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The Learning Disability Mess

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This essay explores the problems that have plagued society since 1975 when Congress first tried to define what is a “learning disability.” The statement that “No one really knows what a learning disability is” rings as true today as in 1975. Rather than solve this problem with an improved classification scheme, Professor Colker recommends that schools, testing entities and the federal government should place less weight on which students are classified as “learning disabled.” Plodders University should become the norm, where students are admitted based, in part, on their scores on exams taken under extended time conditions.

When Congress adopted the Education for All Handicapped Children Act ("EAHCA") in 1975, and mandated the education of all children with disabilities, a key supporter of the bill noted that “No one really knows what a learning disability is.” Because of this lack of understanding of the term “learning disability,” Congress used a provisional definition of the term and instructed the Commissioner of Education to further study the term and devise a more refined definition as well as a diagnosis. Thirty-five years later, that definition remains in federal special
education law under the Individuals with Disabilities Education Act ("IDEA")\(^5\) – the modern version of the EAHCA.\(^6\)

In order for a child to receive special education and related services under the IDEA, the child must qualify as a child with a “disability.”\(^7\) The IDEA lists ten impairments that qualify as a disability,\(^8\) including “specific learning disabilities.”\(^9\) Although Congress expressed concern in 1975 that the inclusion of “specific learning disabilities” would overwhelm special education resources, and placed a temporary cap on that category to avoid this possibility, Congress’ initial concerns have born fruit. The category of “specific learning disability”\(^10\) has become the most common disability classification for children under the IDEA. As of August 3, 2009, such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage”) with 20 U.S.C. § 1401 (30) (current definition) (“(A) In general. The term “specific learning disability” means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. (B) Disorders included. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (C) Disorders not included. Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.”)

\(^6\) In 1990, Congress amended the EAHCA by renaming it the Individuals with Disabilities Education Act to align its terminology with the Americans with Disabilities Act. See Public L. No. 101-476.
\(^7\) See generally 20 U.S.C. § 1400(d)(purposes of IDEA).
\(^8\) 20 U.S.C. § 1401 (3) (“The term ‘child with a disability’ means a child – (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”)
\(^9\) Id.
\(^10\) The term “specific learning disability” is the technical term used in the special education statutes but the term “learning disability” is also often found in the literature. This essay uses both terms interchangeably.
nearly six million children were classified as disabled under that statute; about 2.5 million (42.8 %) were considered to have a “specific learning disability,” more than twice the figure for the next most common disability – speech or language impairments.\textsuperscript{11}

Although Congress has retained the 1975 definition of specific learning disability, it enacted guidelines for diagnosing the impairment with the 2004 Amendments to the IDEA.\textsuperscript{12} That Amendment, however, only added to the confusion in the field. Rather than take a clear position on how states should diagnose a learning disability, Congress gave them the choice of using a “response to intervention model”\textsuperscript{13} or a “discrepancy model”\textsuperscript{14} while also disfavoring the discrepancy approach.\textsuperscript{15} The states have complied with the 2004 Amendments with

\textsuperscript{11} See United States Department of Education, Office of Special Education Programs, Data Analysis System (DANS) (data updated as of August 3, 2009), available at https://www.ideadata.org/arctoc10.asp#partbCC (last viewed on September 30, 2010) (reporting that 2,525,898 children (42.8 %) were classified as having “specific learning disabilities” of the 5,889,849 children receiving special education services; the next most common category was speech or language impairments with 1,121,961 being in that category).

\textsuperscript{12} Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

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

\textsuperscript{14} See 34 C.F.R. § 300.309(a)(2)(ii) (“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 by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305 ...”).

\textsuperscript{15} See 20 U.S.C. § 1414(6)(A)(“Notwithstanding section 607(b), when determining whether a child has a specific learning disability as defined in section 602, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy
a wide range of approaches for diagnosing a learning disability with the highly disparate result that 15.4 % of disabled children meet that definition in Kentucky and 60.2 % in Iowa.\textsuperscript{16} Unfortunately, neither the 2004 Amendments nor states’ attempts at implementation bear much relationship to the understanding of learning disabilities within the field of educational psychology. Instead, they reflect an attempt to align the IDEA with No Child Left Behind\textsuperscript{17} so that children who fall behind grade level can get extra assistance.\textsuperscript{18} Although extra help is a good idea, it need not come at the cost of a learning disability label.

Meanwhile, the field of educational psychology has floundered to develop a coherent definition of learning disabilities. The American Psychiatric Association (“APA”) endorsed the discrepancy approach for diagnosing learning disabilities in the Fourth Edition of its Diagnostic and Statistic Manual of Mental Disorders in 2000 but has proposed new learning disability guidelines in the Fifth Edition\textsuperscript{19} that would align its professional standards with the 2004 Amendments to the IDEA.

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\textsuperscript{16} See U.S. Dept. of Education Data, supra note 11.

\textsuperscript{17} No Child Left Behind is an acronym for the Elementary and Secondary Education Act of 1975, as amended by Pub. L. No. 107-110 (requiring every child to be proficient in reading and math by 2014).


Educational psychologists have criticized the APA for caving to Congress rather than following professional norms in their field.\textsuperscript{20}

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

In Part I of this essay, I will review the legal and psychological literature on what is a learning disability and how such a disability should be diagnosed. Disagreement continues to exist on whether there must be evidence of a psychological or neurological impairment, and whether the discrepancy model should be part of the diagnostic model. In Part II, I will survey the wide range of definitions of learning disability used by the various states despite the fact that the IDEA is a national statute. In Part III, I will discuss the implications of the learning disability classification for college admissions testing. The national testing organizations continue to use the "discrepancy model" for determining whether students are learning disabled even though Congress has disapproved that model under the IDEA. The Department of Justice insists that these national testing organizations should presumptively follow the definitions used by the states under

\textsuperscript{20} See infra text accompanying notes 62-64.

\textsuperscript{21}See 28 C.F.R. § 36.309(b)(v). For text of regulation, see infra text accompanying note 100.
the IDEA without any sense of the wide variance in those definitions and their departure from accepted norms within the field of educational psychology. In Part IV, I will suggest that we should solve the learning disability mess by giving less weight to the importance of the classification.

I. Learning Disabilities

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

Samuel Alexander Kirk suggested the first definition of learning disability in 1962:22

A learning disability refers to a retardation, disorder, or delayed development in one or more of the processes of speech, language, reading, writing, arithmetic, or other school subjects resulting from a psychological handicap caused by a possible cerebral dysfunction and/or emotional or behavioral disturbances. It is not the result of mental retardation, sensory deprivation, or cultural and instructional factors.23

This 1962 definition has many features that are part of the various ways this term is used even today.24 This definition seeks to distinguish between academic

23 Id. at 263.
24 The IDEA refers to a “disorder in one or more of the basic psychological processes.” 20 U.S.C. § 1401(30)(A). It also contains an exclusionary clause – the term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of
deficits that are a result of a psychological handicap rather than mental retardation or a lack of instruction. The 1962 definition describes the symptoms of the condition but does not suggest how to diagnose its existence.

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

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

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

mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” 20 U.S.C. § 1401(30)(B).

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

In 1968, the National Advisory Committee on Handicapped Children (NACHC), under Kirk’s leadership, offered a definition of learning disability quite similar to Kirk’s 1962 definition. The key difference was the addition of the word “specific” to the term so that it became “specific learning disability.” The purpose of the addition of the adjective “specific” was to emphasize “the learning failure was not a generalized problem like [mental retardation] but rather one predicated on the possession of only a discrete number of deficits.” The NACHC definition also provided a list of conditions that could cause this disorder: “perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, developmental aphasia, etc.” It provided these examples instead of referring to “central nervous system dysfunction.” As Kenneth Kavale, a critic of this approach, has observed: “[I]n other

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26 National Advisory Committee on Handicapped Children (NACHC), Special Education for Handicapped Children 34 (1968) (first annual report).
28 NACHC, supra note 26, at 34.
words, the simile becomes the metaphor."\textsuperscript{29} The issue that existed in 1968, and remains today, is whether learning disability is a general term to describe many specific conditions or has a precise etiology that includes the existence of a neurological impairment.

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

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

The term “children with specific learning disabilities” means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.\textsuperscript{30}

\textsuperscript{29} Kenneth A. Kavale et al., A Time to Define: Making the Specific Learning Disability Definition Prescribe Specific Learning Disability, 32 LEARNING DISABILITY Q. 39, 41 (2009).
\textsuperscript{30} Pub. L. No. 94-142.
The 1975 definition included a requirement of a “disorder in one or more of the basic psychological processes.” It is not clear whether that term means the same thing as a “central nervous system dysfunction.” Like the NACHC definition, it listed qualifying disorders as well as excluded conditions. It did not indicate how one would diagnose the existence of a specific learning disability.

When Congress adopted the NACHC definition in 1975, there was concern that too many children would receive the “learning disability” classification deterring from the resources devoted to other disabilities covered by the EAHCA. To address this problem, the bill’s supporters agreed to “require the Commissioner of Education to spell out in detail exactly what may and what may not be considered SLD [specific learning disability … [and] the diagnostic procedures that will be used in determining whether a particular child has a disorder or condition which places that child in the category of children with specific learning disabilities.”31 They also agreed to a temporary cap so that the learning disability numbers in a state could not be more than one-sixth of all the children classified as disabled within a state.32 Congressman Lehman spoke in favor of this approach, saying “No one really knows what a learning disability is. That is the purpose of the amendment, to bring a kind of focus to this problem … We are going to have to find what it is that is causing neurological impairment and learn the definition and diagnosis of this dysfunction.”33 Congress was correct to be concerned that requests for assistance by children labeled learning disabled would swamp the special education system.

32 Id.
33 Id. (Cong. Bill Lehman)
Today, nearly half of all children served under the special education statutes receive the learning disability classification.\(^34\)

Following the passage of the EAHCA, professional organizations continued to discuss how to best define that term both from a definition and diagnosis perspective. The emerging view, as reflected by an institute funded by the United States Office of Education, endorsed the need to use the discrepancy model to diagnose the existence of a learning disability.\(^35\) This view posited that "significant deficits are defined in terms of accepted diagnostic procedures in education and psychology."\(^36\) But it did not define how large the deficit would have to be in order to constitute a "significant" deficit. It also added that a learning disability is not the result of "a lack of opportunity to learn"\(^37\) which was part of the tendency to exclude other explanations for the academic deficit as part of the learning disability definition.

The American Psychiatric Association ("APA") began to recognize specific learning disabilities in its Diagnostic and Statistical Manual of Mental Disorders in its Third Edition, published in 1980.\(^38\) It termed them "specific developmental disorders" and recognized that the "inclusion of these disorders in a classification of ‘mental disorders’ is controversial" but concluded that they should nonetheless be

\(^{34}\) See supra note 11.


\(^{36}\) *Id.*

\(^{37}\) *Id.*

included because they are a type of mental disorder. The Third Edition used a discrepancy model to define the existence of this disorder. For example, it provided the following description of the diagnostic criteria for a "developmental reading disorder": "Performance on standardized, individually administered tests of reading skill is significantly below the expected level, given the individual's schooling, chronological age, and mental age (as determined by an individually administered IQ test). In addition, the child's performance on tasks requiring reading skills is significantly below his or her intellectual capability." It did not define how much discrepancy is necessary for it to be "significant" but approved the discrepancy model.

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

A. Reading achievement as measured by standardized, individually administered test, is markedly below the expected level, given the person's schooling and intellectual capacity (as determined by an individually administered IQ test).

B. The disturbance in A significantly interferes with academic achievement or activities of daily living requiring reading skills.

C. Not due to a defect in visual or hearing acuity or a neurologic disorder.

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

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39 Id. at 92.
40 Id. at 94.
“neurologic disorder” which seems contrary to other views that described a learning
disability as the result of a “central nervous system dysfunction.”

Meanwhile, professional organizations began to emerge in the field. The National Joint Committee on Learning Disabilities tried to take the lead in reconciling the views of these various organizations.\textsuperscript{42} After developing various approaches, the NJCLD endorsed the following definition in 1990:

Learning disabilities is a general term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual, presumed to be due to central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behavior, social perception, and social interactions may exist with learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (for example, sensory impairment, mental retardation, serious emotional disturbance) or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.\textsuperscript{43}

This definition took the position that a learning disability was “presumed to be due to central nervous system dysfunction.” NJCLD’s current web page continues to take that position. In its section labeled “what is a learning disability,” it says in the opening sentence that a “learning disability is a neurological disorder.”\textsuperscript{44} Its definition also deleted reference to the word “specific” that had been added by the NACHC definition in 1968 and incorporated into the federal definition. It took the

\textsuperscript{42} The National Joint Committee on Learning Disabilities (NJCLD) was founded in 1975. For further information, see http://www.ldonline.org/about/partners/njcld (last viewed October 6, 2010).
\textsuperscript{43} NATIONAL JOINT COMMITTEE ON LEARNING DISABILITIES, LEARNING DISABILITIES: ISSUES ON DEFINITION – REVISED IN COLLECTIVE PERSPECTIVES ON ISSUES AFFECTING LEARNING DISABILITIES 61-66 (1994).
\textsuperscript{44} See http://www.ldonline.org/ldbasics/whatisld (last viewed October 6, 2010).
position that a learning disability was a lifelong condition based on central nervous system dysfunction but it took no position on whether the discrepancy model was the best way to diagnose the existence of this condition. Its view was contrary to that of the APA in not insisting that the deficit be a narrow deficit and in not ruling out neurological explanations for the deficit.

The APA published the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders in 1990. It continued to endorse the discrepancy model for diagnosing a learning disability (now termed a "learning disorder") and defined with more precision how much of a discrepancy was necessary to be a "significant" discrepancy:

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

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

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46 Id. at 49.
The next big development in the definition of learning disability came as a result of action by Congress due to complaints about the discrepancy model. The state of Connecticut explains this development in its recent guidelines for identifying students with learning disabilities:

Another critical problem with the IQ-achievement discrepancy is that research does not support excluding students from services based on their failure to meet IQ-achievement discrepancy criteria. Struggling readers with an IQ-achievement discrepancy and those without a discrepancy tend to have similar remedial needs and benefit from similar types of interventions (Gunderson and Siegel, 2001), yet nondiscrepant low achievers may be erroneously viewed as intellectually limited and incapable of improvement. The IQ-achievement discrepancy also appears to contribute to biased identification practices. For example, several studies have found that the use of a discrepancy model in reading favored identification of Caucasian students and middle- and upper-income students; whereas students of color and students from lower socioeconomic backgrounds were more likely to be identified as having an intellectual disability (Fletcher et al., 2007; Speece, Case, and Molloy, 2003). Since students from nonmainstream cultural groups often possess cognitive styles that differ from those typically promoted by the schools, the inappropriate use of standardized tests that are not normed or validated for a specific population often perpetuates cultural misunderstandings, which in turn contributes to poor instructional decision-making (McIntyre, 1996). Aaron, Joshi, Gooden and Bentum (2008) and Vaughn, Levy, Coleman, and Bos (2002) argued that testing for an IQ-achievement discrepancy often does not provide instructionally useful information and may contribute to inadequate remedial efforts.47

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

47 CONNECTICUT 2010 GUIDELINES, supra note 18, at 2.
In response to complaints about exclusive reliance on the discrepancy model, Congress amended the IDEA in 2004 to indicate that states could no longer require the use of the discrepancy model in identifying learning disabilities but, instead, must develop another approach, called the “response to intervention” (RTI) approach.

The new language reads:

(6) Specific learning disabilities.
   (A) In general.
   Notwithstanding section 607(b), when determining whether a child has a specific learning disability as defined in section 602, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.
   (B) Additional authority.
   In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3). 48

Despite creating those new rules for diagnosing a learning disability, Congress retained the longstanding definition of “specific learning disability” earlier in the statute. 49 In other words, Congress created new rules to diagnose a learning disability but did not modify the underlying definition of what is a learning disability. As in 1975, a specific learning disability “means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to

listen, think, speak, read, write, spell, or do mathematical calculations."\textsuperscript{50} Congress maintained the longstanding requirement that there is a disorder in "one or more of the basic psychological processes."

Under the response to intervention model endorsed by the 2004 Amendments, a school district would not have to administer an IQ test as part of the identification process under the rationale that students experiencing difficulty reading who do not have IQ-achievement discrepancies often benefit from similar interventions as do those with IQ-achievement discrepancies.\textsuperscript{51} Hence, the focus of the RTI model is whether children have fallen behind grade-level expectations and are unlikely to meet those expectations without individualized intervention. The RTI model is premised on the conclusion that many children who are not meeting grade level expectations respond well to individualized intervention even if they do not have a high IQ.

Congress endorsed the RTI model in 2004 because it considered that model to better than the discrepancy model. In addition to concerns that the discrepancy model favored middle-class children with high IQ scores, the federal government concluded that the discrepancy model reflects a "wait to fail" model under which children do not receive services "until the student’s achievement is sufficiently low so that the discrepancy is achieved."\textsuperscript{52} The federal government believed that a move to a response to intervention model would save districts money because the discrepancy model "consumes significant resources, with the average cost of an

\begin{footnotesize}
\textsuperscript{50} Id.
\textsuperscript{51} CONNECTICUT 2010 GUIDELINES, supra note 18, at 2.
\textsuperscript{52} 70 Fed. Reg. 35802 (June 21, 2005).
\end{footnotesize}
eligibility evaluation running several thousand dollars.”\textsuperscript{53} The response to intervention model is also a way to align the IDEA with No Child Left Behind (NCLB),\textsuperscript{54} by identifying children who have fallen below grade level expectations and need help beyond what is available in the regular classroom so that they can meet the NCLB requirement of being proficient in reading and math by 2014.\textsuperscript{55} In fact, the IDEA cross-references the NCLB when it mentions the RTI model.\textsuperscript{56}

Nonetheless, educational psychologists did not develop the RTI model as a tool to identify the existence of neuropsychological factors that may explain a child’s academic deficits.\textsuperscript{57} Further, this diagnostic model is not consistent with the IDEA’s requirement that a learning disability be the result of a “psychological impairment.”\textsuperscript{58} As we will see, states have responded to this approach inconsistently with some, but not all, requiring independent evidence of a neurological impairment for students diagnosed under the RTI approach.\textsuperscript{59} States

\textsuperscript{53} Id.

\textsuperscript{54} No Child Left Behind Act is an acronym for the Elementary and Secondary Education Act of 1975, as amended by Public Law 107-110 (requiring every child to be proficient in reading and math by 2014). As the state of North Dakota explains in its specific learning disabilities guidelines: “Guidelines for developing an intervention that may be considered to be ‘scientific, research based’ can be found in the No Child Left Behind (NCLB) Act, which uses scientifically based research as one of its educational cornerstones. The term itself is defined at 20 U.S.C. § 7801(37), and repeated in the 2006 IDEA regulations at 34 C.F.R. § 300.35 to mean research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs.” North Dakota Department of Public Instruction, Guidelines, Identification and Evaluation of Students with Specific Learning Disabilities 4 (May 2007)

\textsuperscript{55} See, e.g., CONNECTICUT 2010 GUIDELINES, supra note 18, at 7 (recognizing the relationship between No Child Left Behind and the 2004 Amendments to IDEA).

\textsuperscript{56} See 34 C.F.R. § 300.35 (“Scientifically based research has the meaning given the term in section 9101(37) of the ESEA.”)

\textsuperscript{57} See REYNOLDS FLETCHER-JANZEN, NEUROPSYCHOLOGICAL PERSPECTIVES ON LEARNING DISABILITIES IN THE ERA OF RTI: RECOMMENDATIONS FOR DIAGNOSIS AND INTERVENTION (2008).

\textsuperscript{58} See 20 U.S.C. § 1401(30)(A).

\textsuperscript{59} See infra Part II.
are uncertain whether Congress still requires them to demonstrate evidence of an *impairment* before classifying a child as learning disabled.

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

A. A group of disorders characterized by difficulties in learning basic academic skills (currently or by history), that are not consistent with the person’s chronological age, educational opportunities, or intellectual abilities. Basic academic skills refer to accurate and fluent reading, writing, and arithmetic. Multiple sources of information are to be used to assess learning, one of which must be an individually administered, culturally appropriate, and psychometrically sound standardized measure of academic achievement.

B. The disturbance in criterion A, without accommodations, significantly interferes with academic achievement or activities of daily living that require these academic skills.60

This language reflects, in part, an attempt to be consistent with the 2004 Amendments to the IDEA. In the rationale section, the authors of these proposed rules stated: “However, the diagnostic criteria do not depend upon comparisons with overall IQ and are consistent with the change in the USA’s reauthorized IDEA regulations (2004) which state that ‘the criteria adopted by the State must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in 34

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60See http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=429 (last viewed on September 9, 2010).
C.F.R. 300.8(c)(10).” The proposed DSM-V emphasizes the importance of standardized achievement tests but moves away from overreliance on “overall IQ” tests. This approach, if adopted, would not necessarily result in the cost-savings mentioned in the language accompanying the IDEA regulations because the battery of achievement tests would need to be “psychometrically sound.” It reflects an approach that allows more flexibility for school districts to assess intelligence as part of the model for diagnosing a learning disability. And the term “discrepancy” has been replaced with the term “are not consistent with.” The prior rules asked whether academic achievement is “substantially below” what is expected for age, schooling and level of intelligence. The proposed rules ask whether academic achievement is “consistent with” what is expected for someone’s age, educational opportunities and intellectual abilities. That semantic change does not appear to reflect a major change in philosophy although it reportedly helps make the DSM similar to the IDEA.

Unlike the DSM-IV, the proposed DSM-V does not specify what it means to be “consistent with.” The DSM-IV suggested that a 2 standard deviation discrepancy always meets the “substantially below” criteria but that one to two standard deviations can be sufficient if there is reason to think that the IQ test understates a person’s intellectual ability. Because “is consistent with” is not defined, these standards reduce rather than add to clarity.

School psychologists have been critical of the proposed DSM-V as well as the RTI-only move by the 2004 amendments to the IDEA. In 2004, the American
Academy of School Psychology took the position that an RTI-only approach is not professionally appropriate because it is important to have a “comprehensive evaluation” that includes “multiple sources of information, including standardized, norm-referenced tests; interviews; observations; curriculum-based assessments; and informed clinical judgment. A student’s response to scientific, research-based interventions can be a part of a comprehensive evaluation, but a response-to-intervention process should not be viewed as a sole criterion for diagnosing LD.”

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

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

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

Kavale and Flanagan agree with the critique of the discrepancy model as being “unreliable and invalid” and leading to “overidentification” but they also

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believe that although an RTI approach can "serve to create a pool of at-risk students who may or may not have SLD" that is proceeds from the “unwarranted presupposition that nonresponsiveness equates to SLD status.”\textsuperscript{64} They reintroduce the concept that has existed under the IDEA since 1975 that there must be an identifiable processing deficit. The move to an RTI-only approach allows all underachievers to be classified as SLD without requiring that the reasons underlying the underachievement of each child be diagnosed.

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

II. IDEA Implementation by the States

Because of the discretion provided to the states by the 2004 Amendments, there are dozens of approaches in existence. Some states have a rigid discrepancy

\textsuperscript{64} Id. at 143.
approach whereas others have banned the discrepancy approach. Within the response to intervention approach, there is also enormous variation with some states requiring evidence of a neurological impairment, some states requiring evidence of a discrepancy between aptitude and achievement, and some states merely requiring substandard academic achievement.

Under the discrepancy model, seven states specify that there must be at least a 1.5 standard deviation variation between achievement and aptitude: California, Missouri, Mississippi, South Dakota, Tennessee, Vermont, and Wyoming. New Mexico uses the 1.5 standard deviation rule for children in grades 7 – 12. The state of Washington uses a 1.55 standard deviation discrepancy test.

65 5 CCR §3030(j), available at http://www3.scoe.net/speced/laws_search/searchDetailsLaws.cfm?id=744&keywords=3030 (last viewed on September 21, 2010).
67 Mississippi State Policies Regarding Children with Disabilities Under the Individuals with Disabilities Education Act Amendments of 2004, State Board Policy 7210 (effective July 20, 2009), at 303 (“NOTE: Severe discrepancy is defined as 1.5 standard deviations below the mean of the standardized test measuring intellectual ability.”), downloaded from http://www.mde.k12.ms.us/special_education/policies.html (last viewed on Oct. 28, 2010).
71 WY ADC EDU GEN Ch. 7 § 4(d)(x).
and Wisconsin insist on a 1.75 standard deviation discrepancy. North Carolina requires at least a 15 point discrepancy, which would be only 1 standard deviation. Similarly, Alabama only requires a 1 standard deviation discrepancy. Florida only requires 1 standard deviation discrepancy for students aged 7 to 10 but requires 1.5 standard deviations for students aged 11 and above.

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

In Utah, under the discrepancy model, the team must “produce a report that states that the team can be 93 percent confident there is a severe discrepancy between the student’s expected achievement score and the obtained achievement score, based on the Utah Estimator software” or “produce a report that shows a significant discrepancy, based on a commercial software program that employs a clearly specified regression formula that considers the relationship between the

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74 WI ADC § PI 11.36(6) (Wisconsin); Minn. R. 3525.1341 subp. 2(C) (Minn).
78 MT ADC 10.16.3019B.
intelligence and achievements tests as well as the tests’ reliability.” It is not clear what standard of significance is employed with this approach but it is likely to be a 2 standard deviation, rather than 1.5 standard deviation approach because 2 standard deviations is typically considered statistically significant.

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

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80 5 CCR §3030(j), available at http://www3.scoe.net/speced/laws_search/searchDetailsLaws.cfm?id=744&keywords=3030 (last viewed on September 21, 2010).
82 Mississippi Specific Learning Disability Definition, at 303 (“NOTE: Severe discrepancy is defined as 1.5 standard deviations below the mean of the standardized test measuring intellectual ability.”)
86 WY ADC EDU GEN Ch. 7 § 4(d)(x).
There is even more variation in how states have implemented the RTI approach. Some states, such as Connecticut, Illinois, Iowa, and North Dakota only consider a student’s achievement (and not aptitude) in determining if he or she should be classified as learning disabled. Connecticut focuses on how a student compares to his or her peers both with respect to his or her knowledge and his or her rate of acquisition of knowledge. The student’s aptitude is not a factor to be considered as part of this inquiry. Connecticut has also abandoned the requirement that there be evidence of a specific processing disorder before a diagnosis of a specific learning disability is made.\(^{87}\) Similarly, in Illinois, children with low achievement are to be classified as having a specific learning disability unless “appropriate curriculum choice and the delivery of effective instruction cannot be demonstrated.”\(^{88}\)

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

1. Organize the lowest 20% of students in the group (class, grade level, or school) to receive interventions.
2. Students in group interventions are monitored regularly.
3. Change interventions when 4 consecutive data points do not meet the student’s goal line.
4. Move students to an individual intervention after two unsuccessful group interventions.
5. Students in individual interventions are monitored at least 1 time weekly.
6. Refer a student for special education after one unsuccessful individual intervention.\(^{89}\)

\(^{87}\) See CONNECTICUT 2010 GUIDELINES, supra note 18.


\(^{89}\) Id. at 16.
This approach requires no documentation of a psychological processing disorder. A child who falls behind academically and does not respond well to group-based intervention becomes eligible for special education services.

One of the most permissive states in defining learning disabilities is Iowa. It appears that many school districts in Iowa use the RTI approach to improve instruction for all children, not as a way to limit the number of students classified as learning disabled. For example, one elementary school screens students early in the year using the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) along with other diagnostic tests to pinpoint problems and guide interventions. In the first year of this program, thirty percent of the school’s students began to receive intervention during an intensive data collection exercise. “The principal, reading-support teachers, and classroom teachers meet once a month to discuss the data they are collecting on students. Three times a year, the school has ‘data days’ to take a deeper look at the overall curriculum and student performance based on other tests.”90 Although Iowa has been a national leader in the use of the RTI approach, it does not see that approach as principally about special education identification. “Special education identification ‘is just the toenail on the elephant,’ said Mr. Tilly, the Heartland official. ‘That’s not what it was created for, and that’s not what its best purpose is.’”91 The harder question raised by the Iowa experience is whether it

91 Id.
makes sense to classify the children who are not achieving grade level expectations as “learning disabled” based on the RTI data or whether some other approach makes more sense. One teacher concludes that the Iowa approach allows them to catch “more ‘on the edge kids.”" But does it make sense to “catch” these kids by classifying them as learning disabled if educational psychologists, as we will see, consider that to be a lifelong neurological condition? One Iowa elementary school reported that the RTI process improved their passing rate on the DIBELS benchmark in one year from 48 percent to 81 percent. Such improvement is commendable, if it reflects genuine improvement in reading fluency, but did the school district then classify and unclassify large numbers of students as learning disabled to reach those goals?

In contrast to Iowa’s permissive approach are states that require evidence a child that a child satisfies criteria under both the RTI and discrepancy model. Georgia requires evidence of a “primary deficit in basic psychological processes and secondary underachievement in one or more of the eight areas along with documentation of the lack of response to instructional intervention as supported by on-going progress monitoring.” In other words, Georgia requires evidence of a psychological processing impairment, underachievement (which is presumably a discrepancy model approach) and a lack of response to intervention.

Florida combines the response to intervention model with the severe discrepancy model. In order for a child to be classified as learning disabled, there

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\[^{92} \text{Id.}\]
\[^{93} \text{Id.}\]
\[^{94} \text{Ga. Comp. R. & Regs. r. 160-4-7-05 (3)(i)(Learning Disability Eligibility Determination)}\]
must be “documented evidence which indicates that general education interventions have been attempted and found to be ineffective in meeting the student’s educational needs” as well as evidence of a severe discrepancy between ability and achievement.\textsuperscript{95} Although the response to intervention method was supposed to broaden the category of children eligible for special education by eliminating the “wait to fail” model and removing some of the cultural bias of an IQ-focused approach, Florida and Georgia appear to be using these rules to heighten the eligibility requirements. Nonetheless, Florida does have the nation’s most lenient definition of a “severe discrepancy” – only requiring one standard deviation for children under the age of eleven.\textsuperscript{96} Georgia’s regulations do not specify what it considers sufficient “underachievement” to trigger satisfaction of that part of the state standard.

The state with the most restrictive application of the learning disability standards is Kentucky. Kentucky’s overall disability statistics (2.06 % of school-age population) are consistent with national norms but their rate of learning disability classification is quite low (15.36 %).\textsuperscript{97} Nationally, learning disabilities are the most

\textsuperscript{95} See Fla. Admin. Code Ann. r. §6A-6.03018(2) (criteria for eligibility).
\textsuperscript{96} Id.
\textsuperscript{97} See United States Department of Education Data, supra note 171. Kentucky’s definition of learning disability can be found at 707 K.A.R. 1:002(59). (“Specific learning disability’ or ‘LD’ means a disorder that adversely affects the ability to acquire, comprehend, or apply reading, mathematical, writing, reasoning, listening, or speaking skills to the extent that specially designed instruction is required to benefit from education. The specific learning disability (LD) may include dyslexia, dyscalculia, dysgraphia, developmental aphasia, and perceptual/motor disabilities. The term does not include deficits that are the result of other primary determinant or disabling factors such as vision, hearing, motor impairment, mental disability, emotional-behavioral disability, environmental or economic disadvantaged, cultural factors, limited English proficiency, or lack of relevant research-based instruction in the deficit area.”) That definition is a generic definition that makes no mention of how to diagnose a learning disability so it is impossible to know from the definition, itself, why
common disability classification. In Kentucky, the numbers for learning disability (13,587) are lower than the numbers for mental retardation (16,462), speech or language impairments (20,250) and other health impairments (15,484). Thus, it seems clear that a child who moves from Iowa with its 60.26% learning disability classification rate to Kentucky with its 13.5% learning disability classification rate faces a significant chance of moving out of the learning disability classification system.

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

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98 See United States Department of Education Data, supra note 171. Nationally, the distributions are: Mental retardation: 475,713 (8.0%); Hearing impairments: 70,682 (1.2%); Speech or language impairments: 1,121,496 (19.0%); Visual impairments: 25,790 (0.4%); Emotional disturbance: 417,872 (7.1%); Orthopedic impairments: 62,332 (1.0%); Other health impairments: 648,112 (11.0%); Specific learning disabilities: 2,522,735 (42.8%); Deaf-blindness: 1,735 (0.0%); Multiple disabilities: 123,924 (2.1%); Autism: 292,638 (4.9%); Traumatic brain injury: 24,857 (0.4%); Developmental delay: 96,853 (1.6%). Kentucky’s numbers for mental retardation are quite high as compared with the national average suggesting that it is classifying children as mentally retarded (or “intellectually impaired”) that our states would classify as learning disabled.

99 This data was compiled from Digest of Education Statistics, National Center for Education Statistics and United States Department of Education data. See IDEADATE.org/PartBChildCount.asp (viewed October 1, 2010).
administrators to develop a uniform standard for assessing whether students should qualify for accommodations such as extended time.

III. College Admissions Testing

Under regulations recently promulgated by the Department of Justice ("DOJ"), these state standards become imprinted on a student’s disability status as he or she seeks to enter college. "When considering requests for modifications, accommodations, or auxiliary aids or services, the entity gives considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations, as well as such modifications, accommodations or related aids and services provided in response to an Individualized Education Program (IEP) provided under the Individuals with Disabilities Education Act or a plan describing services provided pursuant to section 504 of the Rehabilitation Act of 1973, as amended (often referred to as a Section 504 Plan.)”100 In other words, the Department of Justice would like testing agencies to give “considerable weight” to the wide range of IDEA definitions being used at the state level.

This regulation was promulgated in response to complaints that some testing agencies, such as LSAC, were requiring too much documentation as part of requests for accommodations such as extra time. The educational psychology literature consistently establishes that children with learning disabilities101 in reading have

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100 28 C.F.R. § 36.309(b)(v).
slower processing speeds than other children. Their research documented that children with learning disabilities score within the expected range for age “on measures of Oral Language, Motor Speed, and Visual Spatial skill, but less well ... on measures of Written Language, consistent with their well-documented phonological processing problems.” These studies reflect that it is difficult for students with learning disabilities to demonstrate their knowledge under speeded circumstances because they may simply not have enough time to demonstrate their understanding. Hence, students with slower processing speeds are often provided extra time as an accommodation for their disability.

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

The LSAC guidelines require students to submit requests for accommodation that fit the “discrepancy” model not the response to intervention model. Students

102 See, e.g., Michael D. Weiler et al., Processing Speed in Children with Attention Deficit/Hyperactivity Disorder, Inattentive Type, 6 CHILD NEUROPSYCHOLOGY 218 (2000).
103 Id. at 227.
104 See, e.g., Jennifer Hartwig Lindstrom, The Role of Extended Time on the SAT for Students with Learning Disabilities and/or Attention-Deficit/Hyperactivity Disorder, 22 LEARNING DISABILITIES RESEARCH & PRACTICE 85 (2007) (concluding that SAT results can be interpreted in the same way when students with disabilities have an extended-time administration as compared to the standard-time administration); Nicole Ofiesh et al., Using Speeded Cognitive, Reading, and Academic Measures to Determine the Need for Extended Test Time Among University Students with Learning Disabilities, 23 J. OF PSYCHOEDUCATIONAL ASSESSMENT 35 (2005) (acknowledging the widespread use of extra time on exams and suggesting which tests are appropriate for determining allocation of extra time).
must submit test scores from someone who works with adult populations and their
test scores must include an aptitude and achievement battery. These scores must
include “a timed reading comprehension measure, which has been normed on adults
and which allows for both extended and regular administration.”¹⁰⁵ In the summary
score sheet at the end of their instructions, they state that the testing professional
must “identify an information-processing deficit; and identify an aptitude-
achievement discrepancy that meets the appropriate diagnostic criteria.”¹⁰⁶ In
other words, the results must meet the discrepancy definition of learning disability
and not rely on the kind of evidence that may have caused the student to be
diagnosed as learning disabled in K-12 because all testing must be done under adult
norms.

The College Board makes no mention of RTI as a way to demonstrate the
existence of a learning disability.¹⁰⁷ It also fails to reference a child’s classification
under the IDEA as relevant to its disability determination.¹⁰⁸ Its emphasis on scaled
achievement and aptitude test scores suggests exclusive use of the discrepancy
model. Similarly, the ACT uses the discrepancy model in its explanation of the
documentation needed to get extra time on the ACT; it makes no reference to an
IDEA diagnosis as being relevant to accommodations under the ACT.¹⁰⁹

The guidelines by each of these three testing agencies is troubling in light of
the criticism of the discrepancy-only model as being biased in favor of middle-class

¹⁰⁶ Id.
¹⁰⁷ See http://professionals.collegeboard.com/testing/ssd/application/disabilities/learning
¹⁰⁸ Id.
students with high IQ's and its lack of support in the field of educational psychology. Further, it is no longer consistent with federal regulations. Possibly, these entities will modify their practices to comply with the new DOJ regulations. In the meantime, their practices are part of the learning disability mess in that they are adhering to outdated guidelines and failing to follow federal regulations.

A further difficulty faced by the administrators of these entrance examinations is how to report the scores of students who take the exams under conditions of extra time. The difficulty is that it is impossible to know how much extra time is appropriate as an accommodation if an exam has a speeded element because all students benefit from extra time on a speeded exam.110 Ideally, a student with a learning disability would be given exactly enough extra time to make exam conditions feel identical to those of nondisabled students who take the exam under normal conditions. The LSAC takes the position that it cannot provide accommodations with such precision even though it requires extensive documentation of learning disabilities. Hence, the LSAC refuses to give students who take the exam under extra time conditions an “index score” or percentile score to compare them to other candidates. They merely get a raw score.111

The LSAC guidelines state:

Candidates who seek additional test time on scored sections of the test should pay particular attention to the following:
• If you receive additional test time as an accommodation for your condition, LSAC will send a statement with

your Credential Assembly Service (CAS) or LSAT Law School Reports advising that your score(s) should be interpreted with great sensitivity and flexibility.

- Scores earned with additional test time are reported individually and will not be averaged with standard-time scores or other nonstandard-time scores.
- Percentile ranks of nonstandard-time scores are not available and will not be reported.\textsuperscript{112}

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

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

IV. Conclusion

As the previous discussion reflects, we have made little progress since a member of Congress declared in 1975 that “No one really knows what a learning disability is.” Rather than define the term with precision, Congress has puntet the

\textsuperscript{112} See http://lsac.org/JD/LSAT/accommodated-testing.asp.
problem to the states and given them the option of choosing between two methods of diagnosing a learning disability. The states have responded with a wide range of approaches, most of which have little in common with the emerging professional guidelines in the field of educational psychology. And then – to add to this mess – the United States Department of Justice is now insisting that high stakes testing agencies give considerable weight to the learning disability determinations made by the fifty states as they flounder to implement the IDEA. And even when allowed to impose its own stringent definition of learning disability, the Law School Admissions Council cannot figure out how to allocate exactly the right amount of extra time to a student with a learning disability.

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

The way out of the learning disability is not to develop better diagnostic instruments for evaluating the existence of learning disabilities. The way out of this mess is to ask why we have such an overemphasis on whether students meet a definition of “learning disability.” Iowa’s approach to K-12 education seems like a
sound approach that has produced some solid improvement in basic reading skills. All children in the country should have access to those kinds of reading resources but those children should not have to be classified as “learning disabled” to get those resources. And, at the college entrance exam stage, we should alter the norms for test taking. All students should be allowed to take exams under conditions that we now define as “extra time.” Rather than make the individual student justify why he or she should get extra time, test designers should have to justify why tests must be given under timed conditions. Maybe a test for emergency responders would meet such a necessity standard. But it is hard to see why it matters if a student takes 45 minutes rather than 30 minutes to read a passage with good comprehension as a measure of whether he or she should be admitted to a top college.

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

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

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113 Mark Kelman & Gillian Lester, Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities (1997).