



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

May 10, 2018

Perry A. Zirkel, Ph.D., J.D.
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Department of Education and Human Services
111 Research Drive
Bethlehem, Pennsylvania 18015-4793

Dear Dr. Zirkel:

This letter is in response to your electronic mail (email) addressed to Melody Musgrove, former Director, Office of Special Education Programs (OSEP), U.S. Department of Education (Department), requesting clarification regarding the regulation in 34 CFR §300.309(b)(2). You have asked that OSEP clarify the requirements for evaluating a child suspected of having a specific learning disability (SLD) to determine whether the child is eligible to receive special education and related services under the Individuals with Disabilities Education Act (IDEA). Specifically, you asked, “[i]f, in a [S]tate that does not mandate [response to intervention] RTI as the approach for SLD identification, a district uses the severe discrepancy approach without collecting any RTI data, does the district meet this consideration requirement [in 34 CFR §300.309(b)(2)] by relying [on] a variety of other sources of evaluative information or, instead, must the district collect continuous progress monitoring data for consideration by the [individualized education program] IEP [T]eam?” We apologize for the delay in providing this response.

We note that section 607(d) of IDEA prohibits the Secretary from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. This response represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented, and does not establish a policy or rule that would apply in all circumstances.

As you are aware, States have discretion to allow their local educational agencies (LEAs) to use multiple methods for determining SLD eligibility, so long as the methods are consistent with IDEA Part B. Section 300.307(b) makes clear that LEAs must use the State criteria adopted pursuant to 34 CFR §300.307(a) in making SLD eligibility determinations. Under 34 CFR §300.307(a), States must adopt SLD eligibility criteria that are consistent with 34 CFR §300.309 and that meet the minimum requirements prescribed in §300.307(a)(1), (2), and (3). Therefore, as long as the SLD eligibility criteria adopted by a State meet these minimum requirements, the

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State has the discretion to provide flexibility for its LEAs to use more than one method for determining SLD eligibility.¹

If a school district uses a severe discrepancy model for determining whether a child has an SLD, it is not required to implement an RTI process to meet the requirements of 34 CFR §300.309(b)(2). Rather, a school district can meet this requirement through the IDEA evaluation process or through formal assessments based on the regular instructional program. Specifically, 34 CFR §300.309(b)(2) requires that the group making the SLD eligibility determination consider, as part of the evaluation described in 34 CFR §§300.304 through 300.306, data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents. This consideration is necessary to ensure that underachievement in a child suspected of having an SLD is not due to a lack of instruction in reading or math.

If you have any further questions, please do not hesitate to contact Lisa Pagano at 202-245-7413 or by email at Lisa.Pagano@ed.gov.

Sincerely,

/s/

Ruth E. Ryder
Acting Director
Office of Special Education Programs

¹ The Department states in the *Analysis of Comments and Changes* accompanying the final 2006 Part B regulations: "There is nothing in the Act that would require a State to use one model of identification to identify a child with an SLD. We do not believe the regulations should include such a requirement, because section 614(b)(6) of the Act indicates that some flexibility in the selection of models of identification by LEAs can be appropriate, if permitted by the State." See 71 Fed. Reg. 46540, 46649 (August 14, 2006). Further, "State eligibility criteria [for SLD] must meet the requirements in §§300.307 through 300.111 and LEAs must use these State-adopted criteria. We believe that, although these provisions allow States some flexibility in how children with SLD are identified, the requirements in these provisions will ensure that SLD criteria do not vary substantially across States." 71 Fed. Reg. 46653. Also see OSEP's August 15, 2007 *Letter to Zirkel*, available at <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/letters/2007-3/zirkel081507eval3q2007.pdf>.