

## CASE LAW UPDATE

# The Legal Meaning of Specific Learning Disability for Special Education Eligibility

Perry A. Zirkel

Students with specific learning disability (SLD) continue to account for a higher proportion of all special education enrollments than any other classification under the Individuals with Disabilities Education Act (IDEA). According to the latest reported data, in fall 2007 students with SLD amounted to 43.3% of all students with disabilities ages 6 to 21 under IDEA, down from the 50% average for the previous decade (Rehabilitation Research and Training Center, 2009).

Probably the most frequent topic in the special education literature since the 2004 amendments to IDEA has been the movement toward a response-to-intervention (RTI) approach for identifying students with SLD. The amendments expressly required each state to select RTI either as mandated or permitted for this purpose, and at the same time to designate the traditional approach of severe discrepancy as permitted or prohibited; and to determine whether an alternate, research-based approach would be allowed. According to the most recent

survey of state laws, 12 states have adopted RTI as the required approach, whereas the vast majority of states permit both RTI and severe discrepancy—with approximately 20 states additionally allowing the third research-based option—thereby effectively leaving the choice to local districts (Zirkel & Thomas, 2010).

A Council for Exceptional Children (CEC) monograph (Zirkel, 2006) comprehensively canvassed the litigation—both published hearing/review officer and court decisions—concerning SLD identification under IDEA. The major findings included (a) the total amount of approximately 90 pertinent cases from 1980 to 2006, with about four fifths at the hearing/review officer level; (b) the frequency of the decisions rose gradually during this period, with the majority arising in California ( $n = 20$ ), Pennsylvania ( $n = 15$ ), and New York ( $n = 11$ ); and (c) school districts, typically defending the position that the child was not eligible as SLD, won approximately 80% of the cases, with the most frequent decisional fac-

tors being severe discrepancy ( $n = 68$ ) or the need for special education ( $n = 31$ ).

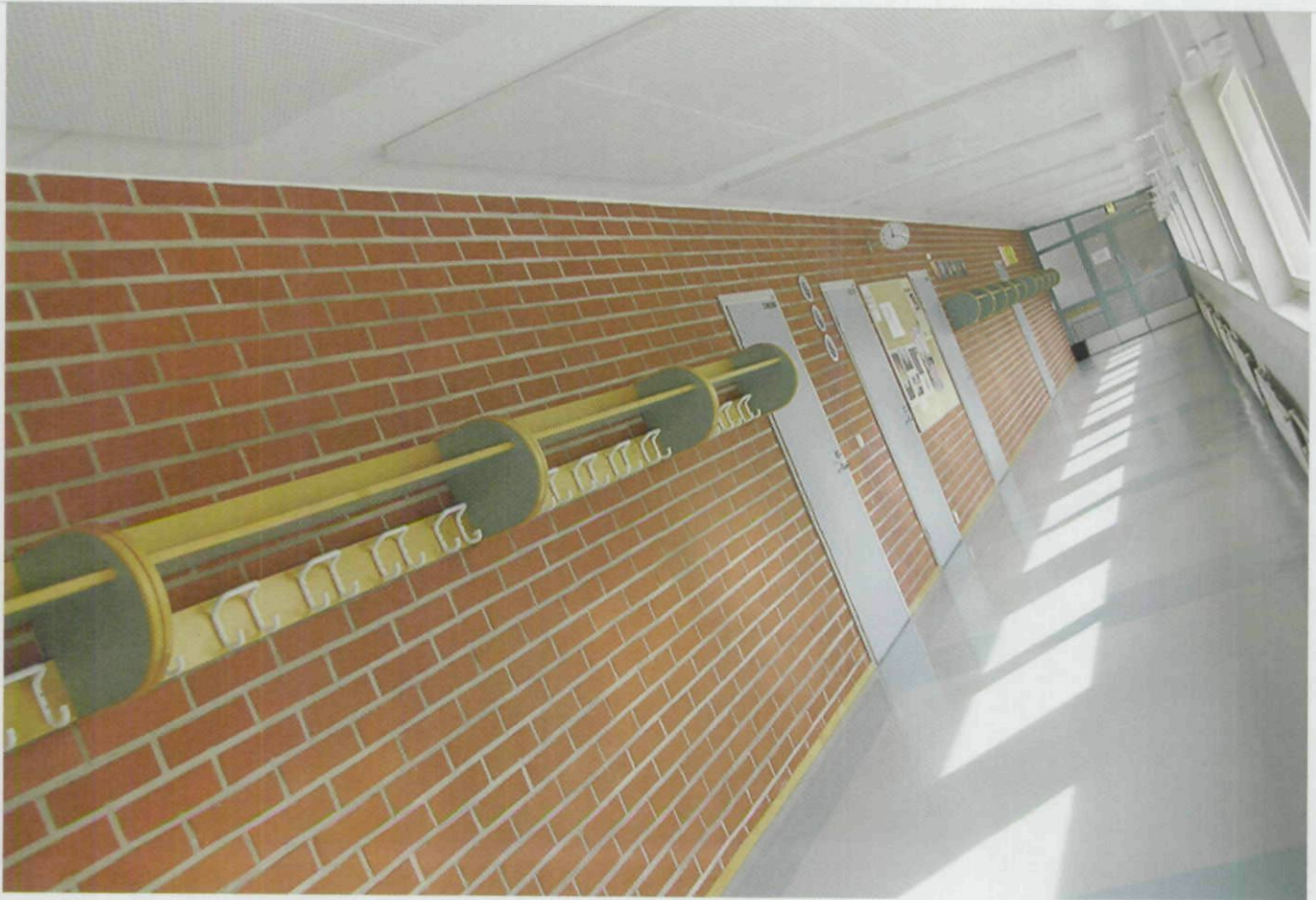
The purpose of this article is to provide an update of the frequency, outcomes, and basis of the published hearing/review officer decisions concerning SLD eligibility since the 2006 monograph. The specific questions include:

1. Have the upward slope and California predominance in frequency continued?
2. Has the trend of district-friendly outcomes changed?
3. Has RTI become a major decisional factor in these cases?

### Method

As in the CEC monograph (Zirkel, 2006), the primary database was the *Individuals with Disabilities Law Reporter* (IDELR), which is the most comprehensive publication of hearing/review officer and court decisions under IDEA. For court decisions, the Westlaw database served for double-





checking that the identification of the relevant cases was complete and ascertaining the citations of any officially published cases.

The cases were limited to hearing/review officer and court cases in these two databases that specifically decided whether a student, upon initial evaluation or upon reevaluation, qualified for special education services under the IDEA classification of SLD. Rulings as to other legal claims within the same case were not part of the tabulation. Examples of bordering cases that did not meet the selection criterion included those based on parental consent for an SLD evaluation (*Chico Unified School District*, 2009); failure to evaluate SLD for otherwise classified student where the issue was free appropriate public education (FAPE) (*Department of Education v. L.K.*, 2006); language processing and writing problems in terms of the IDEA classification of speech and language impairment (*Board of Education of Ossining Union Free School District*, 2006); and a peripheral determination

of SLD ineligibility (*Brendan K. v. Easton Area School District*, 2007; *Strock v. Independent School District No. 281*, 2008; *Williamson County Bd. of Educ. v. C.K.*, 2009). The only marginal case that was included (*Pencader Charter School*, 2008) is a state complaint resolution decision, which IDELR reported and which is at least partially akin to a hearing officer decision. Finally, if a case proceeded to more than one level of published adjudication under the IDEA, such as a hearing officer and then court appeal, the tabulation was limited to the highest and most recent decision.

### Results

Table 1 presents the pertinent decisions in chronological order, and includes both hearing or review officer decisions (denoted by the acronym SEA) and court decisions (in bold type). The decisional factors track the basic components of the IDEA definition of SLD:

- Disorder in one or more psychological processes.

- Disorder-related exclusions (e.g., learning problems primarily the result of other IDEA classifications).
- Discrepancy A: achievement not commensurate with age or ability (i.e., general) after appropriate instruction in general education.
- Discrepancy B: severe discrepancy between achievement and intellectual ability in one or more of eight specified areas.
- Discrepancy-related exclusions A: same as those above under disorder but in the context of the primary reason for the discrepancy.
- Discrepancy-related exclusion B: converse of prerequisite in Discrepancy A, (i.e., lack of proper instruction as the primary reason for the discrepancy).

The case entries also include—where the hearing/reviewer officer or court relied on it to a primary or secondary extent—the second prong of eligibility, which is common to all of the IDEA



**Table 1. Updated Overview of IDELR-Published Hearing/Review Officer and Court Decisions Concerning SLD Eligibility**

Abbreviated Case Name (Forum and Date)	Outcome		Relevance of IDEA Components				
	Party	Eligible	Disorder	Disorder-Related Exclusion	Discrepancy A	Discrepancy B	Need for Special Education
<i>Centennial Sch. Dist.</i> (Pa. SEA 2006)	S	No				▼	▼▼
<i>Elk Grove</i> (Cal. SEA 2006)	S	No			▼	▼▼	
<i>Jaffess</i> (E.D. Pa. 2006)	S	No				▼▼	▼▼
<i>High Tech</i> (Cal. SEA 2007)	S	No	▲ <sup>a</sup>			▼▼	▼▼
<i>Hood</i> (9th Cir. 2007)	S	No				▼▼	▼▼
<i>Jefferson County</i> (Ala. SEA 2007)	S	No		▼▼		▼	
<i>S. v. Wissahickon</i> (E.D. Pa. 2008)	S	No					▼▼
<i>M.P.</i> (C.D. Cal. 2008)	P	Yes				▲▲	▲▲
<i>Victor</i> (Cal. SEA 2008)	S	No				▼▼	
<i>Pencader Charter Sch.</i> (Del. SEA 2008)	S	No					▲▲
<i>W.H.</i> (E.D. Cal. 2009)	S	No <sup>b</sup>				▼	▼▼
<i>Haddon Heights</i> (N.J. SEA 2009)	S	No				▼▼	▼
<i>E.M.</i> (N.D. Cal. 2009)	S	No				▲▲	▼
<i>Chase</i> (D. Colo. 2009)	S	No				▼▼	▼
<i>S. Orange</i> (N.J. SEA 2009)	S	No				▼▼	▼
<i>Austin</i> (Tex. SEA 2009)	S	No					▼▼
<i>Nguyen</i> (D.D.C. 2010)	S	No				▼▼	
<i>Anchorage<sup>c</sup></i> (Alaska SEA 2010)	S	No				▲	▼▼

Note. IDELR = *Individuals with Disabilities Law Reporter*; SLD = specific learning disability; SEA = state education agency—here, hearing/review officer decision; IDEA = Individuals With Disabilities Education Act; S = decision in favor of school district; P = decision in favor of parent.

▼ Secondary factor in ruling against eligibility. ▼▼ Primary factor in ruling against eligibility. ▲▲ Primary factor in ruling for eligibility. ▲ Secondary factor in favor of eligibility.

<sup>a</sup> The hearing officer accepted the diagnosis from the parents' private evaluator of a visual processing disorder as fulfilling this decisional factor.

<sup>b</sup> In *W.H.*, in the context of child find the court alternatively concluded that the student was eligible as other health impairment (OHI), including its effect in terms of written expression. In other cases, e.g., *Hood*, the court rejected alternative eligibility under OHI.

<sup>c</sup> The district acknowledged that the child met the classification criteria, which include discrepancy, but the child's highly gifted status and his performance on the state NCLB tests contributed to the conclusion that he did not need special education.



classifications: "by reason thereof, needs special education and related services" (IDEA regulations, § 300.7(a)(1)).

From late 2006 until early 2010, there were 18 decisions concerning SLD eligibility; court decisions accounted for 41%, a doubling of the proportion present in the previous 90 cases (Zirkel, 2006). The overall total when combined with the previously reported decisions within the period 2005 to 2009 is a moderate decline since the peak in 2000 to 2004, but still a higher level compared to the 5-year periods prior to 2000. Moreover, continuing the previous trend, California accounted for more of the decisions than any other state ( $n = 7$ ), with Pennsylvania remaining in second place ( $n = 3$ ).

As for the outcomes of the most recent decisions, the parents prevailed in establishing the child's eligibility in only one of the 18 cases. In this case (*M.P. v. Santa Monica-Malibu Unified School District*, 2008), the court partially reversed the hearing officer, who had concluded that the student's diagnosis of attention deficit hyperactivity disorder (ADHD) met the SLD disorder criterion and the alternative classification of other health impairment (OHI) but that he was not eligible because he (a) did not meet the severe discrepancy criterion, and (b) did not evidence the need for special education. The court disagreed with the hearing officer's conclusion with regard to severe discrepancy for two reasons: (a) the court found the testimony from the parents' expert witness, a private psychologist specializing in ADHD, to be cogent, whereas the hearing officer had discredited it; and (b) the court similarly gave the opposite weight to the role of motivation:

The Court agrees that the evidence shows that [the child] is capable of completing independent school work when motivated, but the evidence also shows that because of his ADHD he is not capable, without help, of being motivated. This is the very definition of a discrepancy between ability and achievement. (p. 1102)

Based on the same reasons, the court reversed the hearing officer's conclusion as to whether the student needed special education, pointing to the private expert's testimony, the purported ADHD-motivation linkage, and the teacher's unsuccessful attempts at classroom accommodations. The child's alternative and equally successful claim based on OHI eligibility, especially given the court's reliance on ADHD, arguably weakens the weight of the SLD ruling.

In contrast, the other cases tended to follow the pronounced previous trend of deferring to the district's teachers and other experts and being relatively strict about the severe discrepancy criterion. In *S. v. Wissahickon School District* (2008), the court agreed with the hearing officer, not the parents' expert, that the child, who had a diagnosis of ADHD, evidenced a lack of motivation (specifically for homework completion), not a need for special education. Similarly, in the most recent court decision (*Nguyen v. District of Columbia*, 2010), the judge found the teacher's testimony to outweigh the parent's private expert, concluding as follows:

While there is some evidence that H.N. suffers from a learning disability, I cannot say that [the parent] has met her burden. The evidence is weak that H.N. has "a severe discrepancy between achievement and intellectual ability," and failures in achievement are likely at least partially driven by poor attendance. (p. \*7)

Finally, an examination of these decisions revealed that RTI was con-

the district was no longer required but was still permitted to use severe discrepancy, thereby peripherally referencing RTI and only by implication. In *South Orange-Maplewood Board of Education* (2009), the hearing officer mentioned that New Jersey had changed its law to permit an RTI identification approach but nevertheless upheld the district's determination that the student was not eligible for SLD based on its permitted primary reliance on the severe discrepancy approach. If the hearing officer gave RTI any role, it would be—mistakenly—her seeming connection of the district's use of a computer program for determining severe discrepancy with the "scientifically based" aspect of RTI.

In *High Tech Middle Media Arts School* (2007), the hearing officer concluded that the student was not eligible as SLD under either of the methods permitted by California law—RTI or severe discrepancy. However, after defining RTI as a "method that looks at an underachieving child's response to scientific, research-based interventions conducted in the classroom," the hearing officer appeared to misapply the definition by concluding that "there is no underachievement by the student . . . and no evidence of any research-based interventions [emphasis added] attempted with Student" (p. \*498).

## Discussion

The moderate overall decline in published hearing/review officer and court decisions specific to SLD eligibility is likely attributable to the recent declining plateau of IDEA decisions more generally (e.g., Zirkel & Gischlar, 2008;

### **RTI was conspicuous in its absence, [arising] in 2 or 3 of the 18 decisions, and in these few cases—each in favor of noneligibility—its role was negligible or even mistaken.**

spicuous in its absence. RTI only arose in 2 or 3 of the 18 decisions, and in these few cases—each in favor of noneligibility—its role was negligible or even mistaken. In *W.H. v. Clovis Unified School District* (2009), the court merely acknowledged that under IDEA,

Zirkel & Scala, in press). Additional likely contributing factors are the aforementioned decline in the proportion of special education students classified as SLD (Rehabilitation Research and Training Center, 2009) and the dampening effect of the pro-district trend in



case law outcomes for SLD eligibility (Zirkel, 2006).

California's continued predominance in the frequency of SLD cases is not primarily attributable to the state's litigious reputation; various other jurisdictions—starting with the District of Columbia and New York—far exceed California in special education adjudications. When limited to the 50 states (thus leaving the District of Columbia's unusually high total out of the comparison), California ranked fourth—after New York, New Jersey, and Pennsylvania—in the number of adjudicated due process hearings under the IDEA for the period 1991 to 2005; when the figures were adjusted in relation to the special education enrollments, it dropped to 20th place (Zirkel & Gischlar, 2008). Instead, other contributing factors appear more likely to account for its differential position in SLD identification cases.

First, California's regulations (CAL. CODE REGS., 2008) expand on the IDEA definition of SLD in various ways, including expressly allowing for alternative means of determining severe discrepancy "when standardized tests are considered to be invalid for a specific pupil" (§ 3030(j)(4)(B)) and providing—beyond the standardized test and alternative means—a third alternative of eligibility "provided that the team documents in a written report that the severe discrepancy between ability and achievement exists as a result of a disorder in one or more of the basic psychological processes" (§ 3030(j)(4)(C)). Second, California's legislation (CAL. EDUC. CODE, 2008) includes a discrepancy-related exclusion that is a variation from the IDEA language and that has continued to contribute to litigation (e.g., *Hood v. Encinitas Union School District*, 2007), specifically that "the discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program" (§ 56337(c)). Third, overlapping with the California regulation regarding alternative means, the state has been the scene of continuing litigation concerning the use of standardized IQ tests with minority children, with the origi-

nal focus being identification of students with mental retardation (e.g., *Larry P. v. Riles*, 1986) and with the latest iteration rejecting extension of the ban to SLD identification (*Crawford v. Honig*, 1994).

In any event, of more significance is that the outcomes trend continues to be strongly in favor of districts' noneligibility determinations and that RTI has not yet surfaced as a decisional factor. The predominance of district-friendly decisions is consistent with the previous pattern of SLD cases (Zirkel, 2006), which is not unexpected due to the role of precedent in judicial decision making and the overall district-deferential trend in the outcomes of special education litigation (e.g., Golden, 2007). The negligible role of RTI supports this trend, because the precedents specific to severe discrepancy have been so pronounced, but it is in stark contrast to the similarly pronounced trend in the professional literature in favor of replacing severe discrepancy with RTI. Although professional norms do not equate to legal requirements, the 2004 amendments to IDEA, the 2006 IDEA regulations, and subsequent state laws may have suggested litigation surfacing, at least at the hearing officer level by now.

Several reasons might explain the relative absence of RTI in the SLD decisions to date. First, the 12 states that have partially or fully mandated RTI thus far are generally not among the most litigious jurisdictions. Second, the process of not only issuing but also implementing new laws is far from instantaneous. The earliest deadlines were relatively recent: Connecticut's across-the-board deadline and New Mexico's deadline for Grades K to 3 was July 1, 2009; Delaware's deadline for reading and math was September 1, 2008, for the elementary grades and September 1, 2009, for secondary schools. Third, litigation is also slow; even the first level, due process hearings, often do not meet the 45-day time period specified in the IDEA regulations, especially but not entirely because the regulations allow for extensions at the request of either party (§ 300.515(c)) and the new

provision for the resolution process (§ 300.510) effectively extends the deadline for approximately 30 more days (300.515(a)). Finally, a substantial segment of initial due process filings end in withdrawal, settlement, or decisions that are not published in IDELR. Partially mitigating this final factor, a search of the more extensive database that the publisher offers, at and as a premium, to electronic subscribers revealed a similarly negligible role of RTI.

### **The outcomes trend continues to be strongly in favor of districts' noneligibility determinations.**

In the only case where RTI had even a secondary decisional role—the hearing officer decision in *High Tech Middle Media Arts School* (2007)—there was no mention, much less evaluation, of the specific features or criteria of this general approach, such as universal screening, multiple tiers, and continuous progress monitoring. On the other hand, perhaps the hearing officer's reference to "no evidence of any research-based interventions" (p. \*498) meant that because the child was not underachieving—he was responding to proper regular education by "achiev[ing] adequately for the child's age or to meet State-approved grade-level standards in one or more of the [eight enumerated] areas" (IDEA regulations, § 300.309(a)(1))—there was no need to implement RTI. Alternatively, her RTI-related conclusion could be justified by characterizing it as *dicta*, surplus language beyond the holding, or specific ruling, of the written opinion. Her reasoning was merely a hypothetical based on the rejected parent claims that IDEA and California law required RTI and prohibited severe discrepancy for determining SLD. In any event, this limited appearance and role of RTI reinforces its relative absence in the most recent case law.

In sum, the previous trends in SLD hearing/review officer and court decisions specific to SLD eligibility (Zirkel, 2006) have continued in the most



recent 4 years. Whether RTI changes the frequency and outcomes of such decisions remains an open question, similar to the larger issue of whether RTI results—as its proponents suggest—in a decrease in the proportion of students classified as SLD and in more accurate—including less culturally and linguistically biased—SLD identification. Of course, such touted effects are conditioned on implementing RTI correctly, which will be at least partially tested in the coming, but not yet present, wave of SLD litigation based on RTI.

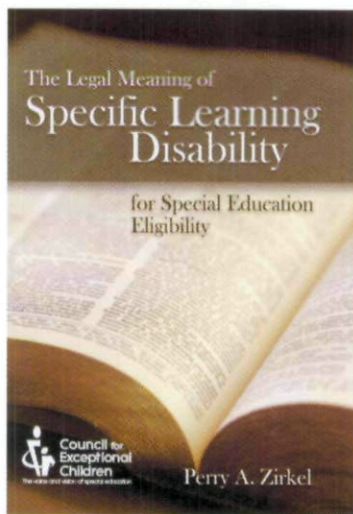
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Students with specific learning disability (SLD) account for half of all the students deemed eligible under the Individuals with Disabilities Education Act (IDEA). The 2004 Amendments to the Act and its currently proposed regulations include significant changes with regard to the severe discrepancy and response to intervention (RTI) criteria for specific learning disability (SLD) eligibility. In the current atmosphere of professional ferment and legal advocacy, this monograph provides what is not available in the literature to date—a thorough and objective synthesis of the various applicable sources of law, including the various pertinent U.S. Department of Education policy interpretations and the more than 80 published hearing/review officer and court decisions under the IDEA.

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