DePaul University

From the SelectedWorks of Mark C. Weber

January 2009

The IDEA Eligibility Mess

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/mark_weber/1

The IDEA Eligibility Mess

Mark C. Weber*

Abstract

The Individuals with Disabilities Education Act (IDEA) guarantees students with disabilities a free public education appropriate to their needs, but students must meet the definition of "child with a disability" to be eligible for that entitlement. The law governing special education eligibility, however, is charitably characterized as a mess.

There are several sources of the current eligibility confusion. First, recent court cases have reached conflicting conclusions about how much adverse educational impact the child's disabling condition must have, what constitutes a sufficient need for special education, and when children with emotional disabilities are eligible. Second, long-established methods for assessing learning disabilities have withered under criticism from educational experts, and a new method of approaching learning disabilities, response-to-intervention, is being touted by the United States Department of Education. Nevertheless, that innovation remains largely unproven and may be impossible to implement at scale. Third, Congress and others have focused long-overdue attention on the disproportionate percentage of African-Americans who are found eligible for special education under the disability categories of mental retardation and emotional disturbance, but neither Congress nor anyone else appears to have a promising idea about how to address the situation.

This Article analyzes and critiques the recent cases, describes and comments on the new learning disability assessment methodology, and evaluates competing ideas about how to respond to ethnic disproportion. It concludes that the solution to the entire set of problems is not a redefinition of special education eligibility under IDEA, but rather a renewed attention to the actual terms of the statute and the goal of full educational opportunity. This step will promote what might be called "not-quite-so-special education," that is, an entitlement for a broad class of children to high quality special education supports provided in the regular educational environment.

---

*Vincent dePaul Professor of Law, DePaul University. B.A. Columbia, J.D. Yale. Thanks to Robert Garda, Andrea Kaufman, Michael Perlin, and Paul Secunda for their comments on an earlier draft. Thanks also to Kim Brown, David King, and Christopher Cook for their research assistance. Author contact: mweber@depaul.edu; 312/362-8808.

© 2008. Unpublished Manuscript—All Rights Reserved.

INTRODUCTION

The Individuals with Disabilities Education Act,[1] usually known as IDEA, guarantees students with disabilities a free public education appropriate to their needs,[2] but students must first meet the definition of "child with a disability."[3] IDEA controversies are a prominent source of federal court business,[4] and have generated four Supreme Court decisions since 2005.[5] Many difficult issues with the statute's interpretation have been resolved,[6] and others have developed into clear splits of authority,[7] but few areas are so thoroughly unsettled, with so few guideposts, as eligibility for special education services under the statute.

---

[1]20 U.S.C.A. §§ 1400-1482 (West 2008). For ease of reference in light of the multitude of recent changes in the statutory provisions cited in this Article, the West unofficial United States Code Annotated, rather than the official United States Code will be used throughout.

[2]20 U.S.C.A. §§ 1412(a)(1).

[3]20 U.S.C.A. §§ 1401(3).

[4]Analysis of the results of a Westlaw search reveals the United States Courts of Appeals issued 56 opinions in special education disputes in 2007. Law schools are only beginning to appreciate the importance of special education law. *See* Perry Zirkel, *Education Law Course Offerings in Law Schools*, 33 J.L. & EDUC. 327, 333 (2004) (reporting results of survey of 123 law school dean respondents) ("[A] general education law course is offered in the clear majority of the law schools, whereas special education law and higher education law are each offered in slightly less than a quarter of the law schools."); Jim Gerl, Why No SpEd Law Classes in Law Schools? (Jan. 18, 2008), http://specialeducationlawblog.blogspot.com/search?updated-max=2008-02-21T15%3A59%3A00-05%3A00&max-results=7 (noting offering of course at DePaul); *see also* postings of mjstowe, anonymous, and nick to https://www.blogger.com/comment.g?blogID=1691205078500083881&postID=4298439780823762853 (Jan. 20-Feb. 26, 2008) (discussing Special Education Law courses in law schools at Kansas, Southern California, and Pepperdine, among others).

[5]Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007); Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006); Schaffer v. Weast, 546 U.S. 49 (2005).

[6]For example, the Supreme Court has ruled that hearing officers and courts may award reimbursement to parents who purchase educational services for their children who have been denied an appropriate education by the public schools, Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993), although an unresolved controversy exists over whether the child must previously have been enrolled in public school for the remedy to apply, *see* Bd. of Educ. v. Tom F., 128 S. Ct. 1 (2007) (affirming reimbursement award by equally divided Court). Parents may sue *pro se* in actions under IDEA. Winkelman v. Parma City Sch. Dist., 128 S. Ct. 1 (2007). Prevailing parents are not entitled to obtain expert witness fees as part of an attorneys' fees award. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006). The burden of persuasion falls on the party, typically the parent, challenging the appropriateness of an educational program rather than on the school proposing the program. Schaffer v. Weast, 546 U.S. 49 (2005).

[7]*Compare* Frank G. v. Bd. of Educ., 459 F.3d 356 (2d Cir. 2006) (awarding reimbursement to parent of child never enrolled in public school) *with* Greenland Sch. Dist. v. Amy N., 358 F.3d 150 (1st Cir. 2004) (denying reimbursement). *Compare* Weixel v. Bd. of Educ., 287 F.3d 138 (2d Cir. 2002) (allowing damages claim under 42 U.S.C.A. § 1983 (West 2008) for violation of IDEA) *with* A.W. v. Jersey City Pub. Schs., 341 F.3d 234 (3d Cir. 2007) (disallowing claim).

© 2008. Unpublished Manuscript—All Rights Reserved.

In a word, IDEA eligibility is a mess. There are several sources of the eligibility confusion. First, a set of recent court cases has reached conflicting conclusions about how much adverse educational impact the child's disabling condition must have, what constitutes a sufficient need for special education, and when children with emotional disabilities are eligible. Second, educational authorities have grown disillusioned with long-established methods for evaluating learning disabilities. The United States Department of Education is promoting a new method of identifying learning disabilities, response-to-intervention, but that innovation remains unproven and looks to be extremely difficult to implement on across disabilities and age ranges. Third, Congress and others have focused renewed attention on the disproportionate percentage of African-Americans who are placed in special education under the disability categories of mental retardation and emotional disturbance. Nevertheless, no consensus has emerged on how to address that condition.

Legal scholars have recently devoted a great deal of attention to special education eligibility. Some work, notably that of Professor Garda, stresses the need to read the terms of IDEA's eligibility provisions rigidly, so as to exclude students whose educational needs might be met by anything other than special education as precisely defined.[8] He would apply state law definitions in some instances to narrow the eligibility standard.[9] Other work, notably that of Professor Hensel, stresses the need to interpret the terms of the IDEA eligibility provisions more loosely, so as to guarantee assistance to children with mild and moderate disabilities who can succeed in the mainstream of public education, rather than restricting IDEA eligibility to children with the most severe impairments who can be served only in restrictive placements.[10] Still other work, notably that of Professors Weithorn and Perlin, points out that strict readings of statutory eligibility terms keep many of the children who most need educational help from obtaining an entitlement to it under IDEA.[11]

---

[8] *See* Robert A. Garda, Jr., *Who Is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 332 (2006). Professor Garda, however, rejects many of the most restrictive judicial and administrative rulings concerning special education eligibility, and reads several of the statutory terms more broadly than some courts have done. *See, e.g., id.* at 306, 315.

[9] *See* Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 497-98 (2004).

[10] *See* Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1152 (2007).

[11] *See* Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1357 (2005); Michael L. Perlin, "Simplify You, Classify You": Stigma Stereotypes and Civil Rights in Disability Classification Systems (Apr. 23, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982226. Professors Weithorn and Perlin address numerous other issues touching on special education eligibility in the works cited.

© 2008. Unpublished Manuscript—All Rights Reserved.

This Article builds on the analytical framework of Professor Garda and the insights of Professors Hensel, Weithorn, and Perlin, but observes that the contemporary controversies over eligibility have aspects that find insufficient discussion anywhere in the legal literature: recent cases that restrict eligibility on flimsy grounds, new assessment and service methodologies, and pressing needs of populations that are being ill-served by both general and special education.[12] The Article analyzes and critiques the cases, describes and comments on the assessment methodologies for learning disabilities, and evaluates competing ideas about ethnic disproportion in identification for special education. It concludes that the way out of the entire set of problems is not a redefinition of special education eligibility under IDEA, but rather a renewed attention by courts and educational policy makers to the actual terms of the statute and its underlying purposes. The statute supports an entitlement to special education services for a broad class of students, but the quality of services needs to be improved and greater effort needs to be made to provide these services in the regular education environment.

Part I of this Article describes the Individuals with Disabilities Education Act. Part II discusses eligibility of students for services under the Act, noting the statutory terms, the reasons the provisions are there, and the prospect that eligibility might decline as a source of controversy. Part III tries to untangle the components of the current IDEA eligibility mess: irrational court decisions, challenges to existing evaluation methodology for students with learning disabilities and the educational system's response, and the persistent problem of overrepresentation of African-Americans in some disability categories. Part IV develops some proposed solutions to IDEA eligibility problems, specifically reforms of the caselaw, recommendations regarding implementation of evaluation methodology, and improvements in special education to decrease any harm resulting from minority overrepresentation. The reforms suggested here are modest, and represent restoration of the letter and spirit of IDEA rather than its transformation, but they should provide a way to solve the problems posed by current approaches to IDEA eligibility.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The Individuals with Disabilities Education Act requires states that receive federal special education funding to provide all children with disabilities a free,

---

[12]The work of Professor Garda is a notable exception to this generalization about inadequately served populations and special education eligibility. *See* Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005). As indicated below, the prescriptions advanced here differ significantly from those of Professor Garda. *See infra* text accompanying notes 295-312. A number of other sources discussing the particular problems of minorities in special education will be discussed *passim*.

© 2008. Unpublished Manuscript—All Rights Reserved.

appropriate public education.[13] Participating states and their local school districts must furnish an appropriate education to all children with disabilities, and also must provide services related to education, such as transportation, physical and occupational therapy, sign language interpretation, and school health services.[14] The law requires that children with disabilities are to be educated, to the maximum extent appropriate, with children who do not have disabilities, and that school districts have to afford the children supplementary aids and services to avoid any need for removal from regular classes.[15]

Parents of children with disabilities have rights to notice and consent and, most critically, rights to participate in the creation of the individualized education program that sets out the services to be delivered to the child.[16] The parents may challenge the program or placement by demanding an adversarial "due process hearing" and they or the school district may appeal the result of the hearing to court, which may hear additional evidence in order to decide the case.[17] The guarantee to each child with a disability of the right to a free, appropriate education, and the guarantee to parents of procedural rights were key features of the 1975 Education for All Handicapped Children Act; they demonstrate a "congressional emphasis" on furnishing individual participation rights that would be exercised to enforce the law's underlying obligations.[18] Two federal cases that strongly influenced Congress in its drafting of the law upheld procedural due process claims against exclusion from public school and equal protection claims against denial of services to children with disabilities in public schools [19]

Parents of children with disabilities spent years organizing and courting allies to secure passage of the Education for All Handicapped Children Act.[20] Although some states and local school districts had long given services to children with disabilities and received limited federal special education reimbursement, as

---

[13]*See* 20 U.S.C.A. § 1411(i) (West 2008) (authorizing appropriations). All states, the District of Columbia, and the outlying areas participate, as does the federal government's Bureau of Indian Affairs.

[14]*See* 20 U.S.C.A. § 1401(26) (defining "related services").

[15]20 U.S.C.A. § 1412(a)(5).

[16]*See* 20 U.S.C.A. § 1414(d) (requiring opportunity for parental participation in devising individualized education program).

[17]20 U.S.C.A. § 1415(f)-(i). States may create a hearing review procedure that must be exhausted before the matter goes to court. § 1415(g). The child remains in the existing placement during the pendency of proceedings. § 1415(j). Attorneys' fees are available to parents if they are successful. § 1415(i)(3)(B)-(F). The law also provides rights to challenge long-term suspensions, expulsions, or other removals from school imposed on children with disabilities. § 1415(k).

[18]*See* Bd. of Educ. v. Rowley, 476 U.S. 176, 205-206 (1982).

[19]Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pa. Ass'n for Retarded Children (P.A.R.C.) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). The Supreme Court commented on the importance of these cases to the formation of the Education for All Handicapped Children Act in *Rowley*, 458 U.S. at 192-93.

[20]*See* ROBERTA WEINER & MAGGIE HUME, . . . AND EDUCATION FOR ALL 14-21 (2d ed. 1987)

© 2008. Unpublished Manuscript—All Rights Reserved.

of 1975 approximately 1.75 million children with disabilities were excluded from public school and 2.5 million were in programs that did not meet their needs.[21] In 1990, Congress renamed the Education for All Handicapped Children Act the Individuals with Disabilities Education Act, and that is the name the law has today.[22] The most recent amendments are the Individuals with Disabilities Education Improvement Act of 2004,[23] often referred to as the "2004 Reauthorization."

II. ELIGIBILITY UNDER IDEA

The topic of eligibility under the Individuals with Disabilities Education Act embraces the questions of what the statutory provisions are and how they work. Understanding eligibility law also entails discussion of why the eligibility provisions are there in the first place and what direction, if any, they might be expected to go in the future. For reasons to be explained, the provisions themselves are surprisingly complex, but there is some justification for their existence, even their complexity. Various long-term trends might be expected to diminish the importance of the eligibility provisions, but other recent developments have instead created what will be described as the IDEA eligibility mess.

A. *What Constitutes Eligibility Under IDEA?*

Children with disabilities are eligible for services under the Act if they meet age standards,[24] have a condition listed in the statute, and by reason of the condition, need special education and related services. The conditions set forth in IDEA are:

---

[21] H.R. REP. NO. 94-332, at 11-12 (1975).

[22] Pub. L. No. 101-476, 104 Stat. 1103 (1990). The term "handicapped" had become disfavored, and many in the disabilities rights movement favored placing the noun "person" or "individual" first and the "with disabilities" modifier later, in order to emphasize that a person with a disability is a human being rather than a manifestation of an impairment. *See* Illinois Attorney General, Disability Rights: Manual of Style for Depicting People with Disabilities, http://www.ag.state.il.us/rights/manualstyle.html (visited Aug. 4, 2008).

[23] Pub. L. No. 108-446, 118 Stat. 2647 (codified in scattered sections of 20 U.S.C.A. §§ 1400-1482 (West 2008)). See generally Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 27 (2006) (describing and commenting on 2004 Reauthorization).

[24] Generally speaking, the age range is three through twenty-one. 20 U.S.C.A. § 1412(a)(1)(B) (West 2008). Children within the age range lose coverage if they have received a regular high school diploma. 34 C.F.R. § 300.101(a)(3)(i) (2008). Children who are in adult prisons are also subject to possible exclusion. § 1412(a)(1)(B)(ii). *See generally* Paul M. Secunda, *Mediating the Special Education Front Lines in Mississippi*, 76 UMKC L. REV. (forthcoming 2008) (describing first-hand experience of mediating special education dispute in state detention facility for children adjudicated as adults).

© 2008. Unpublished Manuscript—All Rights Reserved.

> mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to . . . as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities[25]

The statute defines some of these terms. For example, a specific learning disability is "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," including "such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia."[26] The federal regulations provide further definitions of the listed conditions.[27] That a child has a listed condition is not the sole criterion for eligibility for services under the Act. The child must by reason of the condition need special education and related services.[28]

Title II of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973 also affect eligibility for education adapted to the needs of children who have disabilities by providing these children with protection from disability discrimination. The persons covered under the two laws are those who have a physical or mental impairment that substantially limits a major life activity, or a record of such an impairment, or are regarded as having such an impairment.[29] Duties under section 504 and the ADA include the obligation not to segregate nor to deny equal opportunity,[30] as well as the requirements to accommodate and to provide a free, appropriate public education.[31] These duties apply to units of state and local government (under ADA title II), such as public schools, and entities that receive federal funding (under section 504), including all public and some private schools.[32]

---

[25]20 U.S.C.A. § 1401(3)(A). A child aged three through nine may be eligible on the basis of having "developmental delays, as defined by the state and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development . . . ." § 1401(3)(B) .

[26]20 U.S.C.A. § 1401(30)(A)-(B).

[27]34 C.F.R. § 300.8.

[28]20 U.S.C.A. § 1401(3)(A)(ii).

[29]29 U.S.C.A. § 705(20)(B) (West 2008); 42 U.S.C.A. § 12102(2) (West 2008); *see* 34 C.F.R. § 104.3(j) (2008). Section 504 is found at 29 U.S.C.A. § 794; title II of the ADA, which covers state and local government, including public schools, is found at 42 U.S.C.A. §§ 12131-12150.

[30]*See* 34 C.F.R. § 104.4(b)(ii) (opportunity to participate), (iv) (segregate) (2008)

[31]*See* 34 C.F.R. § 104.33 (requiring provision of free, appropriate public education).

[32]For a discussion of the interplay between the ADA and section 504, see Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504*

© 2008. Unpublished Manuscript—All Rights Reserved.

B. *Why Identify Children as Eligible?*

The earliest federal efforts to assist the education of persons with disabilities included definitions of which children were eligible for services,[33] and these provisions conformed to understandings of disability that were current among education professionals at the time.[34] The drafters of the Education for All Handicapped Children Act of 1975—the direct ancestor of IDEA—followed the practice of using diagnostic labels for eligibility.[35] One authoritative source reports that use of categorizing labels had come under attack by the time Congress considered the Act, but explains that the advocates who lobbied for the law were organized by various disability groups, such as groups concerned with blindness, deafness, physical disabilities, and so on.[36] Most of these groups were more preoccupied with obtaining services by use of the disability label than they were with any stigma the label might carry.[37] The advocacy groups acted in a grand

---

of the Rehabilitation Act and Title II of the Americans with Disabilities Act, 36 WM. & MARY L. REV. 1089 (1995).

[33]*See* Pub. L. No. 93-380 § 101(a)(2)(E), 88 Stat. 491 (1974) ("A state agency which is directly responsible for providing free public education for handicapped children (including mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education), shall be eligible to receive a grant under this section for any fiscal year.") (repealed 1978); Pub. L. No. 91-230 § 602(1), 84 Stat. 175 (1970) ("The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education and related services") (repealed 2004); Pub. L. No. 89-750 § 161, 80 Stat. 1204 (1966) ("As used in this title, the term 'handicapped children' includes mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, crippled, or other health impaired children who by reason thereof require special education and related services.") (repealed 1970). State and local provisions also employed categorical definitions. *See* Rudolf V. Womack, A Survey of Relevant Problems in Administering a Program of Special Education for the Cook County Argo-Evergreen Park, Reavis, Oak Lawn Special Education District 15-27 (June, 1969) (unpublished master's thesis, DePaul University) (on file with Richardson Library, DePaul University) (describing categories then employed by state board of education and local school district pursuant to state law).

[34]Professional sources display what from the present remove seems a near-obsession with definition and categorization. *See* EXCEPTIONAL CHILDREN IN THE SCHOOLS 8 (Lloyd M. Dunn ed., 2d ed. 1973) ("By 1950, 12 types of exceptional children had been delineated: (1) gifted, (2) educable mentally retarded, (3) trainable mentally retarded, (4) emotionally disturbed, (5) socially maladjusted, (6) speech impaired, (7) deaf, (8) hard of hearing, (9) blind, (10) partially seeing, (11) crippled, and (12) chronic health cases."); ROMAINE P. MACKIE, SPECIAL EDUCATION IN THE UNITED STATES: STATISTICS 1948-1966 (1969) (reporting statistics on children served in special education by disability category); Womack, *supra* note 33. One prominent author traces this attitude to the movement at the beginning of the twentieth century to make schools more businesslike and the development of standardized testing during the same period. David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 714-15 (1973).

[35]Pub. L. 94-142 § 4 , 89 Stat. 775 (1975) (repealed 2004).

[36]Leslie E. Ward & Virginia Abernethy, *Background, Enactment, and Implementation of P.L. 94-142*, PEABODY J. EDUC., Summer, 1983, at 1, 10-11.

[37]*Id*. at 11

© 2008. Unpublished Manuscript—All Rights Reserved.

coalition, which muted the voices of some advocates for persons with mental retardation about the disadvantages of labeling.[38] Reasons for an eligibility standard, specifically one that employs medical-diagnostic categories, include funding allocation, imposition of limits on costs, and possible connections between diagnoses and methods of instruction.

1. *Allocating Resources.* The first and most obvious reason to define the class of children with disabilities for purposes of federal and state law is so that members of Congress can be certain the amounts they are appropriating for special education will actually serve children with disabilities rather than be lost in the much larger general education efforts of the districts that receive the money.[39] The original grant of federal funding for special education, after defining "handicapped children" covered under the law, required grantees to submit state plans, and warned:

> The plan must provide satisfactory assurance that funds paid to the State under this title will be expended, either directly or through local educational agencies, solely to initiate, expand, or improve programs and projects, including preschool programs and projects, . . . which are designed to meet the special educational and related needs of handicapped children throughout the State . . . .[40]

The law also contained a nonsupplanting provision, by which states had to guarantee that the federal funds would supplement, and in no instance supplant, state, local and private expenditures for the education of the children defined in the statute.[41] Provisions restricting expenditures to educational services for children with disabilities and prohibiting supplanting continue to this day.[42]

In keeping with these provisions, the funding formula under the Education of All Handicapped Children Act allocated money to states based on their count of children with disabilities being provided special education and related

---

[38] *Id.*

[39] Criticism may be made of existing accountability structures despite the legal requirement that money must be spent only on eligible children. *See* Jeri D. Barclay, *Fiscal Accountability Under the Individuals with Disabilities Education Act: How Do We Ensure the Money Is Spent on Handicapped Children and Related Services?*, 28 J.L. & EDUC. 327, 329 (1999) ("Because there are, in general, no accountability procedures in place for overseeing and checking the expenditures of school systems, it is possible that the money designated for handicapped students is often spent on other 'more important' things, like football goal posts, new lockers, televisions, and bonuses for school board members.").

[40] Pub. L. No. 89-750 § 161, 80 Stat. 1205 (1966) (repealed 1970).

[41] Pub. L. No. 89-750 § 161, 80 Stat. 1206 (1966) (repealed 1970).

[42] *See* 20 U.S.C.A. §§ 1412(a)(18) (West 2008) (prohibiting state-level supplanting of expenditures); 1413(a)(2)(a) (restricting local school district use of funding and prohibiting local-level supplanting of expenditures).

© 2008. Unpublished Manuscript—All Rights Reserved.

services.[43] The current formula for distribution, adopted in the 1997 IDEA Amendments, uses that amount for the state's baseline, but allocates increases in funding since 1999 on a formula that relies on the number of children (not the number of children with disabilities) aged three through twenty-one if the state guarantees free, appropriate public education to children with disabilities of those ages, with a boost for the state's relative population of children in poverty.[44] The amounts are to be passed through to local school districts under the pre-1997 Act children-with-disabilities-count baseline, with increases since 1999 allocated on the school-aged population of the district, again with a supplement for relative population of children in poverty.[45] Effectively, the count of children with disabilities was frozen, and increases in funding tied to increases in the general population of school-aged children and the prevalence of poverty in the state. Under the current version of IDEA, a given child need not actually receive a specific disability category label in order to be given federally funded special education services, but states must report children by disability category for statistical purposes and the child must be a child with a disability under the

---

[43]Pub. L. No. 94-142 § 5(a), 89 Stat. 776 (1975) (repealed 2004).

[44]20 U.S.C.A. § 1411(d)(2)-(3). Other language pertaining to the additional funding guarantees against grant decreases and establishes maximum and minimum grants. § 1411(d)(3)(B). The contingency of decreased federal funding is also addressed. § 1411(d)(4). A limit on the count of children for federal special education funding to no more than 12% of the school-aged population in the state was repealed when Congress changed the funding formula. 20 U.S.C.A. § 1411(a)(5) (West 1996) (repealed 1997).

[45]20 U.S.C.A. § 1411(f)(2) (West 2008). Evidence suggesting that child disability category counts are inconsistent among states led the Department of Education to press for this change. *See Revision of Special Education Programs: Hearing Before the Subcomm. on Early Childhood, Youth and Families of the H. Comm. on Education and the Workforce*, 105th Cong., 1997 WL 42634 (Feb. 4, 1997) (statement of Thomas R. Bloom, Inspector General, U.S. Dep't of Educ.) ("Representatives from all ten of the independent organizations with whom we spoke corroborated our conclusion that the states differed significantly in the proportion of children they counted in the various disability categories."). The sponsors of the 1997 legislation made the change to eliminate incentives for identifying children with disabilities without sufficient justification. H. REP. NO. 105-95, at 88 (1997) ("The Committee developed the change in [funding] formula to address the problem of over-identification of children with disabilities.").

© 2008. Unpublished Manuscript—All Rights Reserved.

statute.[46] Many states continue to use the count of children with disabilities[47] in distributing state special education funding.[48]

2. *Limiting IDEA Costs.* A second reason to define children with disabilities and limit funded services to that class is to set an outside limit on costs borne by the federal and state governments. The use of the category of children with disabilities as an eligibility criterion operates to limit the number of children who can claim entitlement to a free, appropriate public education and thus contribute to that cost. Without some limit on the number of such children, the maximum financial exposure for educating children with disabilities would be infinity. Because of the federal funding formula changes in the 1997 IDEA Amendments, the eligibility standards that limit the number of children deemed to be children with disabilities are a decreasingly significant federal cost control,[49] but past application of the standards constitutes the baseline for allocation of most of the federal funding and so continues to exert budgetary force.[50] Moreover,

---

[46]*See* Marcia C. Arceneaux, *The System and Label of Special Education: Is It a Constitutional Issue?*, 32 S.U. L. REV. 225, 239 (2005) ("Federal law mandates that a child must qualify for special education services, thereby receiving this broad label, before receiving the second 'descriptive category' label (e.g., mildly mentally disabled). The descriptive categorical label is not a mandate by law. However, in practice, the categorical labeling is commonly used within the special education system for national consistency of data."); *see also* 20 U.S.C.A. § 1418(a)(1)(A) (reporting requirements).

[47]Some states use proxies for the count of identified children. These proxies include weighting formulas that allocate set amounts for the assumed extra cost of educating each child in a given disability category, as well as resource-based models, which allocate funding based on teacher and related service personnel count. *See generally* THOMAS PARRISH ET AL., 1 STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999-2000, at 3-11 (2003) (describing set types of state financing systems and compiling survey data on their prevalence).

[48]*See* Thomas Parrish, *Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION 15, 18 (Daniel J. Losen & Gary Orfield, eds. 2002) ("[M]ost . . . states have more generic systems providing funding based on the number of students receiving special education services or on general enrollment."); *id* at 29 (identifying 24 of 28 surveyed states as linking funding for local school districts to counts of children with disabilities being served by district).

[49]Moreover, the federal financial exposure is restricted by the statute and capped by appropriations. The maximum federal funding that may be awarded under IDEA is 40% of the average cost of educating a child without disabilities for each child receiving special education. 20 U.S.C.A. § 1411(a)(2) (West 2008). Congress has never actually appropriated enough funds to provide support for states and school districts at the maximum level under IDEA. Instead, allocations are ratably reduced to meet appropriations. 20 U.S.C.A. § 1411(d)(2)-(3). The federal participation varies from year to year, but it tends to range just above 10%. *See Revision of Special Education Programs*, *supra* note 45, at 1997 WL 42635 (statement of George W. Severns, Ph.D.). The definitional limit on which children may be claimed for the maximum amount of funding in the statute keeps the gap between aspiration and reality from being limitless. Full funding, *i.e.*, funding to the maximum amount, is a perennial hope of many special education advocates and their congressional allies. *See, e.g.,* S. 2185, 109th Cong. (2006) (IDEA Full Funding Act); H.R. 1107 (2005) (Full Funding for IDEA Now Act).

[50]One authority testifying regarding the 1997 legislation opposed relaxing the standards for the category of developmental delay on the ground that it would raise the child count and increase

© 2008. Unpublished Manuscript—All Rights Reserved.

definitional limits on children's eligibility control allocations of state and local dollars based on child count.[51]

3. *Creating Instructional Categories.* Reason number three has to do with instruction. Identification, specifically identification by category, traditionally has been thought to be needed in order to determine what services should be provided to children.[52] Doubts have emerged concerning this link between identification and instruction, with the result that more and more educators question the value of rigid disability-category classification.[53] It remains true, however, that much support for special education legislation comes from professional and parental groups that are organized by disability category or services associated with a particular type of disability.[54] The support for specific categorical definition may thus survive its demonstrated educational value.[55]

C. *A Diminishing Role for Special Education Eligibility?*

The limited, and to some degree diminishing, value of the reasons for insisting on eligibility by disability classification dovetails with the reforms in special education law over the past dozen years. The absence of a clear link to instruction and the removal of a direct tie between eligible-child count and federal funding might be expected to cause a further deemphasis on the eligibility issue. That expectation is in turn reinforced by amendments to IDEA in 1997 and 2004,

---

costs. *Revision of Special Education Programs*, *supra* note 45, at 1997 WL 42639 (statement of Lou Barela).

[51] *See supra* text accompanying notes 47-48.

[52] *See* S. REP. NO. 94-168, at 27 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425,1451 ("[I]dentification and labelling of . . . handicapping conditions . . . is a necessary tool for designing appropriate instruction."); LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 93 (1990) ("It is necessary to identify children who have special needs and to identify what type of programming is appropriate.").

[53] *See, e.g.*, Nat'l Ass'n of Sch. Psychologists, NASP Position Statement on Rights Without Labels (revised statement adopted July 14, 2002), http://www.nasponline.org/about_nasp/positionpapers/rwl.pdf (visited Aug. 4, 2008) ("Contrary to commonly held assumptions, research indicates that . . . [p]articularly among the more subjective, 'mild' disability categories of Specific Learning Disability, Mental Retardation, Emotional Disturbance, and Speech/Language Impairment, labeled students show significant overlap in skills and receive highly similar instruction.").

[54] *See* H. REP. NO. 108-77, at 78-80 (2003) (listing witnesses for various congressional proposals to amend IDEA from 2001-03). It should be noted, however, that a large number of witnesses in support of recent legislation have been academic experts, school district officials, and leaders of cross-disability organizations. *Cf.* Ward & Abernethy, *supra* note 36, at 10-11 (noting high degree of disability-category affiliation of supporters of 1975 special education legislation).

[55] *See* Sharon Weitzman Soltman & Donald R. Moore, *Ending Segregation of Chicago's Students with Disabilities: Implications of the* Corey H. *Lawsuit*, in RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 48, at 239, 250 (noting opposition to change by proponents of existing Illinois system of special education "tightly organized around specific disability categories based on the view that disabilities could be identified with precision and that each disability could best be 'treated' by a specialist in that disability working solely with students who 'had' that particular disability.").

© 2008. Unpublished Manuscript—All Rights Reserved.

as well as a greater orientation towards disability accommodations in other laws. Even the accountability movement in general education has blurred the line between children eligible for special education and other children by causing children not designated as IDEA-eligible to receive specialized instruction to boost test scores and supplemental educational services to compensate for attending underperforming schools.

The 1997 IDEA Amendments took a major step toward reducing reliance on disability categories by taking the category of "experiencing developmental delays," which had previously been used only for pre-schoolers, and permitting it to be used for children all the way up through age nine.[56] The term is defined broadly to include delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development.[57] Effectively, the law allows a child up through age nine to be identified as disabled without any specification of the child's disability.[58]

The 2004 Reauthorization makes a number of changes that affect special education eligibility and may decrease its significance. The new law allows a school district to use up to 15% of its federal special education funding for early intervening services for children who have not been formally identified as needing special education but who nevertheless need additional academic and behavioral support to succeed in the general education environment.[59] Congress adopted this provision in response to the view of the members of the President's Commission on Excellence in Special Education and others who believed that waiting to determine eligibility before providing educational assistance amounts to waiting for children to fail and unnecessarily segregates children with disabilities from the general education population.[60] Significantly, under this law federal special education funding directly benefits students who have never been—and, if the program is successful, perhaps never will be—identified as students with disabilities. The 2004 Reauthorization also provides that state educational agencies must permit school districts to use methods for determining a learning disability other than the discrepancy between a student's intellectual ability and achievement.[61] This change responds to criticism of IQ testing, and may reflect doubts over the meaningfulness of the learning disabilities designation both in itself and in distinction from other categories of disability that have a

---

[56]Pub. L. No. 105-17, § 602, 111 Stat. 42 (1997) (codified at 20 U.S.C.A. § 1401(3)(B) (West 2008)).

[57]20 U.S.C.A. § 1401(3)(B)(i).

[58]This reality led to opposition on the ground that too many children might obtain the classification and thus an entitlement to services. *See supra* note 50 and accompanying text.

[59]20 U.S.C.A. § 1413(f).

[60]PRESIDENT'S COMMISSION ON EXCELLENCE IN SPECIAL EDUCATION, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 7 (2002).

[61]20 U.S.C.A. § 1414(b)(6)(A) (West 2008).

© 2008. Unpublished Manuscript—All Rights Reserved.

negative impact on the learning process.[62] The federal regulations provide that states must permit districts to use a process for determining learning disability that is based on the child's response to scientific, research-based intervention.[63]

As noted above with regard to eligibility standards in general, the federal special education law operates against the background of a separate law barring disability discrimination in all federally funded activity, section 504 of the Rehabilitation Act of 1973.[64] Another law, the Americans with Disabilities Act of 1990 reinforces the nondiscrimination duty for school districts and other units of state and local government.[65] Under these statutes, children who have a physical or mental impairment that substantially limits a major life activity must receive reasonable accommodations from public school systems.[66] Although the vast majority of these children will also be eligible under IDEA, some may obtain services as accommodations without ever going through the special education eligibility process, and still others might be found ineligible under IDEA because they do not meet the specifics of an IDEA eligibility category or do not need special education and related services despite their disabling conditions.[67] The practice of providing limited accommodations and failing to give fuller special education services to some of these children has caused conflicts,[68] but the availability of the services under non-IDEA auspices may decrease the need to find children IDEA-eligible in certain cases.

In reality, specialized educational services for public school children are by no means a monopoly of the special education system. The accountability standards embodied in the student achievement goals of the No Child Left Behind (NCLB) initiative contemplate significantly enhanced services to children who

---

[62] *See* Weber, *supra* note 23, at 27 (collecting sources). *See generally infra* text accompanying notes 194-97 (exploring criticisms of learning disability designation).

[63] 34 C.F.R. § 300.307(a)(2) (2008). The Notice of Proposed Rulemaking for the regulations contains language critical of the discrepancy-based model for learning disabilities determinations and praises the RTI alternative. Notice of Proposed Rulemaking, 70 Fed. Reg. 35,802 (June 21, 2005).

[64] 29 U.S.C.A. § 794 (West 2008).

[65] *See* 42 U.S.C.A. §§ 12131-12150 (West 2008) (covering state and local government services). *See generally* (discussing relationship between section 504 and ADA).

[66] 29 U.S.C.A. § 794 (West 2008), 42 U.S.C.A. § 12132 (West 2008). These laws cover individuals whose condition meets the definition described in the text, as well as those with a record of such an impairment and those regarded as having such an impairment. 29 U.S.C.A. § 705(20)(B) (definition applicable to section 504), 42 U.S.C.A. § 12102(2) (definition applicable to ADA title II).

[67] *See* MARK C. WEBER, RALPH MAWDSLEY & SARAH REDFIELD, SPECIAL EDUCATION LAW: CASES AND MATERIALS 59 (2d ed. 2007). An example would be a child with an orthopedic impairment who has completed the high school physical education requirement.

[68] *Compare* Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099 (9th Cir. 2007) (affirming denial of IDEA eligibility for child receiving accommodations under section 504) *with* Mr. I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1 (1st Cir. 2007) (overturning denial of IDEA eligibility for child afforded services under section 504).

© 2008. Unpublished Manuscript—All Rights Reserved.

are at risk of low achievement so that they rise up to performance levels set by the state.[69] Children in schools that are failing to make adequate yearly progress must be offered supplemental educational services—essentially, tutoring—from providers other than their public schools.[70] Title I remedial educational services are available to children in schools with high numbers or high percentages of impoverished students, and nearly fifteen million students receive assistance under this program.[71] States and school districts must cooperate with the NCLB program or they will lose title I funding.[72]

The confluence of all these developments could result in what I have elsewhere termed "not-quite-so-special education."[73] In the current context, that would mean large numbers of children receiving the specialized services and accommodations they need under any number of different programs, without much emphasis on the label of the child or the name of the program, but with careful attention to the goal of having all children thrive in the mainstream of

---

[69]*See generally* No Child Left Behind Act, Pub. L. No. 107-10, 115 Stat. 1425 (2002) (codified at 20 U.S.C.A. §§ 6301-6320, 7801-7803 (West 2008)); Perry Zirkel, *NCLB: What Does It Mean for Students with Disabilities*, 185 Ed. L. Rep. (West) 805 (2004) (outlining NCLB collective goals for achievement by students). Some commentators are highly negative about NCLB, *see, e.g.*, Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637 (2006), but others are at least guardedly optimistic, *see, e.g.*, Chester E. Finn, *5 Myths About No Child Left Behind*, WASH. POST, Mar. 30, 2008, at B03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/03/28/AR2008032802976.html; Weber, *supra* note 23, at 20-21, 51. The ultimate effect of NCLB on IDEA eligibility remains unpredictable, but there is some reason to believe that, for better or worse, it may diminish the number of children in special education. If successful, the NCLB program may lead to improvements in general education that decrease the need for children to be served by the special education system. Unfortunately, NCLB may also lead to school officials artificially limiting the number of children in special education so that their testing results are not viewed as statistically significant. *See id.* at 20 & n.76 (collecting sources); *see also* Richard C. Herrera, Note, *Policing State Testing Under No Child Left Behind: Encouraging Students with Disabilities to Blow the Whistle on Unscrupulous Educators*, 80 S. CAL. L. REV. 1433 (2007) (discussing various forms of educator misconduct with regard to testing of students with disabilities).

[70]20 U.S.C.A. § 6316(e) (West 2008) . *See generally* Policy and Program Studies Service, U.S. Dep't of Educ., Report Highlights: Early Implementation of Supplemental Educational Services under the No Child Left Behind Act (2002), http://www.ed.gov/rschstat/eval/disadv/supplementalyear1/highlights.pdf (visited Aug. 4, 2008).

[71]*See* 20 U.S.C.A. § 6301 (statement of purpose); U.S. Dep't of Educ., Fact Sheet on Title I, Part A (August 2002), http://www.ed.gov/rschstat/eval/disadv/title1-factsheet.pdf (visited Aug. 4, 2008) (providing statistical information on title I program). *See generally* Stephanie Stullich et al., National Assessment of Title I Final Report (2007), *available at* http://ies.ed.gov/ncee/pdf/20084012_rev.pdf (discussing title I program's longitudinal impact).

[72]*See* 20 U.S.C.A. § 6311 (establishing conditions for funding). The impact of this use of the spending power on federalism concerns has received scholarly attention. *E.g.*, Rentschler, *supra* note 69, at 639-53 (noting federalism-based objections to NCLB); Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 897-900 (2006) (discussing constitutional concerns with regard to funding conditions in NCLB).

[73]Weber, *supra* note 23, at 51.

© 2008. Unpublished Manuscript—All Rights Reserved.

public education.[74] But instead, conflicts have emerged as school districts try to keep children from attaining the eligibility status for IDEA, a status that, unlike being served under section 504, NCLB, or title I, gives the children clear rights to appropriate education and gives their parents explicit procedural protections to enforce those rights. These eligibility conflicts are the first part—but only one part—of the IDEA eligibility mess.

III. THE IDEA ELIGIBILITY MESS

A certain amount of disorder may always be present in legal regimes that address complex social problems.[75] But even within the all-too-arcane field of special education law, the topic of IDEA eligibility is messy indeed. The reasons for that condition, and the components of the current confusion over special education eligibility are three: a series of recent cases, many oddly and indefensibly restricting children's IDEA eligibility; a longstanding dissatisfaction with methods of evaluating children for learning disabilities, matched by a not-fully-proven but hard-sold methodological response; and a well-founded concern over racial overrepresentation in some IDEA eligibility categories, met with anxiety over what to do about it.

A. *Recent Contested Cases, Many Irrationally Restricting Eligibility*

Some of the current problems with special education eligibility stem from judicial decisions that read the eligibility provisions extremely narrowly. A number of these cases divide up the provisions and then use caselaw relating to a different topic, the proper level of special education services, or use state law, in order to give the terms restrictive readings. Other cases rely on an oddly worded regulation supposedly distinguishing social maladjustment from emotional disturbance to exclude children with behavior disorders from eligibility under IDEA. The approaches taken in these decisions have scant justification but significant effects in muddying the eligibility waters.

---

[74]Other observers detected convergence between general education and special education as early as the late 1980s and early 1990s. *See* James A. Tucker & Jeffrey F. Champagne, *Where's the War? A Response to Meredith and Underwood*, 25 J.L. & EDUC. 447, 448 (1996) ("[T]here has been a steady movement toward the integration of special-education philosophy into the regular classrooms of America."); *see also id*. at 451 ("As the field struggles toward reform for all students, terms such as inclusiveness and individualization are not just for special education any more. For reasons having little to do with disabilities, schools are experimenting with outcome-based and outcome-paced progressions that do not presume the existence of a mainstream."). Some sources note a potential for greater convergence but believe it has not yet been fulfilled. *See* Arceneaux, *supra* note 46, at 245-46 (proposing that services for all children be provided within single system of education); Nat'l Ass'n of Sch. Psychologists, *supra* note 53, at 6 (proposing "noncategorical models of service delivery").

[75]For an interesting discussion of this topic in connection with law regarding civil procedure, see Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990).

© 2008. Unpublished Manuscript—All Rights Reserved.

1. *Cases Parsing the Eligibility Provisions, Misusing the* Rowley *Case, and Relying on State Law.* The eligibility provisions in the federal law can be broken down into three components.[76] First, there has to be one of the specified disabling conditions;[77] second, for all of these but specific learning disabilities, which appears to have the term implied, there must be an adverse effect on educational performance;[78] and third, the child, by reason of the disabling condition, must need special education and related services.[79] What appears to be most newsworthy in recent decisions applying these eligibility provisions is the courts' strict parsing of them, the use of *Board of Education v. Rowley*[80] in interpreting one or all of the terms, and the application of state law to questions about the terms' interpretation.

A recent opinion applying these approaches to the case of a child with learning disabilities[81] is *Hood v. Encinitas Union School District*.[82] *Hood* involved a fifth-grader who had average to above average grades and test scores, but who also had serious problems completing her work on time, keeping her belongings organized, and finishing tasks.[83] The child's test scores showed occasional poor performance but high intellectual ability.[84] There was also evidence of a visual impairment and a seizure disorder, and a recommendation for evaluation for attention-deficit disorder, which led to the child's taking medication for the condition.[85] The public school provided an accommodation plan that included preferential seating, use of a graphic organizer and keyboard, one-step directions, visual support for instructions and concepts, frequent prompts for understanding, and daily teacher checks on homework assignments.[86] The hearing officer agreed with the school district that the child was not eligible under

---

[76]Garda, *supra* note 9, at 457-58.

[77]20 U.S.C.A. § 1401(3)(A)(i) (West 2008). Children aged three through nine with developmental delays are treated somewhat differently *See* 34 C.F.R. § 300.8(b) (2008).

[78]34 C.F.R. § 300.8(c)(1)-(13).

[79]20 U.S.C.A. § 1401(3)(A)(ii).

[80]458 U.S. 176 (1982).

[81]The empirical research of Professor Zirkel suggests that relatively few special education disputes hinge on eligibility under the heading of specific learning disability, and that school districts prevail in the overwhelming majority of the cases, typically by showing that the discrepancy between ability and achievement is not severe enough. PERRY A. ZIRKEL, THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY 69-70 (2006). The small number of cases contrasts with their mighty impact on the confusion over IDEA eligibility. For a thoughtful discussion of Professor Zirkel's study, see Paul M. Secunda, *"At Best an Inexact Science": Delimiting the Legal Contours of Specific Learning Disability Under IDEA*, 36 J.L. & EDUC. 155 (2007).

[82]486 F.3d 1099 (9th Cir. 2007).

[83]*Id*. at 1101.

[84]*Id*. The child's scores on achievement tests put her above the median almost uniformly. *Id*.

[85]*Id*. at 1101-02.

[86]*Id*. at 1102.

© 2008. Unpublished Manuscript—All Rights Reserved.

IDEA, and the district court affirmed, relying on a state law providing that discrepancies in performance matter only if they cannot be corrected through other regular or categorical services offered within the regular instructional program.[87]

The court of appeals affirmed, again relying on the state law about discrepancies not being able to be corrected through services offered within regular education.[88] The court tried to buttress its position with a discussion of *Board of Education v. Rowley*, the first case the Supreme Court decided under the statute that became the Individuals with Disabilities Education Act, in which the Court declared that the Act was satisfied if the school system provided "personalized instruction with sufficient support services to permit the child to benefit educationally;" the Act did not require that the child's potential be maximized.[89] At first, the *Hood* court conceded that *Rowley* concerned the level of required services to be provided a child found to be eligible, not the determination of eligibility itself.[90] After pushing the *Rowley* case out the front door, however, the court invited it in the back. It asserted that, "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."[91] The court said that under the some-benefit standard of *Rowley* and cases like it, the child's nearly uniform record of average or above average grades showed that she was disqualified from eligibility as a child with a learning disability under the state provision because the discrepancy between achievement and performance appeared correctible in the regular classroom.[92] The court thus (1) read a Supreme Court case concerning levels of services to (2) place a restrictive construction on state law dealing with commensurateness of achievement with ability, when the state law itself (3) limited the federal definition of learning disability by requiring that the condition not be able to be corrected within the regular classroom.[93] Not one of these steps has a justification in the federal statute.

---

[87] *Id*. at 1103 (citing CAL. EDUC. CODE § 56337(c) (West 2003)).
[88] *Id*. at 1106.
[89] 458 U.S. 176, 203 (1982).
[90] Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099, 1106 (9th Cir. 2007) ("While it is true that the *Rowley* case dealt with the level of services that must be provided to a student already deemed eligible for special education, rather than special education eligibility itself . . . .").
[91] *Id*. at 1107.
[92] *Id*. at 1108.
[93] The court also rejected the contention that the child was a child with a disability under the category of other health impairment (OHI), saying that the child did not need special education when accommodations could be provided in the regular classroom, relying again on a state law provision. *Id*. at 1108 (citing CAL. EDUC. CODE § 56026(b) (West 2003)).

© 2008. Unpublished Manuscript—All Rights Reserved.

Another court of appeals case similar in its breakdown of the eligibility provisions and use of *Rowley* (if not in its reliance on state law provisions) is *Alvin Independent School District v. A.D.*[94] The case concerned a child with attention-deficit hyperactivity disorder (ADHD) who was dismissed from special education after third grade and performed well through elementary school, but then began exhibiting behavior problems in middle school.[95] He was placed in an "at-risk" program, but continued to pass all his classes and meet statewide achievement standards.[96] His misconduct escalated to the point that in eighth grade he engaged in theft of property and robbery of a school concession stand, for which he was given an in-school suspension and a recommendation for placement in an alternative education program.[97] The child nevertheless had satisfactory grades, with one A, three Bs, two Cs, and one D, and passed the state achievement test, doing particularly well in reading.[98] The district court overturned a hearing officer decision that the child was eligible for special education, reasoning that the child did not need special education services by reason of his disability, and the court of appeals affirmed.[99]

The court of appeals agreed with the child's parents that ADHD is included in the IDEA eligibility category of other health impairment (OHI), but ruled that the child failed to meet the second half that the IDEA eligibility standard, that "by reason thereof, [the child] needs special education and related services."[100] The court noted that the child had passing grades and success on state evaluations. It quoted language from *Rowley* stating that the achievement of passing grades is an important factor in determining educational benefit, without noting that *Rowley* was referring to the level of services for a child already found eligible rather than any part of the eligibility standard. The court also said that the child's teachers testified that despite his misconduct he did not need special education and had social success in school;[101] it noted that there were non-ADHD-related reasons for the misconduct, including the recent death of the student's baby brother and the student's abuse of alcohol.[102] The court said that any educational need was not by reason of the ADHD.[103]

---

[94]503 F.3d 378 (5th Cir. 2007).
[95]*Id*. at 379-80.
[96]*Id*. at 380.
[97]*Id*.
[98]*Id*.
[99]*Id*. at 381.
[100]20 U.S.C.A. § 1401(3)(A) (West 2008).
[101]Given the unfortunate social dynamics that often appear in middle school, one may wonder whether the aggressive misconduct may have raised the child's social prestige.
[102]Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 (5th Cir. 2007).
[103]*Id*. A recent district court case with some similarities to *Hood* and *A.D.* is *Ashli C. v. Hawaii*, No. 05-00429 HG-KSC, 2007 WL 247761 (D. Haw. Jan. 23, 2007), in which the court affirmed an administrative decision that a child with ADHD receiving differentiated instruction available to all children in the classroom failed to meet the IDEA eligibility standard because her condition did

© 2008. Unpublished Manuscript—All Rights Reserved.

Not every recent case has been so restrictive in its approach to eligibility. In *Mr. I. v. Maine School Administrative District No. 55*, the First Circuit Court of Appeals held that a child with Asperger's Syndrome and depression was a child with a disability under IDEA.[104] The court reached its result by steering clear of *Rowley*, though it could not avoid the specifics of the federal eligibility provisions and state law definitions. *Mr. I.* concerned a child who regularly missed school, engaged in self-destructive behavior, and had trouble with peer relationships.[105] Nevertheless, she had a history of adequate to superior academic performance.[106] Psychological testing suggested the presence of Asperger's Syndrome and adjustment disorder with depressed mood.[107] The school deemed the child eligible under section 504 and provided her a plan that furnished tutoring and social pragmatics instruction.[108] Over the parents' objections, the school system refused to find her eligible under IDEA, so the parents continued a placement they had initiated for her in a private school after she had made a suicide attempt; they demanded tuition reimbursement from the school district.[109] The hearing officer upheld the school district's conclusion that the child was not eligible under IDEA, but the district court reversed that holding.[110]

The court of appeals affirmed the ruling that the child was eligible.[111] The Asperger's Syndrome and mood disorder met the list of conditions in the statute, leaving in dispute the adverse effect on educational performance and the need for special education by reason of the condition.[112] The court observed that Maine law defined educational performance to include "academic areas (reading, math, communication, etc.), non-academic areas (daily life activities, mobility, etc.), extracurricular activities, progress in meeting goals established for the general curriculum, and performance on State-wide and local assessments."[113] The court rejected the school district's contention that educational performance includes simply the academic areas measured and assessed by the state or school district,

---

not meet the component of the OHI definition that the condition adversely affect educational performance. The court looked to *Rowley* and said that any adverse effect did not render the child unable to learn and perform in regular classroom without specially designed instruction. *Id*. at 9-10.

[104] 480 F.3d 1 (1st Cir. 2007).

[105] *Id*. at 6.

[106] *Id*.

[107] *Id*. at 7.

[108] *Id*. at 8.

[109] *Id*.

[110] *Id*. at 9.

[111] *Id*. at 23. It also affirmed a holding by the district court that the parents were not entitled to tuition reimbursement, because the private school they chose did not provide special education services, nor was the child entitled to compensatory education, because the district court in its discretion believed that prospective relief would be a sufficient remedy for past harm. *Id*. at 23-26.

[112] *Id*. at 19. Precisely which statutory condition applied did not need to be resolved. *Id*.

[113] *Id*. at 11 (quoting 05-071-101 ME. CODE. R. § 2.7 (Weil 2006)).

© 2008. Unpublished Manuscript—All Rights Reserved.

and it buttressed that reading with reference to the broad purposes of IDEA to prepare children with disabilities for independence and meet children's social as well as academic needs.[114]

The court also pointed out that the requirement of "adversely affects educational performance" in the federal regulations includes any adverse effect, even if slight. Relying on legislative history, the dictionary, and other sources, the court rejected arguments by the school district for a reading of the term that would require a significant adverse impact.[115] It distinguished *J.D. v. Pawlet School District*,[116] a Second Circuit case, on the ground that in concluding the child was not eligible for special education the Second Circuit relied on a Vermont regulation that defined adverse effect to require a determination that the child was functioning significantly below expected age or grade norms in one or more areas of basic skills.[117] Finally, the court rejected the school district's argument that the child did not need special education by reason of her condition, stressing that both the federal and state law definitions of special education included the social skills and pragmatic language instruction the child needed.[118] The school district took a confusing position on the child's meaning of the term "need," at one point arguing that need related to benefit in the areas of educational performance affected by the disability and at another that need related to the ability to do well in or benefit from school. The court pointed out that a child may not need special education to do well in school in the sense of getting high grades, but may still perform below acceptable levels in areas such as behavior. It did not resolve the precise meaning of the term, but found the school district's arguments unsupported with regard to the principal point about benefit in the areas of educational performance adversely affected by the child's condition.[119]

2. *Social Maladjustment Cases.* A topic of slightly less prominence in recent caselaw but still a matter of importance for special education eligibility is whether a child's condition fits within the category of severe emotional disturbance, or is classed instead as mere social maladjustment and not included in the categorical definition. "Serious emotional disturbance" is one of the conditions that may qualify a child as a child with disability under IDEA,[120] and

---

[114] *Id*. at 12-13.

[115] *Id*. at 13-16. The court rejected a floodgates argument, saying that a child would be excluded if she did not need special education by reason of the condition, or might be excluded by the disability conditions' definitions without reaching that question. *Id*. at 13-14.

[116] 224 F.3d 60 (2d Cir. 2000).

[117] Mr. I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 16-17 (1st Cir. 2007).

[118] *Id*. at 20-21.

[119] *Id*. at 21-23.

[120] 20 U.S.C.A. § 1401(3)(A)(i) (West 2008). The statutory text notes that serious emotional disturbance is "referred to in this title as 'emotional disturbance.'" *Id*. The terms will be used interchangeably here. The Supreme Court has pointed out the historical practice of excluding children with emotional disturbance from public school, and the importance of the federal special

© 2008. Unpublished Manuscript—All Rights Reserved.

the definition of serious emotional disturbance in paragraph 300.8(c)(4)(i) of the federal regulations covers long-term conditions that are exhibited "to a marked degree" and adversely affect the child's educational performance.[121] These conditions include the "inability to learn that cannot be explained by intellectual, sensory or health factors," the "inability to build or maintain satisfactory interpersonal relationships with peers and teachers," "inappropriate behavior or feelings under normal circumstances," "a general, pervasive mood of unhappiness or depression," or "a tendency to develop physical symptoms or fears associated with school problems."[122] After reciting this list, however, the regulation states: "Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) this section."[123]

The original meaning of this "socially maladjusted" language is mysterious.[124] A leading special education source from the time of the drafting of the 1975 Education for All Handicapped Children Act and the original edition of the regulations notes that "emotionally disturbed" and "socially maladjusted" are often used interchangeably, then goes on to say, "The term 'socially maladjusted' is a less noxious synonym for 'juvenile delinquent.' Its usage is usually restricted to adolescents or preadolescents who break the law and thus has a legal derivation."[125] The inference is that the language about social maladjustment was

---

education law in covering these children. Honig v. Doe, 484 U.S. 305, 324 (1988) ("In drafting the law, Congress was largely guided by the recent decisions in *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 ([D.D.C.] 1972), and *PARC [v. Pennsylvania]*, 343 F. Supp. 279 ([E.D. Pa.] 1972), both of which involved the exclusion of hard-to-handle disabled students. *Mills* in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs "behavioral problems," and had excluded them from classes without providing any alternative education to them or any notice to their parents. . . . Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate all disabled children, regardless of the severity of their disabilities, . . . and included within the definition of "handicapped" those children with serious emotional disturbances.").

[121] 34 C.F.R. § 300.8(c)(4)(i) (2008).

[122] 34 C.F.R. § 300.8(c)(4)(i)(A)-(E).

[123] 34 C.F.R. § 300.8(c)(4)(ii).

[124] *See* Weithorn, *supra* note 11, at 1357 ("Neither term was a diagnostic 'term of art' in the mental health or education fields prior to their use in the legislation and regulations, and studies have revealed that those applying the definition do not apply the term in a systematic or consistent matter from setting to setting or case to case."); Moira O'Neill, Note, *Delinquent or Disabled? Harmonizing the IDEA Definition of "Emotional Disturbance" with the Educational Needs of Incarcerated Youth*, 57 HASTINGS L.J. 1189, 1203 (2006) (collecting sources indicating identical usage of terms "socially maladjusted" and "emotionally disturbed" in materials surrounding enactment of early federal special education legislation). A now-repealed Connecticut special education statute combined the terms, providing a definition for the category "socially and emotionally maladjusted" children. CONN. GEN. STAT. § 10-76a(i) (1985) (repealed 1996).

[125] Paul S. Graubard, *Children with Behavior Disabilities*, *in* EXCEPTIONAL CHILDREN IN THE SCHOOLS, *supra* note 34, at 243, 245. The Model Penal Code Contains a parallel provision in its language concerning the insanity defense:

© 2008. Unpublished Manuscript—All Rights Reserved.

inserted simply to keep every child who is classified as delinquent from being automatically eligible for special education. That interpretation is reinforced by the structure of the regulation itself. The child may meet the criteria for emotional disturbance *and* be socially maladjusted, in which case the child is eligible. It is only if the child fails to meet the criteria of paragraph (c)(4)(i) that he or she will not qualify as having emotional disturbance. Social maladjustment is thus not an exception or exclusion from the category of emotional disturbance,[126] it is simply not a basis for emotional disturbance if it stands alone.

A number of courts interpret the social maladjustment term as a broad exclusion, however. An illustrative decision is *Tracy v. Beaufort County Board of Education*, in which a child with asthma and other breathing difficulties engaged in drug and alcohol abuse, was truant from school, and manifested depression.[127] The school district found the child eligible for IDEA services under the other health impaired category, but the parent argued that he was also emotionally disturbed, and thus that the school district should pay for a private placement they undertook to address the emotional difficulties he was experiencing.[128] The court affirmed a state review officer's decision that the child was not eligible under the emotional disturbance category, declaring: "During the time that Sean was enrolled in public school, he engaged in unruly conduct, such as alcohol and drug abuse, but there was no indication that this conduct was the result of anything other than social maladjustment."[129] The court thus read social maladjustment as a condition in itself, a disability category distinct from emotional disturbance. The court did go on to discuss whether the child met the qualifying characteristics of paragraph (c)(4)(i) and ultimately concluded that he did not, and that emotional disturbance did not cause an adverse effect on his education.[130] Although the latter considerations indicate that the court would have reached the same result had it read the regulation's language about social maladjustment correctly, the treatment of social maladjustment as something distinct from emotional disturbance is troubling.

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Model Penal Code § 4.01 (2001). Thanks to Michael Perlin for this insight.

[126]Thus it makes more sense to speak of the "'socially maladjusted' exclusionary language" than the social maladjustment exclusion. *See* O'Neill, *supra* note 124 (using "exclusionary language" terminology).

[127]335 F. Supp. 2d 675 (D.S.C. 2004).

[128]*See id*. at 688. As noted above, there is no necessary connection between the eligibility category under which the child qualifies and the services the child is entitled to receive, but the parties and the court operated under the assumption that there was.

[129]*Id*.

[130]*Id*. at 689.

© 2008. Unpublished Manuscript—All Rights Reserved.

Tracy is a lineal descendent of *Springer v. Fairfax County School Board*, which it relied on and quoted at length.[131] In *Springer*, a child who had been successful in school developed behavior problems in eleventh grade.[132] He was convicted of possession of burglary tools and tampering with a car, stayed out all night, stole from his parents and others, and used marijuana and alcohol.[133] His offenses at school included absenteeism, driving recklessly on school property, forgery, leaving school grounds without permission, fighting, and stealing another student's car.[134] His absenteeism, failure to complete assignments, and failure to show up for final exams caused him to fail three of seven courses for the year.[135] His parents enrolled him in a private residential school and requested public school funding on the ground that he was a child with emotional disturbance and needed the placement to learn.[136] The school contended that his behavior manifested a conduct disorder, but not emotional disturbance.[137] Although a local hearing officer ruled that the child was IDEA-eligible as emotionally disturbed, a state review officer reversed and the district court affirmed that ruling.[138]

The court of appeals affirmed, stating that the child was socially maladjusted, defined as engaging in "continued behavior outside acceptable norms."[139] The court relied on the child's consistent diagnoses of conduct disorder, which it found to be consistent with social maladjustment.[140] It then asserted that "the regulatory framework under IDEA pointedly carves out 'socially maladjusted' behavior from the definition of serious emotional disturbance."[141] It continued: "This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people."[142] Equating bad conduct with serious emotional disturbance would include too many children in special education and increase the schools' burdens accordingly.[143] The court went on to state that "finding that Edward was socially maladjusted does not end the inquiry. The regulations contemplate that a student may be socially maladjusted and suffer an independent

---

[131] 134 F.3d 659 (4th Cir. 1998); *see Tracy*, 335 F. Supp. 2d at 688-89 (quoting *Springer*).
[132] *Springer*, 134 F.3d at 661.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*. at 661-62.
[138] *Id*. at 662.
[139] *Id*. at 664 (quoting local hearing officer decision).
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*.

© 2008. Unpublished Manuscript—All Rights Reserved.

serious emotional disturbance that would qualify him for special education services . . . ."[144] The court concluded that he did not, discussing the considerations in the regulation.[145]

The portion of the court's reasoning that gave an independent meaning to social maladjustment, equating it with a diagnosis of conduct disorder and viewing it as an exclusion from the category of emotional disturbance, is contrary to the regulation's language and its clear intent. The court removed conduct disorder as a basis for emotional disturbance and required that some "independent serious emotional disturbance" meet one of the various factors found in paragraph (c)(4)(i). But the regulation simply provides that if one of the factors is met, the child qualifies as emotionally disturbed. If the child is a juvenile delinquent and none of the factors are satisfied, then the regulation excludes the child. But it is not the social maladjustment that does the excluding; it is the failure to satisfy paragraph (c)(4)(i). Of course, equating juvenile delinquency or mere misconduct with emotional disturbance would include more children as special education-eligible than Congress intended. But if a conduct disorder manifests itself in one or more of the factors the regulation sets out, it qualifies as severe emotional disturbance whether or not one may accurately characterize it as social maladjustment.[146]

Many courts apply the language about social maladjustment in a more considered way. For example, in *Independent School District No. 284 v. A.C.*, the Eighth Circuit confronted the case of A.C., a fifteen-year-old girl whose conduct in school included disruption of class, profanity, insubordination, and truancy.[147] Outside of school, she used alcohol and drugs, was sexually promiscuous, ran away from home, was suspected of forging checks, and repeatedly threatened or attempted suicide.[148] A local hearing officer and state review officer ruled that she was eligible under IDEA and that the proper placement was a secure, residential treatment facility.[149] The district court reversed the order for

---

[144]*Id*. at 664-65.

[145]*Id*. at 665.

[146]Other cases follow *Springer*'s approach. *See, e.g.,* Bd. of Educ. v. JD, 232 F.3d 886 (3d Cir. 2000) (unpublished) (ruling that child's problems stemmed from social maladjustment, not educational disability that district overlooked); Brendan K. v. Easton Area Sch. Dist., No. 05-4179, 2007 WL 1160377, at *11 (E.D. Penn. Apr. 16, 2007) (finding child not eligible and quoting *Springer* regarding carving out social maladjustment from emotional disturbance); N.C. v. Bedford Central School District, 473 F. Supp. 2d 532, 546 (S.D.N.Y. 2007) (finding child not eligible and separating social maladjustment from emotional disturbance category). In other contexts, courts appear reluctant to afford IDEA remedies to children whose problems manifest themselves in delinquency. *See, e.g.,* Dale M. v. Bd. of Educ., 237 F.3d 813, 817 (7th Cir. 2002) (denying reimbursement for placement deemed to be "jail substitute" for child with psychological impairment who engaged in criminal conduct).

[147]258 F.3d 769 (8th Cir. 2001).

[148]*Id*. at 771.

[149]*Id*. at 773.

© 2008. Unpublished Manuscript—All Rights Reserved.

residential placement on the basis of emotional disturbance; it drew a distinction between unwillingness to attend school or comply with the requirements of a public school placement and the inability to attend school or comply with the placement.[150] The court of appeals, however, disagreed, and reversed the district court, declaring that the proper analysis could not be "limited to a stark distinction between unwillingness and inability to behave appropriately. There is a grey area between normal, voluntary conduct and involuntary physiological response, and that area is where Congress has chosen to locate behavioral problems such as A.C.'s."[151] The court turned to the factors now in paragraph (c)(4)(i) and said, "Read naturally and as a whole, the law and regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations."[152] The child fell into that category, and the condition so identified interfered with her learning to the point where a restrictive placement was needed.[153] Another court applied a similar approach to determine that a ninth-grade child who performed in the 99th percentile in standardized tests but engaged in drug abuse, uncontrollable behavior at home, poor performance at school, and truancy following his parents' divorce proceedings met the standards for eligibility under the emotional disturbance category.[154]

As Professor Weithorn observes, the regulation that includes the social maladjustment term is problematic in that it too readily appears to separate children who are socially maladjusted from those who are emotionally disturbed, while it nevertheless uses criteria for emotional disturbance that include characteristics associated with social maladjustment, such as inappropriate behavior under normal circumstances and the inability to build or maintain interpersonal relationships.[155] Taking the regulation as it stands, however, the problem with the judicial applications of the term, the departure from its proper interpretation, is affording social maladjustment an independent role as an exclusion from the emotional disturbance category and insisting that something independent of it satisfy the emotional disturbance criteria. The regulation does not say that, and the interpretation that it does is insupportable.

3. *The Courts' Role in the IDEA Eligibility Mess.* One cannot take exception to the general approach to eligibility taken by the courts discussed under heading 1, above, which entails asking first to see if one of the listed disability conditions exists; then, if the federal definition includes an adverse-effect requirement, asking about adverse effect on educational performance; and

---

[150] *Id*. at 775.
[151] *Id*.
[152] *Id*. at 775-76.
[153] *Id*. at 777-79.
[154] New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394 (N.D.N.Y. 2004).
[155] Weithorn, *supra* note 11, at 1357. The article collects numerous sources critical of the "socially maladjusted" language of the regulation. *Id*. n.223.

© 2008. Unpublished Manuscript—All Rights Reserved.

then, if the answer to both questions is yes, asking whether as a result the child needs special education. The statute and regulations employ a structure that appears to demand such an approach. What is far from justified, however, is relying on a state law definition that requires the adverse effect be "significant" when the federal regulation features the unadorned term, or relying on state law that defines educational performance in a crabbed way. There is also no justification to rely on a state law definition of "needs special education" that restricts that phrase to needing services or accommodations that cannot be provided in the regular classroom even when the services or accommodations provided in the regular classroom meet the ordinary meaning of the term special education. Thus the reliance on the odd state law definition of the need for special education in *Hood v. Encinitas Union School District*[156] and the reliance on a strange definition of adverse effect on educational performance in *J.D. v. Pawlet School District*[157] are wrong and should be rejected.

Professor Garda defends the use of state law definitions for eligibility terms that the federal statute and regulations leave undefined, specifically definitions of need for special education and educational performance.[158] But there is nothing in IDEA that delegates to the states the power to define the federal statutory terms,[159] and there is no reason that a child in Vermont should be ineligible for special education when the same child would be eligible in Maine under the identical federally supported program. Although the definition of "appropriate" education in IDEA references state law, the definition of "child with a disability" does not.[160] The Department of Education has occasionally said

---

[156]486 F.3d 1099 (9th Cir. 2007) (discussed *supra* text accompanying notes 82-93).

[157]224 F.3d 60 (2d Cir. 2000) (discussed *supra* text accompanying notes 116-17).

[158]*See, e.g.,* Garda, *supra* note 8, at 299, *supra* note 9, at 465-67.

[159]The one limited exception to this generalization demonstrates that when a delegation is intended, it is explicit and arises from a specific situation justifying delegation. Without giving any other authority to the states to define the term "special education," the federal regulations permit states to define what would otherwise be a "related service" as "special education" if they choose to do so. 34 C.F.R. § 300.39(a)(2)(i) (2008). This regulation responded to the situation in the years preceding the 1975 Act, when states varied as to whether a child who required only speech therapy or had similar needs for a very specific and limited form of intervention was be considered eligible for special education. The federal regulators decided to permit the states to retain their existing modes of classification on this point. States that defined these services out of special education would not receive federal money to assist those children, but would continue to use state resources. The original version of the regulation said that special education "includes speech pathology, audiology, occupational therapy, and physical therapy, if the service is considered 'special education' rather than a 'related service' under State standards." 41 Fed. Reg. 56978 (1976) (proposed 45 C.F.R. § 121a.4). The final version merely mentioned "speech pathology, or any other related service, if the service is considered 'special education' rather than a 'related service' under State standards." 45 C.F.R. § 121a.14 (1978). Neither this history nor whatever autonomy states have over curriculum provides a basis for a states to define out of existence the adverse effect of a child's physical or mental condition on educational performance, a test that is part of a clinical standard in a federal law term regarding federal statutory protection.

[160]*Compare* 20 U.S.C.A. § 1401(9)(B) (West 2008) (defining free, appropriate public education to include meeting the standards of the state educational agency) *with* § 1401(3)(allowing discretion

© 2008. Unpublished Manuscript—All Rights Reserved.

in informal statements that various terms of IDEA were open to the states to define,[161] but Congress explicitly provided in IDEA that non-regulation guidance of this sort is not binding,[162] and there is no explicit basis for it in this instance. Considerations of federalism that may support local or state control on matters such as curricular content or levels of educational expenditures[163] are out of place when the threshold question is who is to be served under a federally funded program designed to address the national problem of children with disabilities who are out of school or in inappropriate programs.[164]

The state law definitions at issue in cases such as *Hood* and *J.D.* are particularly inapt because they eliminate the federal entitlements to special education services of children by defining the children out of the coverage of the statute Congress wrote. State law provisions that restrict entitlements established by federal statutes are void under the Supremacy Clause of the Constitution.[165] The Supreme Court has applied this principle in cases regarding benefit programs in which the federal government provides funding to states on the condition they comply with the terms of the federal program, the same arrangement that exists for special education under IDEA. In *Rosado v. Wyman*, the Supreme Court ruled that a provision of New York law that redefined a standard of need in setting benefit amounts for federally funded welfare did not conform to the statutory requirements of the federal statute, when those requirements were properly interpreted.[166] The new definition of need adopted by the state eliminated items of need included before, so as to reduce benefits to families or cut them off from assistance.[167] The Court held that the state was not free to adopt a definition that restricted benefits in a way the federal statute did not specifically authorize.[168] The Court pointed out that the state was free to reject federal money and opt out of the program, but it stressed that the proper interpretation of the federal statute adopted by Congress was the overriding concern, and that was a job for the judiciary, not the state administration.[169] Justice Harlan, writing for the majority, quoted Justice Cardozo: "When federal money is spent to promote the general

---

to states in defining eligible children only with regard to adoption of disability category of child aged three through nine experiencing developmental delay).

[161] *See* Garda, *supra* note 8, at 300 (collecting federal guidances regarding states' ability to define educational performance). *But see* Garda, *supra* note 9, at 465 n. 128 (noting that guidance from the relevant federal office "is less than clear on the subject").

[162] 20 U.S.C.A. § 1406(e)(1).

[163] *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that equal protection does not require equality of educational expenditures among school districts in state, citing local autonomy concerns).

[164] *See* 20 U.S.C.A. § 1400(c)(2), (d) (reciting original findings about unserved children with disabilities and noting continuing purposes of IDEA to guarantee that children have appropriate education).

[165] *See* U.S. CONST., Art. VI.

[166] 397 U.S. 397 (1970).

[167] *Id.* at 416-17.

[168] *Id.* at 417-18.

[169] *See id.* at 421-22.

© 2008. Unpublished Manuscript—All Rights Reserved.

welfare, the concept of welfare or the opposite is shaped by Congress, not the states."[170]

Courts have compounded the definitional problem by using the *Rowley* case to support their constricted views of what it means to need special education on account of a disability. Professor Garda rightly criticizes this "reverse engineering" of *Rowley*'s interpretation of appropriate education standards into the analysis of when a child needs special education.[171] The deaf child in the *Rowley* case was, of course, eligible for special education even though she was performing as well as or better than her peers. The level of services a child is entitled to once the child is eligible is a different topic from whether the child is eligible in the first place, and to rely on *Rowley* to reach a decision on the eligibility topic is to make a category mistake. The reality is that there exists no precise definition for "needs special education" beyond the meaning of the words themselves. As with so many other terms in federal law, the courts (and other decision makers) develop a working sense of who or what falls within the statutory term by deciding the matter case-by-case and then, after passage of time, looking back and seeing if a definition has emerged.[172] From the diversity of caselaw results, it does not appear that a picture has yet come into focus.

Similar hypertrophied definition-making appears to be at work in the construction of IDEA's eligibility term for emotional disturbance. There is no justification for giving an independent categorical meaning to "social maladjustment" and separating it out from "emotional disturbance." The courts that proceed directly to the term of the regulation defining emotional disturbance and compare the child's characteristics—from whatever psychological or physiological source—to the requirements in the regulation are the ones that are interpreting the statute properly. Commentators agree that turning social maladjustment into an exclusion undermines congressional intent and harms children.[173]

---

[170] *Id*. at 423 (quoting Helvering v. Davis, 301 U.S. 619, 645 (1937)). Many cases that overturn state definitional restrictions on federal entitlements in federal-state cooperative programs are in the public welfare field. *See, e.g.,* Townsend v. Swank, 404 U.S. 282 (1971) (overturning state definition of dependent child that excluded college students from welfare eligibility under federal-state program); King v. Smith, 392 U.S. 309 (1968) (overturning state definition of parent that operated to exclude families from welfare eligibility under federal-state program).

[171] Garda, *supra* note 9, at 509. Professor Garda goes on to use *Rowley*'s approach to support the proposition that children passing, yet performing poorly, need special education under the statute. *Id*. at 509-11.

[172] *Cf.* Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979) (suggesting use of common-law development to inform meaning of appropriate education term of statute).

[173] *See* Weithorn, *supra* note 11, at 1357; O'Neill, *supra* note 124, at 1203-07; *see also* Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 334-35 (1993) (describing social maladjustment provision as source of confusion and underidentification of children as emotionally disturbed).

© 2008. Unpublished Manuscript—All Rights Reserved.

Relying on some of the cases discussed above and quite a number of others, Professor Hensel concludes that courts and other decision makers in IDEA disputes are mimicking courts in ADA employment actions by excluding from consideration individuals who do not satisfy a stereotype of the truly disabled.[174] Thus they apply a severity screen that resembles the "substantially limits" a "major life activity" term of the ADA as some courts have restrictively defined it.[175] Like the courts in ADA employment cases, they reduce the number of individuals covered by the statute and manifest an attitude that persons with disabilities are an irreducible "other" who are different from the nondisabled norm in obvious and unbridgeable ways.[176] Predictably, this will undermine the basis in popular support for special education funding and promote the demonizing of the ever-smaller class of children said to absorb resources from general education.[177] The correct approach should be just the opposite. It should broaden the eligibility for assistance of children who need help in order to learn, whatever the origin of their problems. Some form of eligibility determination may be necessary for the special education system to work, but labeling should not be emphasized, nor should the class of eligible children be artificially narrowed.[178] Special education should be a bundle of extra services available to the many who need them rather than a place to hide the supposedly uneducable few.[179] Professor Hensel's position has much to recommend it as an analysis of what the courts are doing and a proposal for which direction the law should move toward. Policy prescriptions need to be developed from these insights, but first it is necessary to look to the other issues present in the current IDEA eligibility controversy.

---

[174]Hensel, *supra* note 10, at 1180-87.

[175]*Id*. at 1184 (referring to 42 U.S.C.A. § 12102(2)(A) (West 2008)). It was entirely predictable that this type of thinking would emerge. Many of the lawyers defending disability discrimination actions by arguing the limited coverage of the ADA are from firms that practice school-side special education law. School administrators who long had lawyers looking after their interests in labor-management issues turned to the same firms for representation in special education matters when they encountered legal disputes of this type. There is, of course, nothing sinister in any of this, but it should be no surprise that legal approaches would migrate from one area to the other. An additional source drawing comparisons between restrictions on special education eligibility and narrow views about who is protected under the ADA is Nicholas L. Townsend, *Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229, 266-67 (2007).

[176]Hensel, *supra* note 10, at 1185.

[177]*Id*. at 1187-96; *see also* Perlin, *supra* note 11, at 42 (discussing "sanist myths" about persons with mental disabilities that isolate these individuals and confer stigma on them, such as the myth that people with mental disabilities are faking their condition or simply need to try harder).

[178]*See* Hensel, *supra* note 10, at 1196-97.

[179]*See id.* at 1200 (making point in context of discussion of overidentification of children with disabilities).

© 2008. Unpublished Manuscript—All Rights Reserved.

B. *Concerns About Learning Disabilities Identification, and the RTI Response*

It is no easy task to repair a vehicle while it is moving. The previous discussion tries to demonstrate that many caselaw interpretations of IDEA's eligibility terms are broken. But IDEA itself is moving on, with recent statutory and regulatory amendments that reflect new approaches to identifying children as eligible with regard to the largest single eligibility category, that of learning disability. These approaches reflect a discontent with current methods of identifying children with learning disabilities, and take the form of Response-to-Intervention (RTI) methodologies. The changes contribute to the current uncertainty about eligibility under IDEA.[180]

1. *Discontent About Identification of Children with Learning Disabilities.* Between 1976 and 1996, the number of students identified under the category of specific learning disabilities (SLD or LD) increased 283% to 2,259,000.[181] The number currently stands at 2,710,476, making SLD the largest disability category, with about 45% of all IDEA-eligible children.[182] This explosion in child count may not be so remarkable. The SLD label is usually considered less stigmatizing than mental retardation or other labels, so schools and parents may be lighting on this category in all plausible instances.[183] Problems have arisen, however, because the growth in the category has occurred against a background of increased criticism of intelligence testing, the traditional method used to

---

[180]Other recent changes to IDEA may also affect eligibility determinations, but at the moment they do not appear significant enough to warrant extended treatment. For example, the 2004 Reauthorization of IDEA demands that children with disabilities be included in state and district assessment programs, including those for the No Child Left Behind initiative. 20 U.S.C.A. § 1412(a)(16)(A) (West 2008). Students with disabilities need to be given appropriate accommodations and alternative assessments when necessary and as indicated in their individualized education programs; the state or district conducting the assessment program has to develop guidelines for furnishing accommodations. § 1412(a)(16)(B)-(C). The alternate assessments have to be aligned with the challenging academic content standards and achievement standards of the state. § 1412(a)(16)(C)(ii)(I). If the state has adopted alternate achievement standards, the alternate assessment has to measure student achievement against the standards. § 1412(a)(16)(C)(ii)(II). The proliferation of detail and the increase in emphasis regarding the achievement testing of children with disabilities may create incentives for administrators to initiate or resist special education identification for the children in their schools. *See* Weber, *supra* note 23, at 20-21 (collecting reports of manipulation of testing cohorts of students with disabilities). Another change in the new law that may affect eligibility is the adoption of a default timeline (that is, unless the state has a different one) of sixty days maximum from receipt of parental consent for evaluation to completion of evaluation. 20 U.S.C.A. § 1414(a)(1)(C).

[181]Frank M. Gresham, Responsiveness to Intervention: An Alternative Approach to Identification of Learning Disabilities (2002), http://nrcld.org/resources/ldsummit/gresham4.html.

[182]U.S. Dep't of Educ., Data Tables for OSEP State Reported Data, https://www.ideadata.org/tables30th/ar_1-3.xls (visited Aug. 4, 2008). The count is as of 2006, and includes schoolchildren ages 6 through 21.

[183]*See* Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 770 & n. 67 (2001) (collecting sources; attributing rise in SLD identification to recognition of lower stigma and to other factors).

© 2008. Unpublished Manuscript—All Rights Reserved.

determine learning disability, and that reality has in turn led to criticism of the conceptual integrity of the SLD category itself.[184]

Traditionally, a learning disability is diagnosed based on the presence of a severe discrepancy between achievement and intellectual ability in one or more areas of learning.[185] IQ testing is the classic means to determine intellectual ability.[186] Critics contend that methods dependent on IQ testing magnify the effects of IQ measurement errors and make the unjustified assumption that IQ is a good ability measure.[187] They challenge the reliability (that is, the stability from testing session to testing session) of discrepancy measurements.[188] Moreover, they observe that there are wide variations from state to state concerning how much discrepancy will support a conclusion that a learning disability exists.[189] One researcher summarized the case he and others have made against the discrepancy approach:

> We believe that the balance of the evidence shows that the severe discrepancy classification criteria are (a) unreliable (particularly in the sense of stability), (b) invalid (poor readers with higher IQs do not differ on relevant variables from those with IQs commensurate with reading levels), (c) easily undermined in practice by giving multiple tests, finding a score that is discrepant and ignoring disconfirming evidence, and (d) harmful because the severe discrepancy delays treatment from kindergarten or first grade when the symptoms of reading disability are first manifested to 3rd or 4th grade when reading problems are more severe, intervention more complex, and the school curriculum shifts from [learning to read] to "reading to learn."[190]

IQ-discrepancy methodology has its defenders, however,[191] and there are also some authorities who take a middle position, suggesting that both IQ-discrepancy

---

[184] *See supra* note 180 (reporting criticism of standardized testing implementation).

[185] Louise Spear-Swerling, *Response to Intervention and Teacher Preparation*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND 273, 276 (Elena L. Grigorenko ed. 2008).

[186] *Id*. at 276-77.

[187] Gresham, *supra* note 181.

[188] Jack M. Fletcher et al., Alternative Approaches to the Definition and Identification of Learning Disabilities: Some Questions and Answers (2004), http://findarticles.com/p/articles/mi_qa3809/is_200412/ai_n9471603/pg_1?tag=artBody;col1.

[189] Daniel J. Reschly & John L. Hosp, *State SLD Identification Policies and Practices*, 27 LEARNING DISABILITIES Q. 197, 208-10 (2004).

[190] Daniel J. Reschly, What If LD Changed to Reflect Research Findings? (Dec. 2003), http://www.nrcld.org/symposium2003/reschly/reschly7.html.

[191] Kenneth A. Kavale et al., The Feasibility of a Responsiveness to Intervention Approach for the Identification of Specific Learning Disability: A Psychometric Alternative (Dec. 2003), http://www.nrcld.org/symposium2003/kavale/kavale.pdf ("The value of discrepancy lies in its

© 2008. Unpublished Manuscript—All Rights Reserved.

and other means should be employed in determining the existence of learning disability.[192]

Use of existing methodologies to determine the presence of LD causes widely varying counts of LD children, with some states reporting percentages more than three times those of other states.[193] This reality, doubts about IQ testing, and natural caution about labeling leads some writers to doubt whether a concept of learning disability ought to exist at all.[194] Other critics are willing to posit the existence of learning disabilities, but deny that the condition should have a role in educational decision making, much less be the basis for what the writers perceive as preferential treatment for students who are identified as having LD.[195] When it comes to leading educational researchers, however, "virtually all authorities recognize the existence of genuine cases of LD . . . ."[196] Ironically, just as the doubts about the integrity of the LD concept are becoming part of the popular culture, evidence is emerging that dyslexia, the best known form of learning disability, has an organic basis that may, in time, be able to be diagnosed

---

ability to document the unexpected nature of the learning problem. Everything else being equal, there was little reason to believe that the particular student would experience learning difficulties. Since the underachievement dimension is integral to the SLD construct, it may represent a better 'first gate to learning disabilities identification' . . . than the proposed RTI model."); *see* Jack A. Naglieri & Alan S. Kaufman, *IDEIA and Specific Learning Disabilities*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra* note 185, at 165 (Elena L. (defending specific cognitive testing and criticizing RTI).

[192]Tom Scruggs, Alternatives to RTI in the Assessment of Learning Disabilities (Dec. 2003), http://www.nrcld.org/symposium2003/scruggs/scruggs3.html (proposing that RTI operate as part of general education and that low achievers in one or more areas demonstrate IQ-achievement discrepancy to be considered LD).

[193]Reschly, *supra* note 190 ("LD prevalence . . . varies by a factor of 3 times in the U.S. (KY=2.76% vs. RI at 9.46%). Moreover, LD prevalence within states varies markedly . . . ."); *see* Kavale et al., *supra* note 191 ("Besides over-identification, another problem is found in the very different numbers of students with LD identified across settings. The significant variability is seen, for example, across states where prevalence rates have been found to range from 2% to 7% . . . . There is little rhyme or reason for these different rates, and it appears that they may primarily reflect a lack of consistency in identification procedures . . . ."). Professor Kavale attributes the variability to insufficiently rigorous and uniform application of discrepancy methodology, rather than reliance on discrepancy approaches per se. *Id*.

[194]*See, e.g.,* Robert J. Sternberg & Elena L. Grigorenko, *Identity and Equality: Which Queue?*, 97 MICH. L. REV. 1928 (1999) (declaring learning disability concept invalid in practice); *see also* Scruggs, *supra* note 192 (collecting and criticizing sources that "manifest . . . hostility to the entire category of learning disabilities.").

[195]*See* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1997). For criticisms of Kelman and Lester, see Andrew Weis, *Jumping to Conclusions in "Jumping the Queue,"* 51 STAN. L. REV. 183 (1998)

[196]Spear-Swerling, *supra* note 185, at 273 (further noting that despite recognition of genuine cases of LD, "some investigators have argued that the LD category helps to excuse schools from the responsibility of teaching all children successfully.").

© 2008. Unpublished Manuscript—All Rights Reserved.

through methods such as magnetic resonance imaging (MRI) tests of the brain.[197] It has also become clear that one common criticism of the LD concept, the charge that rich parents buy LD diagnoses for their children in order to secure accommodations that confer a competitive advantage in school, is an urban legend.[198] Professor Shaywitz, a leading authority on dyslexia and a well known critic of IQ-discrepancy methodology, states, "In all my experience with scores and scores of students, I have yet to encounter a young man or woman who falsely claims to be dyslexic. For those who understand dyslexia and its tremendous costs to the individual, the very idea that someone would willingly seek such a diagnosis is absurd. . . ."[199] In fact, the stigma of the label makes it something no one would accept unless a severe underlying problem led the person to seek help.[200]

Nevertheless, the fact that learning disabilities actually exist and have a physiological basis may not be crucial for educational decision making. A consensus is emerging that effective instruction does not depend on the results of the psychological testing that has traditionally been used in LD diagnosis.[201] And this may mean that the controversies over testing and categorical integrity need

---

[197]*See* SALLY SHAYWITZ, OVERCOMING DYSLEXIA 82, 85 (2003); Michael M. Gerber, Teachers Are Still the Test: Limitations of Response to Instruction Strategies for Identifying Children with Learning Disabilities (Dec. 2003), http://www.nrcld.org/symposium2003/gerber/gerber.pdf ("There is rapidly accumulating evidence that at least some learning disabilities—the same associated with phonological processing deficiencies in behavioral testing—are associated with a clear . . . and modifiable . . . neurological substrate. Therefore, . . . there is strong reason to suppose that, in principle, students displaying this condition can be reliably identified independent of instructional trials."); *see* Margaret Semrud-Clikeman, Neuropsychological Aspects for Evaluating Learning Disabilities (Dec. 2003), http://www.nrcld.org/symposium2003/clikeman/clikeman3.html. Authorities discussing the physiological basis of dyslexia are nonetheless skeptical about the effectiveness of IQ testing in determining the presence of the condition. *See* LILIANE SPRENGER-CHAROLLES ET AL., READING ACQUISITION AND DEVELOPMENTAL DYSLEXIA 72-73 (2006); *see also* SHAYWITZ, *supra*, at 139 ("There is an emerging consensus among researchers and clinicians that the dependence on a discrepancy between IQ and reading achievement for a diagnosis of dyslexia has outlived its usefulness except in very limited circumstances.").

[198]Reschly, *supra* note 190 ("[A]ll studies that I have read or conducted on children and youth with LD confirms virtually without any exceptions that all have significant achievement problems. . . . There is no "fraud" in LD. On that I believe most will agree.").

[199]SHAYWITZ, *supra* note 197, at 164.

[200]*See id*. ("I am puzzled by the often-repeated notion that some students *pretend* to be dyslexic. When asked about this, I always respond by asking in turn, 'Do you know this for a fact? Are you personally aware of such a case?' Invariably the person shakes her head and replies, 'Oh no, it's just something I heard.' Such notions are nonsense.").

[201]Gresham, *supra* note 181 ("Ostensibly, 'verbal' learners should learn more efficiently and effectively under verbal instruction and 'visual' learners should learn more efficiently and effectively under visual instruction. Unfortunately, there is little empirical support for the differential prescription of treatments based on different abilities or aptitudes . . . ."); Reschly, *supra* note 190, (stating that no empirical support exists for methods that match cognitive strengths of students with LD to teaching modalities).

© 2008. Unpublished Manuscript—All Rights Reserved.

never be resolved if children who need assistance can be identified sufficiently that they can be given instruction that meets their educational needs.[202]

2. *Response to Intervention Methodology.* One attempt to provide that form of instruction is Response to Intervention (RTI) methodology. RTI is a process by which children in early grades who are not achieving at a level commensurate with their class or the norms for their grade receive more individualized and more intense instruction with methods that have been validated as effective, while at the same time continuing to attend their general education classes during the lengthy periods of intervention.[203] Those children who do not make adequate progress when exposed to these progressively more intense methods over a set number of weeks are deemed to have a learning disability.[204] Intervention ceases for the rest, although the teacher continues to monitor their progress regularly. The specialized instruction includes phases (sometimes called tiers) of intervention.[205] The first phase is nothing more than high quality instruction and careful assessment of the learning progress of all students on the classroom curriculum.[206] Students who are below a proficiency criterion are referred for a second phase of more intense instruction to meet the weaknesses their assessments display; these interventions are implemented by the classroom

---

[202]Some authorities appear reluctant to embrace RTI because of the perceived threat it poses to existing constructs of a distinct learning disability category. *See, e.g.,* Scruggs, *supra* note 192. For purposes of educational policy and legislation, however, what matters is not whether a distinct "learning disabilities" category survives, but what is the best means to educate students who have difficulties learning when exposed to ordinary instruction and who could be learning more with appropriate education.

[203]Gresham, *supra* note 181. State education departments have adopted their own definitions of RTI. For example, Virginia defines RTI (using the abbreviation "RtI") as "primarily an instructional framework and philosophy, the goals and objectives of which include early intervention for students who struggle to attain or maintain grade level performance." Va. Dep't of Educ., Responsive Instruction: Refining Our Work of Teaching All Children 6 (October 2007), http://www.doe.virginia.gov/VDOE/studentsrvcs/rti_guidance_document.pdf. The document describes RTI as involving "universal screening, multiple layers, or 'tiers,' of instruction, intervention, and support, and progress monitoring (an integrated data collection and assessment system to inform decision making)." *Id.* at 7.

[204]Lynn S. Fuchs et al., *Response to Intervention: A Strategy for the Prevention and Identification of Learning Disabilities*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra* note 185, at 115, 116 ("The premise behind RTI is that students are identified as having LD when their response to validated intervention is dramatically inferior to that of their peers . . . . The inference is that these children who respond poorly to generally effective interventions have a disability that requires specialized treatment to produce successful learning outcomes.").

[205]*See id.* at 115-23 (describing three-tiered model).

[206]Learning Disabilities Ass'n of America, The Role of Parents/Family in Responsiveness to Intervention, http://www.ldaamerica.org/news/print_role-parents.asp (visited Aug. 4, 2008); *see* Gresham, *supra* note 181 (describing monitoring at this phase). Classwide screening ties into NCLB. NCLB's Reading First initiative gives funding for reading programs for children in kindergarten through grade three, and one of the required uses of the money is "administering screening, diagnostic, and classroom-based instructional reading assessments." 20 U.S.C.A. § 6362(c)(7)(i) (West 2008). Thanks to Suzanne Whitney for this insight.

© 2008. Unpublished Manuscript—All Rights Reserved.

teacher over a period of perhaps six weeks.[207] Students whose progress is not adequate enter a third phase, in which they receive a specially designed set of educational interventions for a period of eight or more weeks.[208] This phase may or may not be designated special education.[209] Children who do not respond to intervention after this intensive intervention may be designated as having a learning disability on the basis of the failure to respond or on that basis plus other indicators.[210]

IDEA does not require the use of RTI, but amendments made in the 2004 Reauthorization pave the way for RTI by forbidding states from forcing school districts to use discrepancy criteria when determining if a child has a specific learning disability.[211] The Reauthorization also creates a funding stream for RTI by permitting school districts to use up to 15% of federal special education funding to provide services to children who have not been found to be eligible under IDEA but who need additional support to succeed in general education.[212] These "Early Intervening Services" funds may be used to underwrite RTI.[213] IDEA further provides that a child shall not be identified as a child with a

---

[207]Gresham, *supra* note 181.

[208]*Id*. One source describes the intervention as about thirty minutes of supplemental instruction a day, with progress monitored twice a month; the phase, under this model, may last ten to twenty weeks. Douglas Marston, *Tiers of Intervention in Responsiveness to Intervention*, J. LEARNING DISABILITIES 539, 540 (2005).

[209]Gresham, *supra* note 181. ("Essentially, this phase represents a special-education diagnostic trial period . . . ."). Some models incorporate a fourth tier of even more specialized instruction, but as with the composite model Gresham describes, the latter phases might be designated special education. *See* Council for Exceptional Children, Response to Intervention—The Promise and the Peril, http:www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=8427 (visited Aug. 4, 2008) ("Special education teachers may help develop interventions and/or plan assessments for students receiving instruction and interventions in Tiers 1 and 2. They may not provide instruction to students until Tier 3 or 4, when the student could be referred and identified for special education.").

[210]*See* Council for Exceptional Children, *supra* note 209 ("Students who do not respond to intervention are referred to special education. This step is taken after intensive intervention has not helped."). There is disagreement about how much weight should be placed on the simple fact of failure to make adequate progress following the interventions in the determination of learning disability, and how many additional assessments should be undertaken. *See id*. (collecting educational research sources).

[211]20 U.S.C.A. § 1414(b)(6)(A) (West 2008). The statute specifically permits school districts to "use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures" in ascertaining whether the child has specific learning disabilities. § 1414(b)(6)(B). The Department of Education has interpreted the Act as permitting state educational agencies to require local school districts to use RTI. U.S. Dep't of Educ., Questions and Answers On Response to Intervention (RTI) and Early Intervening Services (EIS), Question C-4 (Jan. 2007), http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C8%2C.

[212]20 U.S.C.A. § 1413(f).

[213]20 U.S.C.A. § 1413(f)(1), (2)(B).

© 2008. Unpublished Manuscript—All Rights Reserved.

disability for purposes of the statute if the "determinant factor" is lack of appropriate instruction in reading or mathematics.[214] A goal of RTI is to exclude from the learning disability category those children whose difficulties stem simply from lack of adequate instruction.[215]

The United States Department of Education regulations implementing the 2004 Reauthorization also promote the use of RTI methods. The Notice of Proposed Rulemaking urged recipients of federal special education funding to abandon IQ discrepancy and extolled the benefits of an RTI process.[216] The final regulations repeat the statutory language permitting non-discrepancy methods for determining LD, including methods relying on the child's response to scientific, research-based intervention.[217] Moreover, they omit a provision in the earlier regulations stating that a child could be determined to have a specific learning disability if he or she "has a severe discrepancy between achievement and intellectual ability in one or more" areas of learning.[218] The regulations modify the prior rule's reference to achievement commensurate with age "and ability levels" and make it achievement adequate for age or meeting state-approved grade-level standards.[219]

The new regulations add extensive provisions requiring determinations that findings with regard to performance or progress of the child are not "primarily the result of" other disabilities or disadvantages, and they require consideration of data that demonstrate that before, or as part of the referral process, the child received appropriate instruction delivered by qualified personnel in general education settings, and "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."[220] Perhaps something other than an RTI process could provide the relevant data and documentation, but properly implemented RTI methods are an obvious way to gather the data and produce the documentation.

---

[214] 20 U.S.C.A. § 1414(b)(5)(A)-(B).

[215] *See* Fuchs et al., *supra* note 204, at 116 ("[I]f an at-risk student responds well to intervention, then their low achievement can be attributed to lack of appropriate instruction, not a learning disability.").

[216] 70 Fed. Reg. 35,864, 35,802 (June 21, 2005).

[217] 34 C.F.R. § 300.307(a) (2008); *see* § 300.309(a)(2)(i).

[218] 34 C.F.R. § 300.541(a)(2) (2007) (superseded).

[219] 34 C.F.R. § 300.309(a)(1) (2008). The regulations appear to allow for the use of some discrepancy-based methods by permitting eligibility when the 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 . . . to be relevant to the identification of a specific learning disability, using appropriate assessments" otherwise consistent with the regulations. § 300.309(a)(2)(ii).

[220] 34 C.F.R. § 300.309(b); *see also* § 300.310 (requiring class observation of the child prior to determination); § 300.311 (requiring additional documentation on various topics related to specific learning disability determination).

© 2008. Unpublished Manuscript—All Rights Reserved.

3. *Benefits of RTI.* Even those who defend discrepancy methodology may have to agree that there are virtues to an RTI approach. First, it delivers instructional intervention to children who need it, and it does so before test score discrepancies emerge, which typically occurs in grade three or later.[221] Second, even for students who eventually are found to be special education-eligible, the method gives data about which educational interventions do or do not produce progress for a specific child, something discrepancy testing methods do not achieve, and which will likely be useful in designing a special education program.[222] Third, RTI may help keep students who do not actually have learning disabilities out of special education, while at the same time conferring educational benefit on them. These are children who may be characterized as "instructional casualties" (the victims of poor teaching practices who could learn if exposed to good teaching), or who come from troubled home environments, or who have other non-disability related circumstances that keep them from learning as well as they can.[223]

A frequently cited benefit of RTI is that it reduces referrals[224] to special education.[225] There are difficulties with considering this a true consequence of RTI, or, for that matter, a benefit. Although many studies show a reduction in referrals when school districts use RTI,[226] the referral count is extremely easy to manipulate. A school district can simply send the word out to teachers not to make special education referrals.[227] Informal messages of this type are extremely

---

[221]Nat'l Joint Comm. on Learning Disabilities, *Responsiveness to Intervention and Learning Disabilities*, 28 LEARNING DISABILITY Q. 249, 252 (2005). The use of objective criteria for intervention in the form of classwide assessments has the related advantage of not requiring the child to wait for a referral to special education (something typically initiated by the classroom teacher) before receiving help. *See* Fletcher et al., *supra* note 188 ("Teacher referral has been demonstrated to be biased, yielding disproportionate numbers of boys and AfricanAmericans, likely reflecting behavior management difficulties that make many referred students difficult to manage in the classroom.").

[222]Nat'l Joint Comm. on Learning Disabilities, *supra* note 221, at 252.

[223]Fletcher et al., *supra* note 188 (discussing "instructional casualties" to be provided accelerated instruction under RTI methodology); Spear-Swerling, *supra* note 185, at 277 ("In their emphases on high-quality Tier 1 instruction and timely, research-based interventions, RTI approaches have the potential to benefit a broad range of children, not only those with genuine LD.").

[224]Referral practices are the key, because most children referred by their teachers are determined to be eligible. *See* Reschly, *supra* note 190 ("Findings indicate that 90% of students referred by teachers are evaluated for special education and 70% are found eligible.").

[225]*See, e.g.,* Nat'l Joint Comm. on Learning Disabilities, *supra* note 221, at 252.

[226]*See, e.g.,* Fletcher et al., *supra* note 188 (citing studies from California and Connecticut).

[227]An example of this is the Virginia RTI plan, which states that "Only after several . . . systematic and research-grounded interventions have been implemented and evaluated, and a child has consistently failed to make adequate progress, may s/he be considered for special education evaluation." Va. Dep't of Educ., *supra* note 203, at 2. In fact, the relevant federal regulation simply states that the group determining the existence of a child's learning disability "must consider, as part of the evaluation . . .data that demonstrate that prior to, or as a part of, the referral

© 2008. Unpublished Manuscript—All Rights Reserved.

likely when local administrators have invested money and prestige in an elaborate RTI program.[228] One of the best known proponents of RTI, Douglas Fuchs, has cautioned about these tactics: "It's easy to reduce the numbers of children in special education programs. You just have to stop referring them."[229] Moreover, if decreasing the number of students referred to and receiving special education means that children who need help receive fewer or less effective services, the situation will have been made worse in the name of making it better.

4. *Problems with RTI.* Balanced against the possible benefits of RTI are a number of anticipated difficulties with it. The first is that of the bright child who achieves at grade level despite dyslexia or some other learning disability who could nevertheless benefit from special education. Dyslexia, for example, can be present in a child with high general intelligence.[230] Estimates of the percentage of children with learning disabilities who are gifted range from 2-5%.[231] These students tend to use their general intelligence to compensate for weaknesses in phonics, memorization, computation, or other tasks, and are likely not to be identified as having learning disabilities until later in their schooling than other students with learning disabilities.[232] By allowing for a discrepancy standard, the pre-2006 regulations made explicit the possibility of IDEA eligibility for a child achieving at grade level or higher whose achievement was nevertheless far below his or her ability.[233] The Department of Education has declared that failure in grade must not be used as a standard for eligibility,[234] but it appears likely that RTI screening will never identify the child achieving at grade level who has an

---

process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel . . ." 34 C.F.R. § 300.309(b)(1) (2008). This provision creates a standard for the process of *finding* eligibility, not a standard for when a child may be *considered* for eligibility.

[228]*See* Michael Alison Chandler, *Waiting Too Late to Test?*, WASH. POST, Dec. 31, 2007, at B01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/12/30/AR2007123002447_pf.html ("For many school systems, RTI-influenced strategies have led to a significant drop in the number of special education students. . . . The new approach has led to a backlash among parents who say their children aren't getting the help they need. A parent-led advisory committee told the Loudoun School Board in the fall that the school system appeared to be under-identifying students who should qualify for special education.").

[229]*Id*.

[230]SHAYWITZ, *supra* note 197, at 82.

[231]Tonya R. Moon et al., *Twice-Exceptional Students*, in EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra* note 185, at 295, 296-97.

[232]*Id*. at 298.

[233]*See* 34 C.F.R. § 300.541(a)(2) (2007) (superseded).

[234]Letter to Anonymous, 41 Individuals with Disabilities Educ. L. Rep. 212 (U.S. Dep't of Educ., Off. of Special Educ. & Rehabilitative Servs. 2004). The duty to identify, locate, and evaluate all children suspected of being children with disabilities applies "even though they are advancing from grade to grade." 34 C.F.R. § 300.111(c)(1) (2008). Programs such as Advanced Placement and International Baccalaureate must not discriminate against qualified students with learning or other disabilities. Office for Civil Rights, U.S. Dep't of Educ., Access by Students with Disabilities to Accelerated Programs (Dec. 26, 2007), http://www.ed.gov/about/offices/list/ocr/letters/colleague-20071226.html.

© 2008. Unpublished Manuscript—All Rights Reserved.

achievement discrepancy and could benefit from special education instruction.[235] The National Joint Committee on Learning Disabilities identified this as a serious potential difficulty with RTI, stating in its Report, "A particular concern is whether RTI is prone to systematic errors in identifying students with LD. For example, the underachievement criterion may exclude some high-ability students with LD from special education."[236]

A second problem is simply that of compliance with RTI requirements when the program is implemented on a large scale. The method mandates that teachers use only scientifically supported instructional techniques; school personnel must monitor individual children's progress rigorously.[237] There is no clear protocol for what should happen if a teacher deviates from the techniques, say by providing negative reinforcement[238] when positive is called for or failing to enter timely progress reports. Must the intervention start over from the time of the failure to comply? An intervention conducted without integrity could result in the child's failing to make progress not because of the presence of a learning disability but because of inadequate instruction.[239] There is little guidance so far from courts or other sources of legal interpretation on the remedy for program integrity failures, although in an instance in which a school district failed to "follow the prescribed protocol for an RTI process" before concluding that a child had no specific learning disability, a challenge was sustained by the Pennsylvania

---

[235]Kavale et al., *supra* note 191 ("What is also clear is that eliminating IQ-achievement discrepancy would result in a significant number of students with SLD *not* being identified when using only a relative discrepancy or low achievement criterion for determining eligibility."); *see* Townsend, *supra* note 175, at 264 ("[The RTI] approach becomes a ceiling on the ability of students with high potential, who can achieve scores in the average range in spite of their learning disability, preventing them from getting the help they need to realize their full potential.").

[236]*See* Nat'l Joint Comm. on Learning Disabilities, *supra* note 221, at 253 ("These students, by compensating with their intellectual strengths and making good use of support services, often manage to achieve within the normal range and, therefore, are unlikely to receive the early individualized instruction that would enable them to make academic progress consistent with their abilities."). *But see* Moon et al., *supra* note 231, at 302 (suggesting use of RTI in combination with other strategies in identifying gifted children with LD). The authors do not explain how bright children who compensate for their weaknesses with skilled guesswork or other mechanisms to perform at an average level will be identified and provided assistance to become better learners.

[237]Even the most rigorous program does not eliminate individual judgment. *See* Gerber, *supra* note 197 ("Even teachers of small intervention groups make decisions to continue or adjust instruction based on evaluation of quality (e.g., automaticity or fluency) as well as accuracy of students' responses. Such decisions and the choices that follow cannot be fully programmed in advance without ignoring potentially meaningful individual differences among students."). One source, however, comments that fidelity to protocol is a problem with non-RTI evaluation mechanisms as well. Reschly, *supra* note 190 ("Implementation fidelity, however, is not a problem unique to RTI.").

[238]Yelling, for example. Professor Gerber politely notes, "Teachers differ as individuals despite the quality of their professional preparation . . . like their students, they cannot be made identical." Gerber, *supra* note 197.

[239]*See* Gresham, *supra* note 181 ("[F]ailure to find significant treatment effects might be explained by poor component integrity over time, by poor daily or session integrity, or both.").

© 2008. Unpublished Manuscript—All Rights Reserved.

State Educational Agency's due process hearing appeals review officer, who awarded tuition reimbursement to the parents for a private program for the child.[240] Implementation of RTI is also likely to be costly in terms of teacher training time and purchased programs,[241] although there may be long-term savings if children are kept from needing expensive services later.[242]

Exacerbating compliance problems is the reality that the evidence supporting the effectiveness of RTI interventions across the curriculum and across age ranges is surprisingly incomplete. Although various interventions are scientifically validated with regard to reading mechanics, interventions directed to reading comprehension have proven ineffective,[243] and specialized instruction in other areas remains unproven.[244] It is true that reading is the most common area

---

[240]Upper Darby Sch. Dist., 106 LRP 60495 (Pa. State Educ. Agency 2006).

[241]Council for Exceptional Children, *supra* note 209 ("Implementing RTI is a substantial undertaking. Staff may need professional development in the RTI process as well as in research-based instruction and progress monitoring. To assist teachers, some schools provide training and manuals on acceptable interventions. In addition, schools may bring in outside support, such as a university, to help teachers learn and teach curriculum."). One source cites indicates that twenty hours of training plus weekly followup sessions will be required for tutors, and forty hours of baseline training for classroom teachers. Gerber, *supra* note 197 (collecting studies).

[242]*See* Gresham, *supra* note 181 (discussing cost-benefit comparison).

[243]NAT'L CTR. FOR EDUC. EVALUATION & REG'L ASSISTANCE, INST. OF EDUC. SCIS., READING FIRST IMPACT STUDY: INTERIM REPORT, at xiv (Apr. 2008), *available at* http://ies.ed.gov/ncee/pdf/20084016.pdf ("On average, Reading First did not improve students' reading comprehension. The program did not increase the percentages of students in grades one, two, or three, whose reading comprehension scores were at or above grade level. In each of the three grades, fewer than half of the students in the Reading First schools were reading at or above grade level."); *see* Sam Dillon, *An Initiative on Reading Is Rated Ineffective*, N.Y. TIMES, May 2, 2008, http://www.nytimes.com/2008/05/02/education/02reading.html?pagewanted=print (summarizing and discussing findings of Interim Report). The Reading First program, which is the principal innovation in reading instruction associated with the No Child Left Behind Initiative, has been criticized for cronyism, among other things. *See* Kathleen Conn, *The Evolution of K-12 Educational Malpractice Claims: Will the "Reading First" Scandals Influence Statutory Causes of Action Under NCLBA and IDEIA?*, 221 Educ. L. Rep. (West) 21 (2007).

[244]For a compilation of favorable results in trials of math intervention, see Lynn S. Fuchs et al., *Response to Intervention*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra* note 185, at 115, 125-27. The authors note that validation of protocols for written language and science remains to be accomplished. *Id*. at 124. Some other experts regard math RTI as a work in progress. David Chard et al., *Systems of Instruction and Assessment to Improve Mathematics Achievement for Students with Disabilities: The Potential and Promise of RTI*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra*, at 227, 228 ("Most research and development in RTI implementation and evaluation have taken place in early reading education. Our interest is in promoting similar efforts in mathematics. However, developing RTI models in mathematics education will be a formidable challenge."). Other authorities are more skeptical about the scientific support for RTI processes in general. *See* Jack A. Naglieri & Alan S. Kaufman, *IDEIA and Specific Learning Disabilities*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra*, at 165, 189 ("The evidence examined by Fuchs et al. (2003) and Naglieri and Crockett (2005) suggest that there is little evidence to demonstrate the utility of RTI."); *see also* Kavale et al., *supra* note 191 (describing

© 2008. Unpublished Manuscript—All Rights Reserved.

in which learning disabilities manifest themselves,[245] but there is a serious gap regarding scientifically validated instruction in other areas.[246] Problems also exist with respect to implementation of RTI methods in the upper grades. Research is limited regarding appropriate protocols for RTI for children beyond their first few years in school.[247] Some authorities are skeptical about whether RTI methods can work for older children at all.[248] When there is no scientifically validated protocol with which to comply, implementation is impossible.[249]

A third problem is that of affording parents and children their important procedural protections while implementing RTI. For example, under IDEA parents are entitled to notice and the opportunity to give or withhold consent to evaluation.[250] RTI is a method of evaluation, and the fact that the regulations providing for RTI are listed under the "Evaluation" heading implies that notice of use of RTI evaluation methods must be provided.[251] Screenings for instructional purposes are not considered evaluations, but RTI involves much more than simple screening.[252] RTI is an educational methodology, not an interpretation of legal requirements, so there is no clear point at which notice must be given to parents in the RTI protocols themselves. An additional procedural right under the law is that a parent may request an evaluation for special education eligibility at any time.[253]

---

support for use of RTI with regard to anything but phonemic awareness in young children as inadequate).

[245]Spear-Swerling, *supra* note 185, at 273 ("[O]ver 90% of children classified as LD prior to fifth grade are identified based primarily on problems in reading.") (citing 1992 data).

[246]Scruggs, *supra* note 192 ("[I]ntensive instruction can improve reading skills, but this does not 'cure' the learning disability, which may have a number of other manifestations. That is, deficits in sustained attention, semantic memory, organizational skills, perceptual motor skills, or social interactions could lead to problems in a number of other school tasks . . . .").

[247]Spear-Swerling, *supra* note 185, at 287; *see* Scruggs, *supra* note 192 ("Presently, the model addresses primarily reading in primary grades, and tells us little about how learning disabilities might be evaluated at higher grade levels, and when the problems emerge primarily as failures in content area learning."); Semrud-Clikeman, *supra* note 197 ("Most of the research has centered on children in kindergarten and first grade classrooms. There is very little empirical evidence that this program is appropriate for children at older ages. Prior to implementation of this program for all children it would be very appropriate to conduct studies with children in middle school and high school.").

[248]*See* Michele Goyette-Ewing & Sherin Stahl, *New Individuals with Disabilities Improvement Act and Psychological Assessment*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra* note 185, at 421, 432 ("Will we be using a wait-to-fail approach with these older children, if we depend on RTI as the primary tool for determining a learning disability?"). Others are more sanguine. *See* Saylor Heidmann, Reading Assessment and IDEIA, in EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra*, at 435, 447-50 (relying on anecdotal information).

[249]*See* Jennifer H. Lindstrom et al., *Assessment and Eligibility of Students with Disabilities*, *in* EDUCATING INDIVIDUALS WITH DISABILITIES: IDEIA 2004 AND BEYOND, *supra* note 185, at 197, 204.

[250]34 C.F.R. § 300.304(a) (2008); *see* § 300.509.

[251]See 34 C.F.R. §§ 300.301-.311.

[252]*See* 34 C.F.R. § 300.302. (covering screening for instructional purposes).

[253]*See* 34 C.F.R. § 300.301(b)..

© 2008. Unpublished Manuscript—All Rights Reserved.

It is not clear exactly what happens if that occurs during RTI. A report of the National Research Center on Learning Disabilities notes: "A potentially difficult situation might arise if parents exercise their right to request an evaluation and LEAs [school districts] do not have clearly described steps, components, procedures, and criteria for SLD determination and for whether and how a student's response to scientific, research-based intervention is included."[254] Parents also have the right to demand an independent educational evaluation if they disagree with the public school's evaluation of their child.[255] It is difficult to imagine how this would include RTI, so IQ-discrepancy or some other method would need to be retained for this purpose.[256] What is more, neither the United States Department of Education[257] nor professional sources[258] anticipate that RTI will be used as the sole criterion for a finding of special education eligibility, but if IQ test-discrepancy methods are abandoned, one cannot tell what the other criteria will be.

Timelines are an important part of IDEA procedural protections. The general time limit for evaluation is sixty days after receipt of parental consent.[259] School districts have to adhere to the time limits in determining specific learning disability unless the parents agree to a written extension.[260] RTI can be a lengthy process, even if the lapse of time is to some degree compensated by educational benefit some children will receive. Judicial remedies exist for delay in determining special education eligibility. For example, in *Board of Education v. L.M.*, the Court of Appeals for the Sixth Circuit ruled that a child should receive a compensatory education remedy to permit a child whose evaluation was delayed

---

[254]Nat'l Research Ctr. on Learning Disabilities, Responsiveness to Intervention in Conjunction with Learning Disability Determination (Winter 2007), http://www.nrcld.org/resource_kit/general/RTIbrief2007.pdf.

[255]34 C.F.R. § 300.502 (2008). The independent evaluation must be at public expense unless the school district requests a hearing and demonstrates that its evaluation is appropriate. § 300.502(b).

[256]Another mystery is how to apply RTI to determine eligibility for private school students. School districts have the obligation to identify, locate and evaluate those students by undertaking activities similar to those undertaken for public school students, 20 U.S.C.A. § 1412(a)(10)(A)(ii) (West 2008), but lack the ability to modify the private schools' general education to embrace RTI methods.

[257]U.S. Dep't of Educ., *supra* note 211, at C-6 ("[A]n RTI process does not replace the need for a comprehensive evaluation."); *see* 20 U.S.C.A. § 1414(b)(2) (West 2008) ("In conducting the evaluation, the local educational agency shall . . . use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information . . . [and] not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability . . . .").

[258]Nat'l Research Ctr. on Learning Disabilities, *supra* note 254 ("RTI is introduced into the statute as one part of the evaluation, eligibility determination, individualized education program, and educational placement procedures, not as the only evaluation procedure. The inference is that SLD determination is not based on a sole criterion of a child's response to an intervention.").

[259]34 C.F.R. § 300.301(c)(1)(i). States may enact different time limits. § 300.301(c)(1)(ii).

[260]34 C.F.R. § 300.309(c).

© 2008. Unpublished Manuscript—All Rights Reserved.

during his third and fourth grade years "to catch up with his peers."[261] The court adopted a standard for actionable violations that "the claimant 'must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for deciding not to evaluate.'"[262] This standard may be met in some cases when a school system uses RTI but takes no other steps on behalf of the child while time continues to elapse. On the other hand, the delay actually has to cause harm for relief to be proper. In *Lesesne v. District of Columbia*, the Court of Appeals for the District of Columbia ruled that the parent would not prevail in a case over failure to meet an evaluation deadline unless the parent could demonstrate that a child suffered harm from the delay.[263] In a situation where the child has received RTI but has not received any other form of evaluation or been deemed eligible for special education, claims based on delay may be difficult to sustain if the child obtained benefit from the RTI comparable to what would have been received in special education. When that is not the case, a remedy is appropriate if timelines have been violated.

The fourth problem with RTI is the interaction of disciplinary protections with delays in identification of the child as a child with a disability.[264] Under IDEA, students who are eligible for special education cannot have their services completely terminated, no matter what conduct they may have been accused of or engaged in.[265] If the child is suspended or otherwise removed from his or her educational placement for ten days in the same school year, ongoing educational services have to be provided; although the services may be in a different setting, they must enable the child to participate in the general education curriculum and to continue to make progress on individualized educational program (IEP) goals.[266] Every child who is removed is entitled to receive a functional behavioral assessment and behavior intervention services and modifications.[267] Before making any long-term change in the child's placement, the IEP team must determine whether the misconduct was a manifestation of the child's disability.[268] If the conduct was a manifestation, the school has to conduct a functional behavioral assessment and modify the child's behavior plan as necessary.[269] Unless the child's conduct involved weapons, drugs, or infliction of serious bodily injury, the school must return the child to his or her previous placement.[270]

---

[261] 478 F.3d 307, 316 (6th Cir.2007).

[262] *Id*. at 313 (quoting Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817, 823 (M.D. Ga. 1997)).

[263] 447 F.3d 828 (D.C. Cir. 2006).

[264] The same problem, of course, arises for children who are ultimately not found eligible for special education if their needs are remediated during the RTI process.

[265] 20 U.S.C.A. § 1412(a)(1)(A) (West 2008).

[266] 34 C.F.R. § 300.530(d)(1)(i) (2008).

[267] 34 C.F.R. § 300.530(d)(1)(ii).

[268] 34 C.F.R. § 300.530(e).

[269] *Id*.

[270] 34 C.F.R. § 300.530(f).

© 2008. Unpublished Manuscript—All Rights Reserved.

Even in the weapons, drugs, and serious injury cases, the removal is limited to forty-five school days.[271] Various appeal rights also exist.[272]

These rights in connection with the discipline process are extremely important to children and their parents. Though the law says that the rights apply in limited instances for a child who has not yet been determined to be a child with a disability when the school had knowledge that the child was a child with a disability,[273] the applicability of that provision is far from certain. The United States Department of Education has taken the position that participation in RTI, standing alone, is not enough to supply the basis in knowledge to trigger the discipline protections.[274] Parents can be expected to resist the use of RTI processes that delay the eligibility determination or entirely prevent their children from being deemed eligible if they perceive the children as vulnerable to student discipline that could result in suspension or expulsion from school without the protection afforded students who have received a determination of IDEA eligibility. State educational agencies or local school board could, of course, avoid any conflicts on this topic by voluntarily extending protections similar to those that apply to IDEA-eligible children to all children, or at least to all those in RTI. It is hardly consistent with sound educational methods to have any students—those officially considered to have disabilities and those not—out of school for long periods of time with no opportunity to make educational progress.[275]

5. *RTI's Role in the Eligibility Mess.* Despite the apparent drawbacks of RTI, the IQ-discrepancy controversy and RTI response to it would not necessarily present a problem for IDEA eligibility policy. Indeed, these developments might be an opportunity to set learning disabilities intervention on a sounder footing while benefiting students whose learning problems do not show up in an IQ profile. The developments thus may advance in part the services-for-all-who-need-them approach embodied in the not-quite-so-special education model. The difficulty—and the reasons things are now a mess and may get worse—is the likely exclusion of children who could benefit significantly from learning disabilities services but who perform well enough on screenings that they are not

---

[271] 34 C.F.R. § 300.530(g) (2008).

[272] 34 C.F.R. § 300.532.

[273] *See* 34 C.F.R. § 300.534.

[274] U.S. Dep't of Educ., *supra* note 211 , at F-3.

[275] Even if only the most important protections were afforded, such as the right to continued services in an alternative setting during periods of suspension, children would benefit and parental pressure for rapid eligibility determinations would diminish. No warranties are made regarding the political palatability of this proposal, but it may be noted that after significant agitation to eliminate disciplinary protections for children with disabilities in the debates leading up to the 2004 Reauthorization, the changes made were fairly modest and the legislation even contains a provision expressing disapproval of zero-tolerance policies. *See* Weber, *supra* note 23, at 34-39 (discussing, inter alia, 20 U.S.C.A. § 1415(k)(1)(A), which calls for consideration of unique circumstances on case-by-case basis when disciplining students with disabilities).

© 2008. Unpublished Manuscript—All Rights Reserved.

selected for RTI, and the inclusion of children in the early phases of RTI for protracted periods when they should be receiving more intense services. The mess will become worse if schools attempt to implement RTI on a grand scale without sufficient personnel training or preparation, or if the schools violate the internal tenets of RTI by applying it to groups of children for which there is no scientifically validated intervention available. Schools must also determine how to protect procedural rights as they implement RTI, and they need to afford disciplinary protections to all children who are suspected of having disabilities, which likely is the entire category of children in RTI and a number of others besides.

C. *African-American Overrepresentation*

Caselaw trends and changes in learning disabilities evaluation methodology join with a third major development in producing the IDEA eligibility mess. That development is the belated awareness that African American children are significantly overrepresented in some special education eligibility categories. This realization has led to legislative action, well-founded concerns about discrimination, and overdue attention to the problem of separate settings for children in the special education system. There are those who would respond to the development by further limiting special education eligibility. A better approach is to address the problems of isolation, stigma, and low expectations directly.

The United States Department of Education reports that there are major differences among racial and ethnic groups with regard to special education eligibility, particularly with regard to mental retardation and emotional disturbance. According to the *Annual Report on the Implementation of the Individuals with Disabilities Education Act*, statistics for the most recent year available demonstrated that "the percentage [of students] receiving special education (i.e., risk index) was largest for American Indian/Alaska Native students (13.8 percent), followed by black (12.4 percent), white (8.7 percent) and Asian/Pacific Islander (4.5 percent) students."[276] The report continued: "Black students were 3.0 times more likely to receive special education and related services for mental retardation and 2.3 times more likely to receive special education and related services for emotional disturbance than all other racial/ethnic groups combined."[277]

---

[276] U.S. DEP'T OF EDUC., 1 TWENTY-SEVENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 38 (2005), *available at* http://www.ed.gov/about/reports/annual/osep/2005/parts-b-c/27th-vol-1.pdf (discussing data for students ages 6-21).

[277] *Id*. at 40. There is disproportional representation of other ethnic groups as well, but the pattern is more geographically scattered and indicates statistical underrepresentation as well. Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 412 (2001) ("Although African Americans appear to

© 2008. Unpublished Manuscript—All Rights Reserved.

This information is not new, but instead reflects long-term data trends. Two well-known authorities describe the situation in the following terms:

> [T]rends include the following: (a) pronounced and persistent racial disparities in identification between white and black children in the categories of mental retardation and emotional disturbance, compared with far less disparity in the category of specific learning disabilities; (b) a minimal degree of racial disparity in medically diagnosed disabilities [such as deafness, blindness, and orthopedic impairment] as compared with subjective cognitive disabilities; (c) dramatic differences in the incidence of disability from one state to the next; and gross disparities between blacks and Hispanics, and between boys and girls, in identification rates for the categories of mentally retarded and emotionally disturbed.[278]

The ethnic disparities, particularly the overrepresentation of African-Americans in the mental retardation and emotional disturbance categories, have attracted congressional attention. The 2004 IDEA Reauthorization requires states to have "policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities."[279] States must collect and examine student data to determine if significant disproportionality on the basis of race and ethnicity is taking place in the state or its local school districts with regard to special education identification, placement in particular settings, and incidence, duration, and type of disciplinary actions.[280] If there is a determination that significant disproportionality is occurring with respect to identification or placement, the state has to provide for the review and, if appropriate, the revision of policies, procedures, and practices used in identification and placement.[281] The state must also require any local school district found to have a significant

---

bear the brunt of overidentification, the evidence indicates that all minority groups are vulnerable to discrimination in identification for special education. For example, Hispanics, Native Americans, and Asian Pacific Americans are each overrepresented in mental retardation classifications at more than three times the rate of whites in at least one state. In most states, however, Hispanics and Asian Pacific Americans are more likely to be overrepresented.") (relying on data compiled by Thomas Parrish).

[278]Daniel J. Losen & Gary Orfield, *Racial Inequity in Special Education*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION *supra* note 48, at xv, xxiii. Other disparities appear even when these particular disparities vanish. California eliminated overrepresentation of African-Americans classed as students with mild mental retardation over the period from 1980 to 1994, but overrepresentation of African-Americans identified as having learning disabilities increased substantially. Donald P. Oswald et al., *Community and School Predictors of Overrepresentation of Minority Children in Special Education*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION *supra*, at 1, 3.

[279]20 U.S.C.A. § 1412(a)(24) (West 2008).

[280]20 U.S.C.A. § 1418(d)(1).

[281]20 U.S.C.A. § 1418(d)(2)(A). The revision of policies has to be publicly reported. § 1418(d)(2)(C).

© 2008. Unpublished Manuscript—All Rights Reserved.

disproportionality to reserve the maximum amount of funds (that is, 15% of federal special education payments) to provide early intervening services to assist children not yet identified as being children with disabilities.[282]

Disparities by themselves do not demonstrate discrimination, but some anomalies in the picture, such as the absence of significant African-American overrepresentation in medically determinable disability categories and wide differences by location in identification of African-Americans, support the inference that discriminatory identification is occurring. Mr. Losen and Professor Orfield conclude: "The data on disproportionate representation is compatible with the theory that systemic racial discrimination is a contributing factor where disparities [in special education identification] are substantial."[283] Poverty, by itself, does not fully explain the racial disparities.[284] Ethnicity remains a significant predictor of cognitive disability identification even when poverty and wealth are controlled for in the statistical analysis.[285] In addition, the problem of the "instructional casualty" is likely to be especially pronounced in a situation in which a child is racially or culturally isolated.[286] This conclusion is supported by the reality that African-American children in wealthier school districts with more children of high socio-economic status are more likely to be identified as mentally retarded than African American children in other locales.[287]

Separate schooling of children with disabilities—that is, education in specialized classrooms out of the mainstream—is more often the case when the children with disabilities are African-American. The Department of Education reports that: "Compared to students with disabilities from other racial/ethnic groups, black students with disabilities were the least likely to be educated in the regular classroom for most of the school day (38.6 percent)."[288] Conversely, "White students with disabilities were the most likely to be educated in the regular classroom for most of the school day (54.7 percent)."[289] Very isolated settings are particularly common for African-American children with disabilities: "Black students with disabilities were more likely than students with disabilities from other racial/ethnic groups to be educated outside the regular classroom more than 60 percent of the day (28.1 percent). They were also more likely to be educated in [completely] separate environments (5.2 percent)."[290]

---

[282] 20 U.S.C.A. § 1418(d)(2)(B). *See generally supra* text accompanying notes 59-60, 212-13 (discussing early intervening services).
[283] Losen & Orfield, *supra* note 278, at xxiii.
[284] *Id*.
[285] *Id*. at xxiv.
[286] *See supra* text accompanying note 223 (discussing "instructional casualties").
[287] Losen & Welner, *supra* note 277, at 415-16 (relying on data compiled by Donald P. Oswald).
[288] U.S. DEP'T OF EDUC., *supra* note 276, at 48.
[289] *Id*.
[290] *Id*.

© 2008. Unpublished Manuscript—All Rights Reserved.

These isolated settings impose harm on the children placed in them. To take the example of children whose behavior disorders manifest themselves in antisocial conduct, "forced segregation with antisocial peers . . . often reinforces problem behavior."[291] Moreover, since African-American children are disproportionately identified as special education-eligible, special education practices that employ separate placements become an effective mechanism to segregate African-American children in single-race special education placements, rather than in racially integrated mainstream classrooms.[292] Isolated and isolating placements need not be the rule.[293] They appear to exist in large part because of the absence of resources to enable children with high needs to learn in their ordinary classrooms. One source observes that "racially isolated, high-poverty urban schools may be using special education as triage because they lack supports for inclusive educational placements."[294]

Professor Garda, who has written extensively on the topic of overrepresentation, believes that a redefinition of the "needs special education" component of the IDEA eligibility standard is necessary to solve the overrepresentation problem.[295] He would limit IDEA eligibility to students who need "significant instructional adaptations that are not provided to all students, regardless of disability."[296] This perspective locates the problem in the fact of IDEA eligibility, rather than in the reality of separate placements and low

---

[291]David Osher et al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 48, at 93, 96.

[292]Losen & Welner, *supra* note 277, at 407 ("[A]s a result of misdiagnosis and inappropriate labeling, special education is far too often a vehicle for the segregation and degradation of minority children.").

[293]One prominent expert on disability law has challenged the legal presumption favoring educational settings in which children with disabilities are integrated with those who do not have disabilities. Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. Pa. L. Rev. 789 (2006). For a response, see Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PENN. L. REV. PENNUMBRA 174 (2007).

[294]Edward Garcia Fierros & James W. Conroy, *Double Jeopardy: An Exploration of Restrictiveness and Race in Special Education*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 48, at 39, 40.

[295]Garda, *supra* note 12, at 1074 ("[W]ithout fundamental changes to, and a proper understanding of, the "needs special education" eligibility criteria, the educational paradigm adopted in the [2004 Reauthorization] cannot take root, and the eligibility problems will persist.").

[296]*Id*. Professor Garda would further rule out a student's eligibility for special education "until all available accommodations and regular education interventions have proven ineffective." *Id*. at 1074-75. Though intended to force general education to take responsibility for students of all cultures and ethnicities by individualizing instruction, this suggestion, will, I fear, take to an extreme the wait-to-fail approach that has been so severely criticized regarding learning disabilities evaluation. *See supra* text accompanying note 60 (criticizing wait-to-fail approach). Professor Garda would use a below-average performance standard, rather than a standard of failing, *see* Garda, *supra* note 9, at 491-512, *supra* note 12, at 1129, but so many children are below average (half, except in Lake Woebegone) that in practice the standard will likely become that of failing or nearly so.

© 2008. Unpublished Manuscript—All Rights Reserved.

expectations once IDEA eligibility is established. Professor Garda makes a case that misidentifying a child as having a disability is harmful because of stigma and loss of self-esteem,[297] and anecdotal accounts, such as that of Billy C. Hawkins, a college president who was labeled mentally retarded as a child, confirm this view.[298] But stigma and loss of self-esteem are by no means solely the results, and certainly are not the necessary results, of eligibility for special education services. All students perceived as different are vulnerable to mistreatment that imposes stigma and psychological harm.[299] The sensible response is for schools to act aggressively to keep teachers and peers from imposing stigma on those students,[300] whether the students are identified for special education or not.[301] And there is good ground to doubt that the critical factor in imposition of stigma or low expectations is the legal identification for special education.[302] Students who are struggling to keep up with the class will be labeled "stupid" or worse irrespective of how the law classifies them for purposes of statutory entitlements.[303]

If revised or reinterpreted eligibility standards keep children who are floundering in general education classes from a legal entitlement to assistance, the educational problems they encounter will simply become more intractable. Difficulties that students experience with the general education curriculum reflect

---

[297] *Id*. at 1082-83.

[298] *See* Losen & Welner, *supra* note 277, at 411.

[299] *See* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 184 (discussing imposition of stigma on persons with disabilities).

[300] *See generally* Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1155-58 (2002) (discussing steps to prevent and remedy harassment on the basis of disability).

[301] If the student is not found eligible for special education, some of the legal remedies for harassment will not be available, because they are those furnished under IDEA. *See id.* at 1110-19 (discussing IDEA remedies).

[302] *See* Arceneaux, *supra* note 46, at 244 ("Although the term stigma or stigmatization is often used to describe an outcome of special education, particularly for minorities, there is a lack of empirical data to support this finding separate from consolidated studies with other variables.").

[303] Some personal narrative may support this point. I attended Catholic grade schools in the Milwaukee area in the 1960s. There were no special education classes in the schools I attended and no children identified as special education eligible or given disability classifications. Nevertheless, it was obvious to everyone which children were struggling to learn. They were ruthlessly stigmatized and frequently became the victims of harassment. It is hard to imagine that the mistreatment would have been any worse had they been given a formal disability designation, and their prospects certainly would have improved had they been afforded support in their schooling as a matter of entitlement. There are, of course, limits to the value of this observation. In any given case, an official designation may still have a harmful effect. But much depends on what the consequences of the designation will be, and if the consequence is an entitlement to effective services rather than isolation, the designation is worth the disadvantage, particularly if the school aggressively corrects any peer and teacher mistreatment of children who are so designated as well as those who are not.

© 2008. Unpublished Manuscript—All Rights Reserved.

problems that desperately need to be addressed.[304] At the present time, the only system that confers an entitlement to services and the procedural protections to enforce the entitlement is the special education system.[305] General education, as currently constituted, is not up to the task. One analysis of studies concludes that: "Keeping minorities who are already performing poorly in the general education systems that failed them (or inappropriately returning them there from special education) perpetuates inferior educational outcomes for these students."[306] Even that analysis assumes that the students will stay in school if the entitlement to special education disappears, an outcome that is highly unlikely. African-American children who manifest mental disabilities are highly vulnerable to suspension and expulsion from school unless they have the protections that IDEA gives children who are deemed eligible for special education.[307]

The true problems are not those of special education identification. They are isolation, low expectations, and poor outcomes, *simpliciter*.[308] Even Professor Garda acknowledges that the negative effects of incorrect labels on children are

---

[304]Losen and Welner note that "Special education can provide tremendous benefits to children who need supports and services." Losen & Welner, *supra* note 277, at 407.

[305]As Losen and Welner acknowledge, *Alexander v. Sandoval*, 532 U.S. 275 (2001), places out of reach individual litigation under the disparate-impact regulations enforcing title VI of the Civil Rights Act. *See id*. at 409. Their suggested alternative, litigation under 42 U.S.C. § 1983 to enforce the regulations, *see id*. at 449-51, seems less than promising in light of recent cases restricting the applicability of that cause of action, notably *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.8, at 570 (5th ed. 2007) ("Together, . . . the Supreme Court's two most recent decisions—*City of Rancho Palos Verdes v. Abrams* and *Gonzaga University v. Doe*—reveal a Court very much seeking to narrow the ability to use § 1983 to enforce federal statutes.") .

[306]Oswald et al., *supra* note 278, at 3.

[307]*See* Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 29 (2006) ("Unfortunately, the IDEA has been at times a double-edged sword. . . . [I]t has been overly used to label and disproportionately place African-American males in special education programs and out of mainstream educational instruction. At the same time, African-American males with mental disabilities have been suspended and expelled from school in lieu of receiving services required by the IDEA.") (footnotes omitted).

[308]Reschly, *supra* note 190 ("The most vulnerable feature in modern special education for persons with high incidence disabilities is insufficient documentation of positive benefits to children and youth. . . . Moreover, when positive outcomes are documented in LD, the magnitude is modest."); *see also* Beth Harry et al, *Of Rocks and Soft Places: Using Qualitative Methods to Investigate Disproportionality*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 48, at 71, 72 (noting that disproportionate special education identification by race "is problematic . . . [in] that there continues to be doubt that placement in special education programs results in beneficial outcomes for many students."). Positive outcomes appear to vary by race. The Department of Education reports that 59.1% of white children with disabilities graduate from high school with a regular diploma, while only 36.2% of African-American children with disabilities do so. The respective dropout rates are 29.9% and 41.7%. U.S. DEP'T OF EDUC., *supra* note 276, at 53; Osher et al., *supra* note 291, at 94 ("While academic outcomes are poor for all youth with emotional and behavioral disorders, they are particularly dismal for African Americans.").

© 2008. Unpublished Manuscript—All Rights Reserved.

"compounded by their placement in classes separate from their peers with less demanding curriculums."[309] Rather than redefining any component of the special education eligibility standard to eliminate a child's entitlement to services appropriate to his or her educational needs, the prescription should be to improve the quality of special education services and deliver them to children who remain in the general education classroom, with the services provided so intensely that the students meet the same expectations for achievement as everyone else is meeting.

That being said, a number of incremental steps addressed to overrepresentation may be appropriate. State funding formulas that do not distribute special education funds to school districts based on the numbers of students they identify for special education are less associated with overrepresentation of minorities than per-capita formulas are.[310] The reporting and early intervening services spending requirements recently put into place by Congress may also prove beneficial.[311] Nevertheless, strict proportionality of representation by race is likely to remain an unrealistic goal, if only because of the real, if sometimes overstated, contribution of poverty to disability. One prominent critic of overrepresentation concedes that "in high-poverty districts, strict numeric proportionality may mean that some children in need are not receiving services."[312]

D. *Summary*

The law of eligibility under IDEA is indeed a mess. The recent caselaw is frequently unhelpful, and sometimes it is downright harmful in that it keeps children Congress intended to benefit from the law from receiving the law's benefits. The RTI movement holds promise for students who have learning disabilities, but there are many unanswered questions and perhaps some unanswerable ones in extending RTI methodology as far as is being proposed. Finally, there is an air of racial discrimination in the way African Americans are treated in the special education system, including eligibility and placement determinations, just as there is in the way African Americans are treated in the educational system in general. What is to be done?

---

[309]Garda, *supra* note 12, at 1083. Professor Garda further notes that "One final explanation for African-American students' poor outcomes from special education is that eligible African-American children are more likely than their white counterparts to be placed in restrictive, segregated settings apart from general education students and the general curriculum." *Id*. at 1085.

[310]Thomas Parrish, *Racial Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 48, at 15, 16.

[311]*See generally supra* text accompanying notes 279-82 (describing recent statutory initiatives addressing disparities). Garda remains skeptical. *See* Garda, *supra* note 12, at 1100-01.

[312]Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 48, at 219, 235.

© 2008. Unpublished Manuscript—All Rights Reserved.

IV. THE CLEANUP

I have already hinted at some of the steps that might be needed—or at least some of those that must be avoided—if the problems with the law of special education eligibility are to be resolved. What needs to be done includes rectifying the caselaw, moving cautiously on RTI, and addressing the problems raised by racial overrepresentation not as problems of IDEA eligibility, but as problems in connection with what happens once a child is IDEA eligible.

A. *Reforming the Caselaw on Eligibility*

The solution to the problems posed by the caselaw does not lie in changing the three-part eligibility definition. Except for the difficulty with the social maladjustment category, which can be fixed in other ways, the first part, which includes the disability classifications themselves,[313] poses little difficulty. The second part, the "adversely affects educational performance" term found in all but the learning disability definition,[314] is also not problematic as long as it is read in its federally-minted, unadorned form. There is no basis to transform it into "*significantly* affects educational performance" or the equivalent. Using state rules or policies to do so violates the supremacy of federal law by defining out of a federal statute's coverage many of the children the federal law protects. The same point applies with regard to the third term, "by reason thereof, needs special education and related services."[315] Putting a restrictive reading on this term, whether one based in state law or plucked from a school district's pleadings, undermines the goals of IDEA to serve all children with disabilities, not some imaginary subset of children who cannot be educated in a general education classroom even with accommodations and supports.[316] Special education consists of those accommodations and supports,[317] and federal law favors delivering the accommodations and supports in the general education classroom.[318] All children

---

[313] 20 U.S.C.A. § 1401(3)(A)(i) (West 2008); 34 C.F.R. § 300.8(c) (2008).

[314] 34 C.F.R. § 300.8(c).

[315] 20 U.S.C.A. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a).

[316] As noted, the original title of the federal statute was the Education for All Handicapped Children Act. Even now, the first statement of purposes in the legislation reads: "The purposes of this title are—to ensure that all children with disabilities have available to them a free appropriate public education . . . ." 20 U.S.C.A. § 1400(d)(1)(A).

[317] *See* 20 U.S.C.A. § 1401(3)(A)(ii) ("The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education."); 34 C.F.R. § 300.39(a) (2008) ("Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability . . . .").

[318] 20 U.S.C.A. § 1412(a)(5)(A) ("[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment [may] occur[] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

© 2008. Unpublished Manuscript—All Rights Reserved.

who require "specially designed instruction to meet [their] unique needs"[319] and "aids, services, and other supports"[320] because of one of the conditions listed in the IDEA definition need special education and related services by reason thereof, and are IDEA-eligible. The courts should appreciate Professor Hensel's insight that they are being led on a misguided search for the "truly disabled," a search that IDEA does not require, but that instead threatens to undermine the goals of the statute.[321]

There is a paradox in the fact that school districts fight over the eligibility of children such as those in the *Hood*,[322] *A.D.*,[323] and *Mr. I.*[324] cases. If the children are not eligible, the school districts cannot use federal funds to serve them. Depending on the funding formula the state employs, the district will likely not be able to claim as much state reimbursement as it otherwise would if the children are excluded from the count of eligible children.[325] Yet the schools still deny eligibility and literally make a federal case out of it when the parents object. Perhaps the local school districts are responding to state education department regulators who are eager to decrease the number of special education children by any means possible. More likely, the school districts, even though they claim to be willing to provide services through other mechanisms, are unwilling to extend to these children the legal entitlement to services, complete with the procedural and discipline protections needed to put the entitlement into force. It may be more convenient to serve or not serve as the school district chooses, and to be free of statutory notice, hearing, and continuation-of-services requirements. But when that convenience is purchased at a price of distorting the terms of the federal law, the courts should step in.

As for other matters raised by the caselaw, the reach of *Rowley*[326] should be limited to its definition-of-appropriate-education context (as argued below, for other reasons its reach ought to be restricted still further). Social maladjustment is not a distinct category from emotional disturbance. An amendment to the federal regulations to eliminate the sentence containing the social maladjustment term

---

[319]20 U.S.C.A. § 1401(29).

[320]20 U.S.C.A. § 1401(33) (West 2008). This extends to "aids, services, and supports that are provided in regular education classes or other education-related settings." *Id.*

[321]*See* Hensel, *supra* note 10., at 1180 (discussed *supra* text accompanying notes 175-79); *see also supra* text accompanying note 316 (emphasizing need to serve "all children").

[322]Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099 (9th Cir. 2007).

[323]Alvin Indep. Sch. Dist. v. A.D. , 503 F.3d 378 (5th Cir. 2007).

[324]Mr. I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1 (1st Cir. 2007).

[325]*See generally supra* text accompanying notes 47-48 (discussing state special education funding).

[326]Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

© 2008. Unpublished Manuscript—All Rights Reserved.

would be welcome,[327] but if that does not happen, the courts should look to the definition of emotional disturbance itself and not treat social maladjustment as an exclusion to that definition.

B. *Learning Disabilities and Response to Intervention*

What about RTI? RTI is too promising an innovation to squelch, but the problems of implementing it on a grand scale are too overwhelming to permit an unqualified endorsement. It should be rolled out as a method to handle suspected difficulties in reading mechanics for children in the early grades. It should be extended to other suspected disabilities and to older children only as the research base justifies. If parents of a high-achieving child demand the child's evaluation, discrepancy methods should be used. Precisely when notice and other procedural rights kick in may be unclear under present law, but as a matter of policy it would make sense to afford full-fledged IDEA notice to parents of all children selected for specialized intervention under an RTI program. It would also be desirable, and under a sensible interpretation of the law it should be required, to make an eligibility determination within the applicable timeline from the beginning of selection for RTI services, unless the parents agree to an extension of time. The lapse of the timeline does not mean that RTI services should stop, but simply that the services should be considered special education if the child meets eligibility standards based on the information gathered to that point and the parents consent to the services. RTI must not become a means to avoid or delay providing IDEA procedural and disciplinary protections. In fact, there is good reason to believe that much parental opposition to RTI would evaporate if school districts were to bind themselves to afford IDEA or IDEA-like disciplinary protections to all children placed in RTI programs. Even the best-case RTI scenario is unlikely to eliminate all need for testing-based approaches to LD, however. More than one means of evaluation must be used for eligibility determinations,[328] and additional means will need to be developed before testing can be abandoned.

C. *Racial Overrepresentation and Related Issues*

The problem of overrepresentation of African-Americans and other ethnic groups in some high-incidence disability categories is vexing. The solution, however, rests not with a redefinition of eligibility or with other mechanisms that would keep children from gaining legal rights to specialized services. Although

---

[327]The Department of Education proposed dropping the term in 1982, but the change never made it into the final regulation. *See* O'Neill, *supra* note 124, at 1202 (citing 47 Fed. Reg. 33836 (Aug. 4, 1982)).

[328]20 U.S.C.A. §§ 1414(b)(2)(A) (West 2008) (requiring school district to "use a variety of assessment tools and strategies"), 1414(b)(2)(B) (forbidding school district to "use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability"); 34 C.F.R. § 300.306(c)(i) (2008) (requiring school district to "[d]raw upon information from a variety of sources, including aptitude and achievement tests") .

© 2008. Unpublished Manuscript—All Rights Reserved.

non-special education services that compensate for educational disadvantage or cultural isolation would be a good thing, they key to the overrepresentation problem is to keep overrepresentation from being a problem. That is, the potential harm from special education identification, chiefly the forced separation of children into non-mainstream, low-expectation programs, needs to be fixed. There are a number of remedies to be undertaken. One is to expand in-class assistance through curricular adaptations and accommodations, whether these are designated special education or something else.[329] Another is to increase the availability of after-school special education services delivered either at home or elsewhere. Courts have edged towards the recognition that specialized programs directed to enabling children to succeed in the mainstream are a less restrictive educational option than placing a child in a self-contained special education class in the public school, and so may be required irrespective of the fact that children might still benefit educationally from fewer services in a self-contained setting. For example, in *L.B. v. Nebo School District*, the Tenth Circuit Court of Appeals ruled that a young child with autism had to be kept in a private mainstream preschool setting chosen by her parents, in which she had an aide to assist her, and at the same time receive thirty-five to forty hours a week of applied behavioral analysis services at home, outside of the school day.[330] The court rejected the school district's proposal for a public preschool environment focusing on special education (with a few nondisabled children also enrolled) and a lower number of hours of applied behavioral analysis services delivered at the school.[331] The court stressed that the extra hours of services at home permitted the child to thrive in preschool, making her the most academically advanced child in her mainstream class.[332] Although the school district argued that the child would receive some educational benefit with the lower amount of services, the court applied the statutory mandate in favor of the least restrictive educational environment, a duty not bounded by the *Rowley* some-benefit standard.[333] If school systems, prodded by courts, can break out of the six- to seven-hour school day and set their sights on boosting the performance of children with disabilities to academic excellence, a special education designation will be a benefit, not a disadvantage.

This imperative suggests another, the need to improve special education services in general. Numerous commentators have suggested that the *Rowley* case was ill-considered[334] or has been rendered obsolete by changes to the special

---

[329]In addition, state funding formulas that create financial incentives to overidentify should be changed. *See supra* text accompanying note 45 (discussing incentives in funding formulas).
[330]379 F.3d 966 (10th Cir. 2004).
[331]*Id*. at 978.
[332]*Id*. at 971.
[333]*See id*. at 977-78.
[334]*See, e.g.,* Katharine T. Bartlett, *The Role of Cost in Decisionmaking for the Handicapped Child*, LAW & CONTEMP. PROBS., Spring, 1985, at 7, 47; Bonnie Poitras Tucker, Board of Education of

© 2008. Unpublished Manuscript—All Rights Reserved.

education law in 1997 that stressed the goals of independence and self-sufficiency.[335] Although courts continue to cite and rely on *Rowley*,[336] they need to recognize that its some-benefit standard does not govern questions such as which services are needed for a child to be educated in the least restrictive environment.[337] They also need to understand that the No Child Left Behind initiative, with its stress on bringing the achievement of all children up to state grade-level standards, will inevitably affect what is considered appropriate education under IDEA. One of the primary purposes of the 2004 IDEA Reauthorization was to harmonize NCLB and IDEA.[338] If the goal is to bring all children up to grade level by 2014,[339] education that fails to do so is hardly an appropriate education for children with disabilities who could make grade level performance with more intense programming.[340] Indeed, it may be argued that

---

the Hendrick Hudson Central School District v. Rowley: *Utter Chaos*, 12 J.L. & EDUC. 235 (1983).

[335]*See, e.g.,* Scott F. Johnson, *Reexamining* Rowley*: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. & L.J. 561, 574-75; Tara L. Eyer, Commentary, *Greater Expectations: How the 1997 IDEA Amendments Raise the Floor of Opportunity for Children with Disabilities*, 26 EDUC. L. REP. 1, 4-6 (1998).

[336]*See* Julie F. Mead & Mark A. Paige, Board of Education of Hendrick Hudson v. Rowley: *An Examination of Its Precedential Impact*, 37 J.L. & EDUC. 329, 329 (2008) (collecting cases) ("*Rowley* stands firm as the primary precedent whenever the educational rights of children with disabilities are considered.").

[337]*See* Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL'Y 147 (2001).

[338]*See* 20 U.S.C.A. § 1400(c)(5)(C) (West 2008); Weber, *supra* note 23, at 16-21. One new IDEA requirement, drawn from NCLB, is that a child's statement of educational services and aids be based on peer-reviewed research to the extent practicable. 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4) (2008). This measure is designed to force school districts to use educational methodology that is proven to succeed, and should affect the standard for appropriate education. *See* Jean B. Crockett & Mitchell L. Yell, *Without Data All We Have Are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education*, 37 J.L. & EDUC. 381, 388 (2008) ("The inclusion of this terminology may prove to be significant to future courts when interpreting the [free, appropriate public education] mandate because the law directs IEP teams, when developing a student's IEP, to base the special education services to be provided on reliable evidence that the program or service works.").

[339]*See* 20 U.S.C.A. § 6311(a)(2)(F) (West 2008).

[340]*See* Philip T.K. Daniel, *"Some Benefit" or "Maximum Benefit": Does the No Child Left Behind Act Render Greater Educational Entitlement to Students with Disabilities*, 37 J.L. & EDUC. 347, 354 (2008) ("NCLB makes it clear that, under federal law, students with disabilities are entitled to and expected to meet the same high academic standards as non-disabled children. The standards movement assumes that all students can achieve high levels of learning if they receive high expectations, clearly defined standards, and effective teaching to support achievement. These high expectations in state education standards, however, are at odds with the core holding in *Rowley* that school districts only need to meet the minimalist 'some educational benefit' standard. The shift from process to outcome, which is at the heart of the standards-based movement, also contradicts the *Rowley* finding that the purpose of the IDEA is to provide access to education. The movement's emphasis on content and proficiency focuses on what students actually learn . . . ."); *see also* Dixie Snow Huefner, *Updating the FAPE Standard Under* Rowley, 37 J.L. & EDUC. 367, 378 (2008) ("Under IDEA '04 the purpose of IDEA is no longer merely to provide 'a basic floor of opportunity.' The expectation of academic and functional progress calls for more than a floor.").

© 2008. Unpublished Manuscript—All Rights Reserved.

anything less fails to comply with the federal definition of appropriate education as that which "meet[s] the standards of the State educational agency."[341] NCLB's requirement that adequate yearly progress goals be met by subgroups that include both minorities and students with disabilities[342] may be the prime motivator for schools to increase the intensity of services given to both African-American children and children with disabilities. For this reason, whatever one's general opinion may be regarding standardized testing,[343] the subgroup focus of NCLB needs to be maintained.[344]

Will the stigma of disability remain, particularly the stigma associated with learning disability or emotional disturbance? Perhaps. Attitudes of the majority with regard to race or disability, and, particularly, race and disability, do not change easily. For the present and for the foreseeable future, schools will need to take aggressive steps to educate children without disabilities that harassment is wrong and will be met with stern disciplinary action.[345] Courts must be ready to provide remedies when schools fail to do what they should.

CONCLUSION

At the present time, there does not appear to be an adequate justification for eliminating eligibility requirements altogether.[346] Other programs may prove successful with children whose problems do not stem from disability. Moreover, federal dollars for the education of children with disabilities should fund

---

But see Mr. C. v. Me. Sch. Admin. Dist. No. 6, 538 F. Supp. 2d 298, 300-01 (D. Me. 2008) (rejecting argument that amendments to IDEA in 2004 altered appropriate education standard).

[341]*See* 20 U.S.C.A. § 1401(9)(B). Children with severe cognitive disabilities will not be able to meet grade-level standards, particularly in the upper grades, but NCLB allows for this fact by allowing a small percentage of children to count towards the total of children meeting proficiency standards based on alternate educational assessments. 34 C.F.R. § 200.13(c)(ii) (2008). *See generally* Michelle Croft, Note, *Modified Assessments and No Child Left Behind: Beneficial to Students with Disabilities But Potential Problems in Implementation*, 11 J. GENDER RACE & JUST. 513 (2008) (discussing alternate educational assessments).

[342]20 U.S.C.A. § 6311(a)(2)(C)(v)(II).

[343]*See* Weber, *supra* note 23, at 19-21 (noting criticisms of NCLB testing regimen, particularly regarding children with disabilities).

[344]NCLB requires that certain subgroups of children, including children with disabilities, show adequate yearly progress in meeting proficiency standards, just as the progress must be shown by the group of children in the school as a whole and the children in each school. 20 U.S.C.A. § 6311(a)(2)(C)(v)(II)(cc).

[345]*See* Weber, *supra* note 300, at 1155 & n.382 (listing voluntary action that school districts should take to combat harassment of students with disabilities); *see also* Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be "A Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1 (2005) (discussing legal remedies for bullying of children with disabilities) .

[346]Some have suggested that the entitlements to an appropriate education should apply to all children. *See, e.g.,* Terry Jean Seligmann, *supra* note 183, at 761 ("A focus on the individual child's needs, parental involvement, enforceable rights, and a range of services should be part of every school child's life, not only those designated as special.").

© 2008. Unpublished Manuscript—All Rights Reserved.

education of children with disabilities, not be directed to other social priorities. Nevertheless, the move towards broader disabilities categories is to be applauded, and there is much to be said for the extension of a legal entitlement to appropriate services for children without disabilities who are the public school system's "instructional casualties." The latter development will need to await a political movement comparable to the one that led to the special education entitlement embodied in the 1975 Education for All Handicapped Children Act.

There are measures, however, that should be taken to reform special education eligibility and clean up the eligibility mess that the courts and others have created. The steps to do so are largely straightforward and do not require legislative intervention. They simply require courts and schools to follow the letter and spirit of the special education law.

© 2008. Unpublished Manuscript—All Rights Reserved.