).

54. *Id.*

process under the rationale that students experiencing difficulty reading who do not have IQ-achievement discrepancies often benefit from similar interventions as those do with IQ-achievement discrepancies.⁵⁵ Hence, the focus of the RTI model is whether children have fallen behind grade-level expectations and are unlikely to meet those expectations without individualized intervention. The RTI model is premised on the conclusion that many children who are not meeting grade-level expectations respond well to individualized intervention even if they do not have a high IQ.

Congress endorsed the RTI model in 2004 because it considered that model superior to the discrepancy model. In addition to concerns that the discrepancy model favored middle-class children with high IQ scores, the federal government concluded that the discrepancy model reflects a “wait to fail” model under which children do not receive services “until the student’s achievement is sufficiently low so that the discrepancy is achieved.”⁵⁶ The federal government believed that a move to a response to the intervention model would save districts money because the discrepancy model “consumes significant resources, with the average cost of an eligibility evaluation running several thousand dollars.”⁵⁷ The RTI model is also a way to align the IDEA with No Child Left Behind (NCLB),⁵⁸ by identifying children who have fallen below grade-level expectations and need help beyond what is available in the regular classroom so that they can meet the NCLB requirement of being proficient in reading and math by 2014.⁵⁹ In fact, the IDEA cross-references the NCLB when it mentions the RTI model.⁶⁰

55. CONNECTICUT GUIDELINES, *supra* note 18, at 2.

56. Assistance to States for the Education of Children With Disabilities; Preschool Grants for Children With Disabilities; and Service Obligations Under Special Education—Personnel Development To Improve Services and Results for Children With Disabilities, 70 Fed. Reg. 35,782, 35,802 (June 21, 2005) (proposed rules) (to be codified at 34 C.F.R. pt. 300).

57. *Id.*

58. The No Child Left Behind Act is the popular name for the Elementary and Secondary Education Act of 1975, as amended by Public Law 107-110 (requiring every child to be proficient in reading and math by 2014). As North Dakota noted,

Guidelines for developing an intervention that may be considered to be “scientific, research based” can be found in the No Child Left Behind (NCLB) Act, which uses scientifically based research as one of its educational cornerstones. The term itself defined at 20 U.S.C. § 7801(37), and repeated in the 2006 IDEA regulations at 34 C.F.R. § 300.35 to mean research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs.

N.D. DEP’T OF PUB. INSTRUCTION, GUIDELINES, IDENTIFICATION AND EVALUATION OF STUDENTS WITH SPECIFIC LEARNING DISABILITIES 4 (2007), *available at* www.dpi.state.nd.us/speed/guide/SLDGuide07.pdf.

59. *See, e.g.*, CONNECTICUT GUIDELINES, *supra* note 18, at 5 (recognizing the relationship between No Child Left Behind and the 2004 Amendments to the IDEA).

60. *See* 34 C.F.R. § 300.35 (2011) (“Scientifically based research has the meaning

Nonetheless, educational psychologists did not develop the RTI model as a tool to identify the existence of neuropsychological factors that may explain a child's academic deficits.⁶¹ This diagnostic model is not consistent with the IDEA's requirement that a learning disability be the result of a "psychological impairment."⁶² As we will see, states have responded to this approach inconsistently, with some, but not all, requiring independent evidence of a neurological impairment for students diagnosed under the RTI approach.⁶³ States are uncertain whether Congress still requires them to demonstrate evidence of an *impairment* before classifying a child as learning disabled.

Although no professional groups within the field of educational psychology endorsed the RTI approach when Congress adopted it in 2004, the APA has taken steps to endorse it. The proposed Fifth Edition of the Diagnostic Manual seeks to change the professional standards for diagnosing a learning disability to align them with the legal standards embodied in the 2004 version of the IDEA. The proposed revision states that "learning disabilities" are:

A. A group of disorders characterized by difficulties in learning basic academic skills (currently or by history), that are not consistent with the person's chronological age, educational opportunities, or intellectual abilities. Basic academic skills refer to accurate and fluent reading, writing, and arithmetic.

Multiple sources of information are to be used to assess learning, one of which must be an individually administered, culturally appropriate, and psychometrically sound standardized measure of academic achievement.

B. The disturbance in criterion A, without accommodations, significantly interferes with academic achievement or activities of daily living that require these academic skills.⁶⁴

This language reflects, in part, an attempt to be consistent with the 2004 Amendments to the IDEA. In the rationale section, the authors of these proposed rules stated:

However, the diagnostic criteria do not depend upon comparisons with overall IQ and are consistent with the change in the USA's reauthorized IDEA regulations (2004) which state that "the criteria adopted by the State must not require the use of a severe discrepancy between

given the term in section 9101(37) of the ESEA.").

61. See NEUROPSYCHOLOGICAL PERSPECTIVES ON LEARNING DISABILITIES IN THE ERA OF RTI: RECOMMENDATIONS FOR DIAGNOSIS AND INTERVENTION (Elaine Fletcher-Janzen & Cecil R. Reynolds eds., 2008) [hereinafter NEUROPSYCHOLOGICAL PERSPECTIVES].

62. See 20 U.S.C. § 1401(30)(A) (2006).

63. See *infra*, Part II.

64. *A 12 Learning Disorder*, AM. PSYCHIATRIC ASS'N DSM-5 DEV., <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=429> (last visited Sept. 9, 2010) [hereinafter *Learning Disorder*].

intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in 34 C.F.R. 300.8(c)(10).”⁶⁵

The proposed DSM-V emphasizes the importance of standardized achievement tests but moves away from overreliance on “overall IQ” tests. This approach, if adopted, would not necessarily result in the cost-savings mentioned in the language accompanying the IDEA regulations⁶⁶ because the battery of achievement tests would need to be “psychometrically sound.” It reflects an approach that allows more flexibility for school districts to assess intelligence as part of the model for diagnosing a learning disability. And the term “discrepancy” has been replaced with the term “are not consistent with.” The prior rules asked whether academic achievement is “substantially below” what is expected for age, schooling, and level of intelligence. The proposed rules ask whether academic achievement is “consistent with” what is expected for someone’s age, educational opportunities and intellectual abilities. That semantic change does not appear to reflect a major change in philosophy, although it makes the DSM more similar to the IDEA.

Unlike the DSM-IV, the proposed DSM-V does not specify what it means to be “consistent with.” The DSM-IV suggested that a two-standard-deviation discrepancy always meets the “substantially below” criteria but that one to two standard deviations can be sufficient if there is reason to think that the IQ test understates a person’s intellectual ability. Because the DSM-V does not define the term “is consistent with,” these standards reduce, rather than add, clarity.

School psychologists have been critical of the proposed DSM-V as well as the RTI-only move by the 2004 amendments to the IDEA. In 2004, the American Academy of School Psychology took the position that an RTI-only approach is not professionally appropriate because it is important to have a

“comprehensive evaluation” that includes “multiple sources of information, including standardized, norm-referenced tests; interviews; observations; curriculum-based assessments; and informed clinical judgment. A student’s response to scientific, research-based interventions can be a part of a comprehensive evaluation, but a response-to-intervention process should not be viewed as a sole criterion for diagnosing LD.”⁶⁷

In other words, the RTI-only approach adopted by the 2004 Amendments to the IDEA and subsequently adopted by many states is not professionally appropriate.

65. *Id.*

66. *See supra* note 52 and accompanying text.

67. Linda Caterino et al., *A Survey of School Psychologists’ Perceptions of the Reauthorization of IDEA 2004*, 62 SCH. PSYCHOLOGIST 45, 46 (2008).

In a critique of both the RTI and the discrepancy models, Kenneth Kavale and Dawn Flanagan argued in 2007 that a proper definition of specific learning disability must include the following criteria:

- (1) one or more academic ability deficits have been identified;
- (2) one or more cognitive ability/processing deficits have been identified; . . .
- (3) the identified academic and cognitive deficits are related and have been determined not to be the primary result of exclusionary factors [and]
- (4) the pattern of results supports the notion of underachievement in the manner that might be expected in cases of suspected SLD [rather than] via alternative causes such as mild MR or other factors known to have an adverse effect on both academic and cognitive performance (e.g., sensory-motor handicaps, lack of English language proficiency).⁶⁸

Kavale and Flanagan agree with the critique of the discrepancy model as being “unreliable and invalid” and leading to “overidentification,” but they also believe that although an RTI approach can “serve to create a pool of at-risk students who may or may not have SLD,” that proceeds from the “unwarranted presupposition that non-responsiveness equates to SLD status.”⁶⁹ They reintroduce the concept that has existed under the IDEA since 1975 that there must be an identifiable processing deficit. The move to an RTI-only approach allows all underachievers to be classified as SLD without requiring that the reasons underlying the underachievement of each child be diagnosed.

In 2010, we are still therefore left with a basic question: How do we know that a child has a learning disability? The discrepancy model is highly disfavored because of its middle-class bias, but the field of educational psychology has not approved a pure RTI model—even though that model has been endorsed by the 2004 Amendments to the IDEA and been proposed by the American Psychiatric Association. The RTI-only model is a way to identify children who are falling behind grade-level expectations, even after receiving good instruction, but does not identify which of those children has a neurological or psychological impairment that is causing these educational problems. The RTI-only model transforms the Individuals with Disabilities Education Act into the Education of the Individual Act by eliminating the need to demonstrate an impairment in order to be classified as learning disabled.

68. Kenneth A. Kavale & Dawn P. Flanagan, *Ability-Achievement Discrepancy, Response to Intervention, and Assessment of Cognitive Abilities/Processes in Specific Learning Disability Identification: Toward a Contemporary Operational Definition*, in HANDBOOK OF RESPONSE TO INTERVENTION: THE SCIENCE AND PRACTICE OF ASSESSMENT AND INTERVENTION 130, 142 (Shane R. Jimerson et al. eds., 2007).

69. *Id.* at 143.

II. THE IDEA IMPLEMENTATION BY THE STATES

Because of the discretion provided to the states by the 2004 Amendments, there are dozens of approaches in existence. Some states have a rigid discrepancy approach whereas others have banned the discrepancy approach. Within the response to intervention approach, there is also enormous variation; some states require evidence of a neurological impairment, some states require evidence of a discrepancy between aptitude and achievement, and some states merely require substandard academic achievement.

Under the discrepancy model, seven states specify that there must be at least a 1.5 standard deviation variation between achievement and aptitude: California⁷⁰ Missouri⁷¹ Mississippi⁷² South Dakota⁷³ Tennessee⁷⁴ Vermont,⁷⁵ and Wyoming.⁷⁶ New Mexico uses the 1.5 standard deviation rule for children in grades seven through twelve⁷⁷ The State of Washington uses a 1.55 standard deviation discrepancy test.⁷⁸ Minnesota and Wisconsin insist on a 1.75 standard deviation discrepancy.⁷⁹ North Carolina requires at least a fifteen-point discrepancy, which would be only one standard deviation.⁸⁰ Similarly, Alabama only requires a one standard deviation discrepancy.⁸¹ Florida only requires 1.0 standard deviation discrepancy for students aged seven to ten but requires 1.5 standard deviations for students aged eleven and above.⁸²

70. CAL. CODE REGS. tit. 5, § 3030(j)(4)(A) (2011).

71. MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., MISSOURI STATE PLAN FOR SPECIAL EDUCATION: REGULATIONS IMPLEMENTING PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 25 (rev. 2010) [hereinafter MISSOURI PLAN], *available at* http://dese.mo.gov/schoollaw/rulesregs/Inc_By_Ref_Mat/IDEAPartB.htm.

72. MISS. DEPT. OF EDUC., STATE POLICIES REGARDING CHILDREN WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 2004: STATE BOARD POLICY 7210 303 (rev. 2009) [hereinafter MISSISSIPPI PLAN] *available at* http://www.mde.k12.ms.us/special_education/policies/2009/Policy_06-17-09.pdf (“Severe discrepancy is defined as 1.5 standard deviations below the mean of the standardized test measuring intellectual ability.”).

73. S.D. ADMIN. R. 24:05:25:12(8) (2011).

74. TENN. STATE DEP'T OF EDUC., SPECIAL EDUCATION MANUAL 61 (2008) [hereinafter TENN. EDUCATION MANUAL], *available at* <http://www.state.tn.us/education/speced/doc/80608SEMManualfinal.pdf>

75. VT. ADMIN. CODE tit. 7, § 2362.2.4 (2011).

76. EDUC. GEN-7 WYO. CODE R. § 4(d)(x)(E)(I)(2) (LexisNexis 2011).

77. N.M. PUB. EDUC. DEP'T, TECHNICAL EVALUATION AND ASSESSMENT MANUAL, 20 (2007), *available at* <http://ped.state.nm.us/SEB/technical/NMTEAMMANUAL.pdf>.

78. WA. ADMIN. CODE tit. 392, ch. 172A-03065 (2011).

79. MINN. R. 3525.1341(2)(C) (2011); WIS. ADMIN. CODE PI § 11.36(6)(c)(2)(b) (2011).

80. 16 N.C. ADMIN. CODE 2E.1503 (2011).

81. ALA. ADMIN. CODE r. 290-8-9.03(10)(c)(6)(d)(2)(i) (2007 & Supp. 2011).

82. FLA. ADMIN. CODE ANN. r. 6A-6.03011(4) (2011).

Other states follow various unique approaches under the discrepancy model. Montana's rule states that a "severe discrepancy is defined as a 50% or higher probability of a two standard deviation discrepancy between cognitive ability and achievement in one or more of the areas identified [in the regulations] when adjusted for regression to the population mean."⁸³ It is not clear what that standard even means because educational psychologists would not normally report a score merely within a 50% confidence band.

In Utah, under the discrepancy model, the team must "produce a report that states that the team can be 93% confident there is a severe discrepancy between the student's expected achievement score and the obtained achievement score, based on the Utah Estimator software" or "produce a report that shows a significant discrepancy, based on a commercial software program that employs a clearly specified regression formula that considers the relationship between the intelligence and achievements tests as well as the tests' reliability."⁸⁴ It is not clear what standard of significance is employed with this approach but it is likely to be a 2.0 standard deviation approach, rather than 1.5 standard deviation approach because 2.0 standard deviations is typically considered statistically significant.

In practical terms, these differences matter. In Alabama, for example, a child with an IQ in the 85th percentile—a score of 115—and achievement in the 50th percentile—a score of 100—on a reading test would be considered to have a specific learning disability in reading.⁸⁵ If that child moved to California,⁸⁶ Missouri,⁸⁷ Mississippi,⁸⁸ South Dakota,⁸⁹ Tennessee,⁹⁰ Vermont,⁹¹ or Wyoming,⁹² that amount of discrepancy would be insufficient for a learning disability diagnosis. The child's IQ would have to be as high as 122 or the child's achievement would have to be as low as 92 to meet the 1.5 standard deviation requirement for those states.

There is even more variation in how states have implemented the RTI approach. Some states, such as Connecticut, Illinois, Iowa, and North Dakota only consider a student's achievement (and not aptitude) in

83. MONT. ADMIN. R. 10.16.3019B (2011).

84. UTAH STATE BD. OF EDUC., SPECIAL EDUCATION RULES 51-52 (2011), available at <http://www.schools.utah.gov/sars/DOCS/law/finalrules.aspx>.

85. ALA. ADMIN. CODE r. 290-8-9.03(10)(c)(6)(d)(2)(i).

86. CAL. CODE REGS. tit. 5, § 3030(j) (2011).

87. MISSOURI PLAN, *supra* note 71, at 25.

88. MISSISSIPPI, *supra* note 72, at 303.

89. S.D. ADMIN. R. 24:05:25:12 (2011).

90. TENN. EDUCATION MANUAL, *supra* note 74, at 61.

91. VT. ADMIN. CODE tit. 7, § 2362.2.4 (2011).

92. EDUC. GEN-7 WYO. CODE R. § 4(d)(x)(E)(I)(2) (LexisNexis 2011).

determining if he or she should be classified as learning disabled. Connecticut focuses on how a student compares to his or her peers both with respect to his or her knowledge and his or her rate of acquisition of knowledge. The student's aptitude is not a factor to be considered as part of this inquiry. Connecticut has also abandoned the requirement that there be evidence of a specific processing disorder before a diagnosis of a specific learning disability is made.⁹³ Similarly, in Illinois, children with low achievement are to be classified as having a specific learning disability unless "appropriate curriculum choice and the delivery of effective instruction cannot be demonstrated."⁹⁴

North Dakota offers the following as an example of an appropriate RTI approach:

1. Organize the lowest 20% of students in the group (class, grade level, or school) to receive interventions.
2. Students in group interventions are monitored regularly.
3. Change interventions when 4 consecutive data points do not meet the student's goal line.
4. Move students to an individual intervention after two unsuccessful group interventions.
5. Students in individual interventions are monitored at least 1 time weekly.
6. Refer a student for special education after one unsuccessful individual intervention.⁹⁵

This approach requires no documentation of a psychological processing disorder. A child who falls behind academically and does not respond well to group-based intervention becomes eligible for special education services.

One of the most permissive states in defining learning disabilities is Iowa. It appears that many school districts in Iowa use the RTI approach to improve instruction for all children, not as a means to limit the number of students classified as learning disabled. For example, one elementary school screens students early in the year using the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) along with other diagnostic tests that pinpoint problems and guide interventions. In the first year of this program, 30% of the school's students began to receive intervention during an intensive data collection exercise. "The principal, reading-support teachers, and classroom teachers meet once a month to discuss the data they are collecting on students. Three times a year, the school has 'data

93. See CONNECTICUT GUIDELINES, *supra* note 18, at 3.

94. ILL. STATE BD. OF EDUC., SPECIAL EDUC. & SUPPORT SERV., ILLINOIS SPECIAL EDUCATION ELIGIBILITY AND ENTITLEMENT PROCEDURES AND CRITERIA WITHIN A RESPONSE TO INTERVENTION (RTI) FRAMEWORK: A GUIDANCE DOCUMENT 9 (2010), available at http://www.isbe.state.il.us/SPEC-ED/pdfs/sped_rti_framework.pdf.

95. *Id.* at 16.

days' to take a deeper look at the overall curriculum and student performance based on other tests."⁹⁶ Although Iowa has been a national leader in the use of the RTI approach, it does not see that approach as principally about special education identification. "Special education identification 'is just the toenail on the elephant,' said Mr. Tilly, the Heartland official. 'That's not what it was created for, and that's not what its best purpose is.'"⁹⁷ One teacher concludes that the Iowa approach allows them to catch "more 'on the edge kids.'"⁹⁸ One Iowa elementary school reported that the RTI process improved their passing rate on the DIBELS benchmark in one year from 48% to 81%.⁹⁹ Such improvement is commendable if it reflects genuine improvement in reading fluency, but did the school district then classify and un-classify large numbers of students as learning disabled to reach those goals?

In contrast to Iowa's permissive approach are states that require evidence that a child satisfies criteria under both the RTI and discrepancy model to be classified as learning disabled. Georgia requires evidence of a "primary deficit in basic psychological processes and secondary underachievement in one or more of the eight areas along with documentation of the lack of response to instructional intervention as supported by on-going progress monitoring."¹⁰⁰ In other words, Georgia requires evidence of a psychological processing impairment, underachievement (which is presumably a discrepancy model approach), and a lack of response to intervention. Although the response to intervention method was supposed to broaden the category of children eligible for special education by eliminating the "wait to fail" model and removing some of the cultural bias of an IQ-focused approach, Georgia appears to be using these rules to heighten the eligibility requirements.

The state with the most restrictive application of the learning disability standards is Kentucky. Kentucky's overall disability statistics (2.06% of school-age population) are consistent with national norms but their rate of learning disability classification is quite low (15.36%).¹⁰¹ Nationally,

96. Christina A. Samuels, *The 'Response to Intervention' Framework in Iowa Is Helping Teachers Better Understand and Address Students' Learning Needs*, EDUC. WEEK, Sept. 10, 2008, available at <http://www.edweek.org/tsb/articles/2008/09/10/01rti.h02.html>.

97. *Id.*

98. *Id.*

99. *Id.*

100. GA. COMP. R. & REGS. 160-4-7-.05(3)(i) (2010).

101. See U.S. Dep't of Educ., *Table 1-3, supra* note 11; 707 KY. ADMIN. REGS. 1:002(59) (2011) ("Specific learning disability" or 'LD' means a disorder that adversely affects the ability to acquire, comprehend, or apply reading, mathematical, writing, reasoning, listening, or speaking skills to the extent that specially designed instruction is required to benefit from education. The specific learning disability (LD) may include dyslexia, dyscalculia, dysgraphia, developmental aphasia, and

learning disabilities are the most common disability classification. In Kentucky, the numbers for learning disability (13,587) are lower than the numbers for mental retardation (16,462), speech or language impairments (20,250) and other health impairments (15,484).¹⁰² Thus, it seems clear that a child who moves from Iowa with its 60.26% learning disability classification rate to Kentucky with its 13.5% learning disability classification rate faces a significant chance of moving out of the learning disability classification system.¹⁰³

This kind of national variation is part of the learning disability mess. Children can go in and out of the learning disability category as they move from state to state. The happenstance of geography can also materially affect whether students get extra help at school. As we will see below, this variation becomes especially problematic as students begin to apply to colleges and universities because students with learning disabilities are often eligible for extended time on standardized exams. With no national standard, it becomes difficult for test administrators to develop a uniform standard for assessing whether students should qualify for accommodations such as extended time.

III. COLLEGE ADMISSIONS TESTING

Under regulations recently promulgated by the DOJ, these state standards become imprinted on a student's disability status as he or she seeks to enter college.

When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations or related aids and services provided in

perceptual/motor disabilities. The term does not include deficits that are the result of other primary determinant or disabling factors such as vision, hearing, motor impairment, mental disability, emotional-behavioral disability, environmental or economic disadvantaged, cultural factors, limited English proficiency, or lack of relevant research-based instruction in the deficit area.”). That definition is a generic definition that makes no mention of how to diagnose a learning disability, so it is impossible to know from the definition, itself, why Kentucky has such a low rate of learning disability classification.

102. See U.S. Dep’t of Educ., *Table 1-3, supra* note 11. Nationally, the distributions are: Mental retardation: 475,713 (8.0%); Hearing impairments: 70,682 (1.2%); Speech or language impairments: 1,121,496 (19.0%); Visual impairments: 25,790 (0.4%); Emotional disturbance: 417,872 (7.1%); Orthopedic impairments: 62,332 (1.0%); Other health impairments: 648,112 (11.0%); Specific learning disabilities: 2,522,735 (42.8%); Deaf-blindness: 1,735 (0.0%); Multiple disabilities: 123,924 (2.1%); Autism: 292,638 (4.9%); Traumatic brain injury: 24,857 (0.4%); Developmental delay: 96,853 (1.6%). *Id.* Kentucky’s numbers for mental retardation are quite high as compared with the national average suggesting that it is classifying children as mentally retarded (or “intellectually impaired”) that our states would classify as learning disabled.

103. See *id.*

response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan).¹⁰⁴

In other words, the DOJ would like testing agencies to give “considerable weight” to the wide range of the IDEA definitions being used at the state level.

This regulation was promulgated in response to complaints that some testing agencies, such as LSAC, were requiring too much documentation as part of requests for accommodations such as extra time. The educational psychology literature consistently establishes that children with learning disabilities¹⁰⁵ in reading have slower processing speeds than other children.¹⁰⁶ Researchers document that children with learning disabilities score within the expected range for age “on measures of Oral Language, Motor Speed, and Visual Spatial skill, but less well on measures of Written Language, consistent with their well-documented phonological processing problems.”¹⁰⁷ Studies reflect that it is difficult for students with learning disabilities to demonstrate their knowledge under speeded circumstances because they may simply not have enough time to demonstrate their understanding. Hence, students with slower processing speeds are often provided extra time as an accommodation for their disability.¹⁰⁸

Students with learning disabilities who have been provided with extra time on tests in primary and secondary school often request extra time on college and law school admissions tests. Under the new DOJ regulations, considerable weight should be given to their disability classification under the IDEA when testing agencies assess these requests. In practice, these regulations are not being followed by the LSAC, the College Board, and the ACT.

104. 28 C.F.R. § 36.309(b)(v) (2011).

105. See, e.g., M. Kay Runyon, *The Effect of Extra Time on Reading Comprehension Scores for University Students With and Without Learning Disabilities*, 24 J. LEARNING DISABILITIES 104 (2001).

106. See, e.g., Michael D. Weiler et al., *Processing Speed in Children with Attention Deficit/Hyperactivity Disorder, Inattentive Type*, 6 CHILD NEUROPSYCHOLOGY 218 (2000).

107. *Id.* at 227.

108. See, e.g., Jennifer Hartwig Lindstrom, *The Role of Extended Time on the SAT for Students with Learning Disabilities and/or Attention-Deficit/Hyperactivity Disorder*, 22 LEARNING DISABILITIES RES. & PRAC. 85, 86 (2007) (concluding that SAT results can be interpreted in the same way when students with disabilities have an extended-time administration as compared to the standard-time administration); Nicole Ofiesh et al., *Using Speeded Cognitive, Reading, and Academic Measures to Determine the Need for Extended Test Time Among University Students with Learning Disabilities*, 23 J. OF PSYCHOEDUCATIONAL ASSESSMENT 35, 37 (2005) (acknowledging the widespread use of extra time on exams and suggesting which tests are appropriate for determining allocation of extra time).

The LSAC guidelines require students to submit requests for accommodation that fit the “discrepancy” model not the response to intervention model. Students must submit test scores from someone who works with adult populations, their test scores must include an aptitude and achievement battery, and these scores must include “a timed reading comprehension measure, which has been normed on adults and which allows for both extended and regular administration.”¹⁰⁹ In the summary score sheet at the end of their instructions, LSAC states that the testing professional must “identify an information-processing deficit; and identify an aptitude-achievement discrepancy that meets the appropriate diagnostic criteria.”¹¹⁰ In other words, the results must meet the discrepancy definition of learning disability and not rely on the kind of evidence that may have caused the student to be diagnosed as learning disabled in K-12 because all testing must be done under adult norms.

The College Board makes no mention of RTI as a way to demonstrate the existence of a learning disability.¹¹¹ It also fails to reference a child’s classification under the IDEA as relevant to its disability determination.¹¹² Its emphasis on scaled achievement and aptitude test scores suggests exclusive use of the discrepancy model. Similarly, the ACT uses the discrepancy model in its explanation of the documentation needed to get extra time on the ACT; it makes no reference to an IDEA diagnosis as being relevant to accommodations under the ACT.¹¹³

The guidelines by each of these three testing agencies is troubling in light of the criticism of the discrepancy-only model as being biased in favor of middle-class students with high IQ’s and its lack of support in the field of educational psychology. Further, it is no longer consistent with federal regulations. These entities may possibly modify their practices to comply with the new DOJ regulations. In the meantime, their practices are part of the learning disability mess in that they are adhering to outdated guidelines and failing to follow federal regulations.

A further difficulty faced by the administrators of these entrance examinations is how to report the scores of students who take the exams under conditions of extra time. It is impossible to know how much extra time is appropriate as an accommodation if an exam has a speeded element

109. LSAC, GUIDELINES FOR DOCUMENTATION OF COGNITIVE IMPAIRMENTS 2 (2011), available at <http://www.lsac.org/JD/pdfs/GuidelinesCognitive.pdf>.

110. *Id.* at 4.

111. See COLLEGEBOARD, *Learning Disabilities*, <http://professionals.collegeboard.com/testing/ssd/application/disabilities/learning> (last visited June 26, 2011).

112. *Id.*

113. See ACT, *ACT Policy for Documentation to Support Requests for Test Accommodations on the ACT (No Writing) or ACT Plus Writing*, <http://www.act.org/aap/disab/policy.html> (last visited June 26, 2011).

because all students benefit from extra time on a speeded exam.¹¹⁴ Ideally, a student with a learning disability would be given exactly enough extra time to make exam conditions feel identical to those of nondisabled students who take the exam under normal conditions. The LSAC takes the position that it cannot provide accommodations with such precision even though it requires extensive documentation of learning disabilities. Hence, the LSAC refuses to give students who take the exam under extra time conditions an “index score” or percentile score to compare them to other candidates; they merely get a raw score.¹¹⁵

The LSAC guidelines state:

Candidates who seek additional test time on scored sections of the test should pay particular attention to the following:

- If you receive additional test time as an accommodation for your condition, LSAC will send a statement with your Credential Assembly Service (CAS) or LSAT Law School Reports advising that your score(s) should be interpreted with great sensitivity and flexibility.
- Scores earned with additional test time are reported individually and will not be averaged with standard-time scores or other nonstandard-time scores.
- Percentile ranks of nonstandard-time scores are not available and will not be reported.¹¹⁶

In other words, because LSAC cannot figure out exactly how much extra time to provide a candidate, the candidate is unable to receive a score that is identical to that of other test takers. By contrast, the College Board and ACT do not flag scores taken under conditions of extra time for different treatment although they, presumably, experience the same difficulty as the LSAC in determining exactly how much extra time is appropriate for each test taker who receives accommodations. This is yet another example of the learning disability mess created by the emphasis on standardized exam scores in the college and law school admissions process.

If the national testing entities would follow federal regulations, a new problem would emerge. The enormous state by state variation would then be transported to college entrance exams. A child who grew up in Iowa, with its generous definition of learning disabilities, might be able to attain extra time on these exams but a child from Kentucky would not be able to. It seems inappropriate to have that kind of variation on a national entrance

114. See Ruth Colker, *Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413, 416 (2008).

115. See ANDREA E. THORNTON ET AL., PREDICTIVE VALIDITY OF ACCOMMODATED LSAT SCORES: LAW SCHOOL ADMISSION COUNCIL TECHNICAL REPORT 01-01 (2002), available at <http://www.lsac.org/LsacResources/Research/TR/TR-01-01.pdf>.

116. See LSAC, *The LSAT: Accommodated Testing*, <http://lsac.org/JD/LSAT/accommodated-testing.asp> (last visited Nov. 11, 2011).

exam.

CONCLUSION

As the previous discussion reflects, we have made little progress since a member of Congress declared in 1975 that “no one really knows what a learning disability is.”¹¹⁷ Rather than defining the term with precision, Congress has punted the problem to the states and given them the option of choosing between two methods of diagnosing a learning disability. The states have responded with a wide range of approaches, most of which have little in common with the emerging professional guidelines in the field of educational psychology. To further add to this mess, the DOJ is now insisting that high stakes testing agencies give considerable weight to the learning disability determinations made by the fifty states as they flounder to implement the IDEA. And even when allowed to impose its own stringent definition of learning disability, LSAC cannot figure out how to exactly allocate the right amount of extra time to a student with a learning disability.

The learning disability mess is, in part, a byproduct of our fixation on high stakes testing. Young children have to worry about meeting state proficiency standards as reflected by standardized test scores to advance to the next grade. High school students need to score as high as possible on timed, standardized exams to be admitted to elite colleges. And law students typically take time-pressured three or hour in-class exams for their entire grade in large classes. “Plodders”—who sometimes have learning disabilities—struggle with all of these examination instruments as we emphasize speed and performance under stressful conditions over competency and knowledge.

The way out of the learning disability mess is not to develop better diagnostic instruments for evaluating the existence of learning disabilities. The way out of this mess is to ask why we have such an overemphasis on whether students meet a definition of “learning disability.” Iowa’s approach to K-12 education seems like a sound approach that has produced some solid improvement in basic reading skills. All children in the country should have access to such reading resources but these children should not have to be classified as “learning disabled” to get those resources.

We should also alter the norms for test taking at the college entrance exam stage. All students should be allowed to take exams under conditions that we now define as “extra time.” Rather than making the individual student justify why he or she should get extra time, test designers should have to justify why tests must be given under timed conditions. Perhaps a

117. 121 CONG. REC. 25531 (July 29, 1975) (statement of Rep. Bill Lehman).

test for emergency responders would meet such a necessity standard. However, it is hard to see why it matters if a student takes forty-five minutes rather than thirty minutes to read a passage with good comprehension and whether this should even be a measure of whether he or she should be admitted to a top college.

I realize that it is unlikely that the College Board, or other testing agencies, will decide to abandon time-pressured exams on their own. After all, it is less expensive to give a shorter exam. But what if universities started demanding that applicants be given more time to take entrance exams? What if universities started demanding admission of the most thoughtful students rather than the fastest, and needed different kinds of standardized exams to identify such students? Could Plodder University become the next Harvard, with students scrambling to be admitted under admissions criteria that give no weight to the speed under which students can complete exams?

In 1997, Mark Kelman and Gillian Lester published a path-breaking book called *Jumping the Queue* in which they documented how the discrepancy model for diagnosing learning disabilities has benefited middle-class students by giving them an opportunity to attain extra time on standardized testing.¹¹⁸ The response to their work (and that of many others) has been to develop the RTI-only approach that replaces one poor model with another. It is time to stop trying to create the perfect model for defining learning disability and to, instead, ask why all these middle-class students want extra time on standardized exams. The time-pressured, high stakes testing model does a disservice to many students by not allowing them to demonstrate their knowledge and abilities. Instead of finding new ways to help children jump the queue, we need to get rid of the line altogether. When Plodders University becomes the norm, we can truly get out of the learning disability mess.

118. MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 7 (1997).